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INVESTIGATIONS

They Got Hurt At Work — Then They Got Deported

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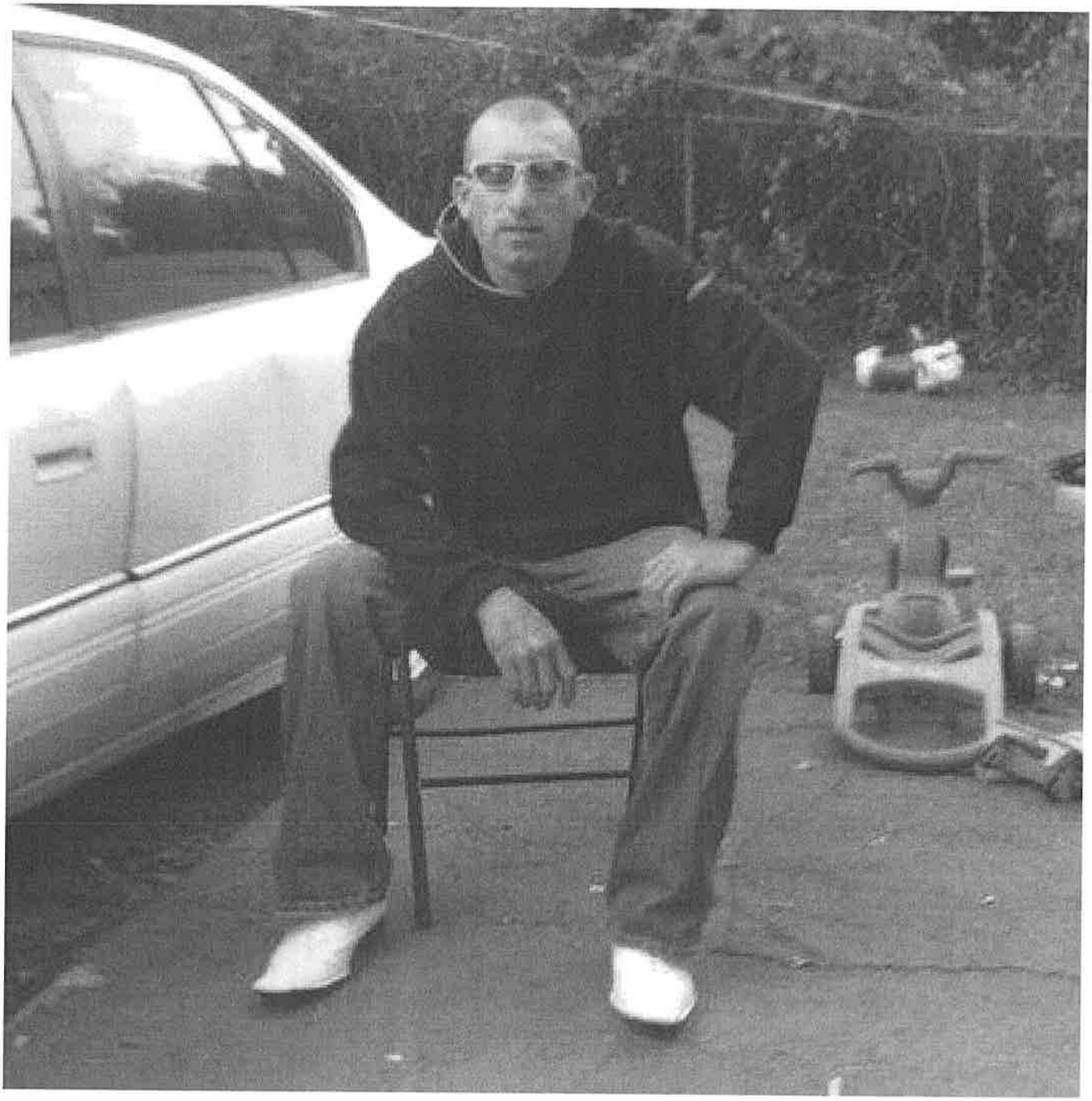
Heard on All Things Considered

MICHAEL GRABELL  HOWARD BERKES

FROM ProPublica

At age 31, Nixon Arias cut a profile similar to many unauthorized immigrants in the United States. A native of Honduras, he had been in the country for more than a decade and had worked off and on for a landscaping company for nine years. The money he earned went to building a future for his family in Pensacola, Fla. His Facebook page was filled with photos of fishing and other moments with his three boys, ages 3, 7 and 8.



Nixon Arias worked off and on for a Florida landscaping company for nine years before a legitimate injury at work resulted in his arrest, prosecution and deportation to Honduras.

Courtesy of Nixon Arias

But in November 2013, that life began to unravel.

The previous year, Arias had been mowing the median of Highway 59 just over the Alabama line when his riding lawnmower hit a hole, throwing him into the air. He slammed back in his seat, landing hard on his lower back.

Arias received pain medication, physical therapy and steroid injections through his employer's workers' compensation insurance. But the pain in his back made even walking or sitting a struggle. So his doctor recommended an expensive surgery to implant a device that sends electrical pulses to the spinal cord to relieve chronic pain. Six days after that appointment, the insurance company suddenly discovered that Arias had been using a deceased man's Social Security number and rejected not only the surgery but all of his past and future care.

Desperate, Arias hired an attorney to help him pursue the injury benefits that Florida law says all employees, including unauthorized immigrants, are entitled to receive. Then one morning after he dropped off two of his boys at school, Arias was pulled over and arrested, while his toddler watched from his car seat.

Arias was charged with using a false Social Security number to get a job and to file for workers' comp. The state insurance fraud unit had been tipped off by a private investigator hired by his employer's insurance company.

With his back still in pain from three herniated or damaged disks, Arias spent a year and a half in jail and immigration detention before he was deported.

In partnership: npr ProPublica

This story was reported in partnership between NPR and ProPublica, an investigative journalism organization. A version of this story is posted on ProPublica's website in English and Spanish.

However people feel about immigration, judges and lawmakers nationwide have long acknowledged that the employment of unauthorized workers is a reality of the American economy. From nailing shingles on roofs to cleaning hotel rooms, some 8 million immigrants work with false or no papers nationwide, and studies show they're more likely to be hurt or killed on the job than other workers. So over the years, nearly all 50 states, including Florida, have given these workers the right to receive workers' comp.

But in 2003, Florida's lawmakers added a catch, making it a crime to file a workers' comp claim using false identification. Since then, insurers have avoided paying for

injured immigrant workers' lost wages and medical care by repeatedly turning them in to the state.

Workers like Arias have been charged with felony workers' comp fraud even though their injuries are real and happened on the job. And in a challenging twist of logic, immigrants can be charged with workers' comp fraud even if they've never been injured or filed a claim, because legislators also made it illegal to use a fake ID to get a job. In many cases, the state's insurance fraud unit has conducted unusual sweeps of worksites, arresting a dozen employees for workers' comp fraud after merely checking their Social Security numbers.

What's quietly been happening to workers in Florida, unnoticed even by immigrant advocates, could be a harbinger of the future as immigration enforcement expands under President Trump.

One of Trump's first executive orders broadened Immigration and Customs Enforcement's priorities to include not just those convicted of or charged with a crime but any immigrant suspected of one. The order also targets anyone who has "engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency." That language could sweep in countless injured unauthorized workers because state workers' comp bureaus and medical facilities typically request Social Security numbers as part of the claims process.

In the past few months, a Massachusetts construction worker who fractured his femur when he fell from a ladder was detained by ICE shortly after meeting with his boss to discuss getting help for his injury. In Ohio, Republican lawmakers pushed a bill that would have barred undocumented immigrants from getting workers' comp. It passed the state's House of Representatives before stalling in the Senate in June.

To assess the impact of Florida's law on undocumented workers, ProPublica and NPR analyzed 14 years of state insurance fraud data and thousands of pages of court records. We found nearly 800 cases statewide in which employees were arrested under the law, including at least 130 injured workers. An additional 125 workers were arrested after a workplace injury prompted the state to check the personnel records of other employees. Insurers have used the law to deny workers benefits after a litany of

serious workplace injuries, from falls off roofs to severe electric shocks. A house painter was rejected after she was impaled on a wooden stake.

Flagged by insurers or their private detectives, state fraud investigators have arrested injured workers at doctor's appointments and at depositions in their workers' comp cases. Some were taken into custody with their arms still in slings. At least 1 in 4 of those arrested was subsequently detained by ICE or deported.

State officials defended their enforcement, noting that the workers, injured or not, violated the law and could have caused financial harm if the Social Security numbers they were using belonged to someone else. Moreover, the law requires insurers to report any worker suspected of fraud.

"We don't have the authority or the responsibility to go out and start analyzing the intent of an insurance company or anybody else when they submit a complaint to us," said Simon Blank, director of the Florida insurance fraud unit. "It would be unfortunate," he said, if insurers turned in injured workers "just to do away with claims."

Blank insisted that his investigators' efforts have nothing to do with immigration. But ProPublica and NPR's review found that more than 99 percent of the workers arrested under the statute were Hispanic immigrants working with false papers.

While Florida's statute is unique, insurers, hard-line conservatives and some large employers have been battling across the country for the past 15 years to deny injury benefits to unauthorized immigrants, with occasional success. In a little-noticed ruling last fall, an international human rights commission criticized the United States for violating the rights of unauthorized immigrants, including a Pennsylvania apple picker who was forced to settle his case for a fraction of the cost of his injury and a Kansas painter who was unable to get the cast removed from his broken hand until he was deported to Mexico.

In Florida, cases against such workers have become standard practice for a group of closely affiliated insurers and employers. The private investigative firm they employ has created a wall of shame, posting the arrests it has been involved in on its website.

Critics say the arrangement encourages employers to hire unauthorized immigrants, knowing they won't have to pay for their injuries if they get hurt on the job.

"It's infuriating to think that when workers are hurt in the United States, they're essentially discarded," said David Michaels, the most recent head of the federal Occupational Safety and Health Administration. "If employers know that workers are too afraid to apply for workers' compensation, what's the incentive to work safely?"

The law's real-life ramifications came as a surprise to one of the lawyers who helped draft it and who had no idea it had been used to charge hundreds of workers who had never been hurt on the job.

"How is there insurance fraud if there's no comp claim?" asked Mary Ann Stiles, a longtime business lobbyist and attorney for insurers. "That would not be what anybody intended it to be."

In Arias' case, records show he never wrote the false Social Security number on any of the various forms related to his claim. It was printed automatically by the insurance carrier, using information from his employer. But that didn't stop the state attorney from charging him with 42 counts of insurance fraud — one for every form the number appeared on.

As part of the prosecution, investigators demanded Arias pay back $38,490.51 to Normandy Harbor Insurance for the medical care and benefits checks he had already received for his injury. The insurer declined to comment. Back in Honduras, Arias, who struggles with chronic back pain, has been unable to find more than odd jobs. And he hasn't seen his three U.S.-born sons in more than two years.

The whole time in detention, "I was always asking, 'Why? What's the reason I'm here? I haven't done anything, I haven't stolen anything; I haven't killed anyone,' " Arias said by phone from his rural village in the state of Copán. "I was just working for my kids."

A company's control over injury claims

The website of Command Investigations, located just outside Orlando, boasts of its success in hunting down workers' comp fraud, posting like trophies a gallery of mug

shots of mostly Hispanic men and women. But most of those pictured weren't nabbed jet-skiing with a fake knee injury. They are legitimately injured workers whom Command investigators caught using false Social Security numbers.

Command, which tipped off the state to Arias, opened up shop in 2012 and quickly rose to prominence in Florida by catering to the lucrative employee leasing industry. Unlike temp agencies, which find workers and task them to businesses, employee leasing companies promise to lower businesses' overhead by hiring their employees on paper and then leasing them back. The basic premise is that by pooling the risk of several small businesses, leasing companies can bargain for better insurance rates. Such a setup is especially attractive to mom and pop firms in dangerous industries, such as construction.

One of Command's first big clients was Lion Insurance, whose affiliate SouthEast Personnel Leasing serves as the employer of record for more than 200,000 employees nationwide. According to its website, SouthEast generates $2.3 billion in annual revenue — about as much as clothing retailer J. Crew or the restaurant chain Red Lobster.

Since 2013, nearly 75 percent of the injured immigrants arrested in Florida for using false IDs were turned in by Command — and half worked for SouthEast, ProPublica and NPR found. SouthEast has had 43 injured workers arrested for using false Social Security numbers — more than any other company.

One reason: SouthEast, as well as its insurance carrier, Lion, and its claims processor, Packard Claims, are all owned by the same person. The unusual arrangement gives the company more control over injury claims and a consistency other firms specializing in high-risk industries can't provide. But critics say it benefits SouthEast in more pernicious ways: Knowing that Lion and Packard can deny the claims of unauthorized workers allows SouthEast to offer discounts to contractors that other leasing firms can't.

"They sign up these companies knowing full well that 95 percent of the employees are immigrant workers," said Cora Cisneros Molloy, who recently began representing injured workers after two decades defending employers and insurers. "Only after an

accident occurred do they determine they're going to do an investigation and check that Social Security number."

Controlling the empire from a six-story office building surrounded by palm trees in Holiday, Fla., is John Porreca, 68, who grew up in Philadelphia and worked in the leasing business before buying SouthEast with his wife in 1995. Despite owning one of the largest private companies in Florida, Porreca has managed to stay out of the public eye, showing up in the local press only rarely, such as when he donated the money for a baseball field for disabled children or bought a $4 million beachfront mansion, the size of which rankled neighbors.

Porreca didn't respond to multiple messages left at his office or home over the course of a month. In an email, Brian Evans, an attorney for SouthEast, said Porreca declined to comment other than to say that SouthEast "strictly adheres" to the law and is not responsible for what happened to its workers, even though the company's investigators reported them to the state.

Command's president, Steve Cassell, also declined interview requests, citing confidentiality agreements with his clients.

Bram Gechtman, a Miami attorney who has represented several injured SouthEast workers, said the sheer number of cases in which Lion and Packard discovered workers' false IDs only after they were injured raises the question of why SouthEast doesn't do more to screen its hires.

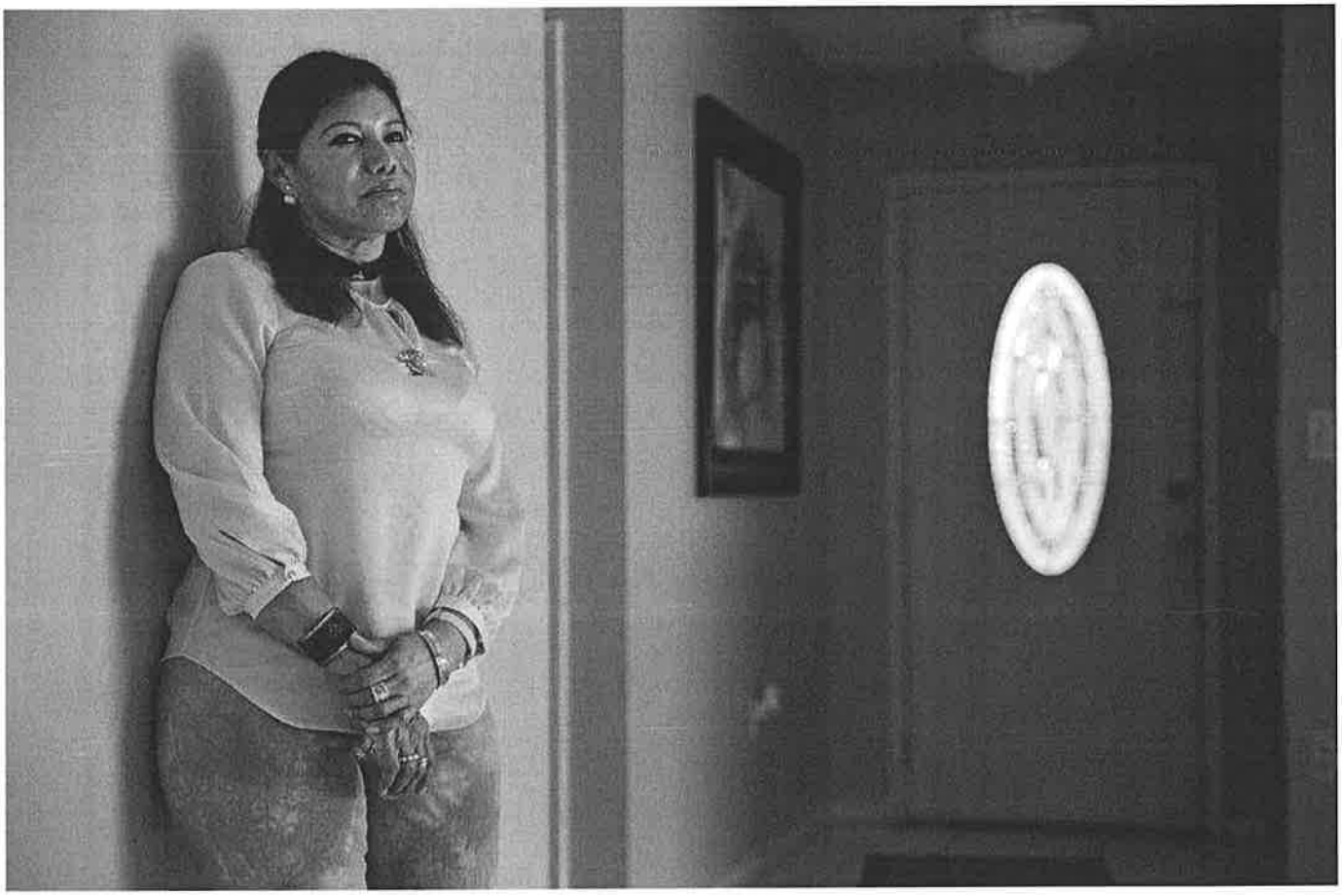
"If I had a situation where I had all these people defrauding my company over and over and over again, allegedly, I would do something to try to stop it," he said, "unless there was another reason why I didn't want it to stop."

Command and SouthEast have recently expanded to other states. Last year, a woman in Georgia was arrested for identity theft after a cart ran over her foot at a meatpacking plant and Command turned her in to the state workers' comp bureau. In California, two staffing agencies sued SouthEast, saying its claims processor routinely denied workers' comp claims based on immigration status, leading to litigation that increased the cost of the claims.

For workers, welcomed without question until they get hurt, getting caught in Command and SouthEast's dragnet can upend otherwise quiet lives.

Berneth Javier Castro originally came to the United States on a tourist visa in 2005 scarching for the woman he had loved and lost during the war in Nicaragua in the 1980s. Unable to find her and facing debts back home for his house and his daughter's school, Castro, now 52, overstayed his visa and found work at a St. Augustine roofing company in 2007. Initially, he was paid in cash under the table. But after a few months, the company said he needed a Social Security number to continue working. So he bought one. It was the only way he could get work, he said.

In 2011, Castro finally reconnected with Lucía Escobar using modern technology — he found her on Facebook. Escobar, 48, who had received asylum and is now a U.S. citizen, was going through a divorce. They began talking every day and planned to be together once the divorce was final.



Lucía Escobar flew to Nicaragua from Miami to marry Berneth Javier Castro, her childhood sweetheart. Castro, an undocumented worker, faced deportation and voluntarily left the U.S. after suffering an injury at work and seeking workers' compensation benefits.

Scott McIntyre for ProPublica

Like many unauthorized workers, Castro feared he would be deported if he reported an injury. So when he sliced his pinkie on some copper sheeting and got nine stitches, he stayed quiet and kept working. But a few months later, when he wrenched his back passing a load of tiles to a coworker on a roof, the company sent him to a clinic.

There, a company representative filled out the form since it was in English, Castro said. He didn't recall the Social Security number he'd used, so the representative got it from the company and put it on the form.

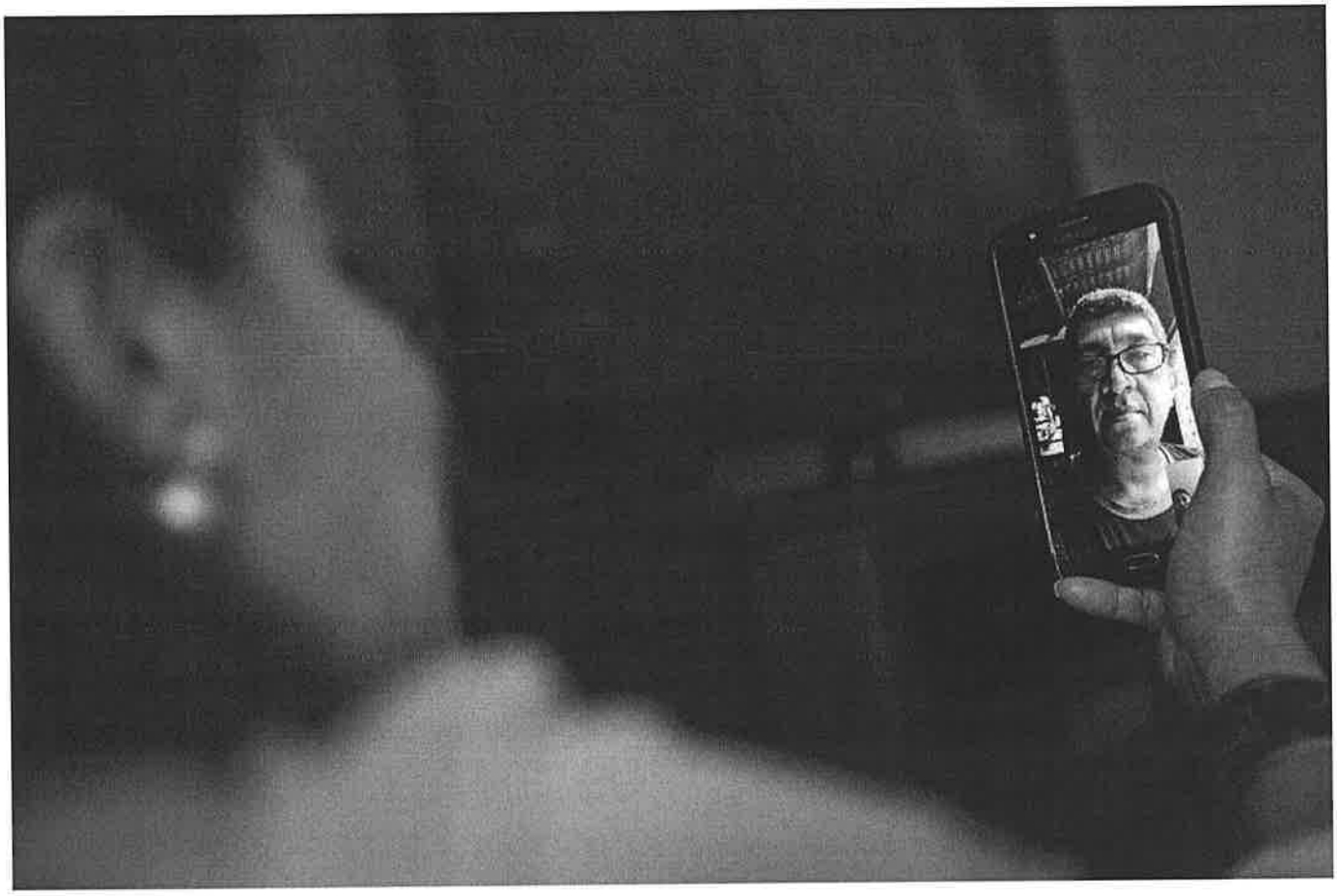
The clinic gave Castro some pills for the pain. But when he returned for the follow-up appointment, he was told there was a problem with his Social Security number. Castro never returned and treated his back with heating pads and pain relief balms. He figured that was the end of it and continued working for the company for nearly a year.

Then in November 2013, state investigators turned up at his home and arrested him for insurance fraud. He had been turned in by a Command investigator working for Lion.

The workers' comp fraud charges were eventually dropped, but Castro pleaded no contest to fraudulently using someone else's identity. He spent five months in jail and was facing deportation before a judge granted him a voluntary departure to Nicaragua.

"The fake number, I understood because I needed it to work, but I didn't understand the fraud," Castro said by phone from Managua. "I'm not an irrational man. I'm not a criminal. So I didn't understand where I might have committed fraud. It didn't make sense to me. I never filled out a document asking for anything looking for compensation."

Escobar sensed something was wrong when she suddenly stopped hearing from him. Then his phone was disconnected. "Every day, I went on Facebook, hoping and writing to him," she said.



Escobar speaks with her husband, Castro, by phone from outside Miami. Escobar is caring for her grandson while Castro hopes to return to the U.S. despite being charged with insurance fraud after filing a legitimate workers' comp claim.
Scott McIntyre for ProPublica

Months later, when he finally called her from Nicaragua, she was at once relieved and despondent. In 2015, after her divorce was final, she flew to Nicaragua and married him. But they still live separately, Castro in Nicaragua and Escobar outside Miami, where she cares for her grandson. They are applying for Castro to return, but the conviction could stand in his way.

"It's sad because when you get married, you want to be with your husband," Escobar said. "We waited for so long to be together."

New tactics from employers and insurers

Over the years, numerous courts have upheld the rights of unauthorized workers to receive compensation for workplace injuries, the minimum wage and protection from retaliation for joining unions. The rights stem from their status as employees regardless of their status as immigrants.

A Florida appeals court, for example, ruled in 1982 that "an alien illegally in this country" is entitled to workers' comp benefits.

That presumption was thrown into doubt in 2002 when the U.S. Supreme Court ruled that a group of undocumented plastics workers fired for union activities weren't entitled to back pay because of their immigration status. Insurers and large employers immediately flooded the courts with petitions designed to claw back labor protections for unauthorized immigrants. Leading the fight in Florida were employee leasing firms.

The petitioners argued that undocumented immigrants weren't entitled to workers' comp since their employment was obtained illegally. Lawmakers in several states, from Colorado to North Carolina, introduced bills to block claims by unauthorized workers.

As state courts and legislatures rejected that argument, insurers began pushing to deny immigrants disability benefits, arguing that once their unauthorized status was known, they couldn't return, like other workers, to less intensive jobs. That reasoning succeeded in Michigan and Pennsylvania, but not in Delaware and Tennessee.

In the past few years, employers and insurers have begun using a new tactic, arguing that they should only be responsible for paying lost wages based on what the immigrant would have made in his or her home country. In Nebraska, for example, meatpacker Cargill tried to cut off benefits to Odilon Visoso, who was injured when a 200-pound piece of beef fell on his head, saying it was too difficult to determine what he could earn in Chilpancingo, Mexico, a crime-ridden city controlled by drug cartels near his rural, mountainous village. Nebraska's Supreme Court told the company to use Nebraska wages.

Florida's 2003 law was part of a sweeping overhaul aimed at lowering costs for employers. According to a state Senate review, the division of insurance fraud had pushed for the provision, arguing that "many times illegal aliens are in league with unethical doctors and lawyers who bilk the workers' compensation system." It was easier to prove that immigrants had lied about their identities, the agency said, than to prove their injuries were fabricated.

In recent interviews, however, representatives from the state fraud unit and insurance industry couldn't identify a single case where immigrants had worked with doctors and lawyers to defraud workers' comp. Instead, they noted that false Social Security numbers impede insurers' ability to investigate claims. In addition, they said, those claims could prevent the people whose identity was stolen from getting benefits if they are injured in the future.

Stiles, the attorney who was a key architect of the law, said the state's construction industry was rife with fraud at the time and there was a lot of concern about illegal immigration. She said even immigrants who are "truly injured" should be denied benefits if they're using illegal documents for their claim and "they shouldn't be here in the first place."

"I think we're a nation of laws and we ought to be able to enforce those laws," she said. "And if the federal government won't do it, sometimes the state has to help itself."

Within months of the provision passing, though, the state Senate's banking and insurance committee recommended reconsideration, raising concerns that legitimately injured workers could be disqualified. But that advice was never heeded. The first criminal cases under the law showed up in 2006. The law netted laborers, farmworkers, roofers and landscapers. Several, like Arias, were hurt while working on public projects — renovating schools or pouring concrete at the zoo. But ProPublica and NPR also found arrested workers who had been injured at McDonald's and Best Western and turned in by major insurers like Travelers, The Hartford and Zurich.

In one case, state investigators found that more than 100 workers were all using a Social Security number belonging to a 10-year-old girl.

One of SouthEast's first cases involved a hotel housekeeper at the Comfort Suites in Vero Beach. Yuliana Rocha Zamarripa was cleaning a hotel room in 2010 when she slipped on a bathroom floor and slammed her knee on the bathtub, leaving her with pain and swelling so severe she was unable to walk.

Lion sent her to a doctor but quickly denied her claim based on a false Social Security number.

Rocha's mother had brought her to the United States from Mexico when she was 13, and when she turned 17, her father bought her the fake ID so she could work.

With few options, Rocha, now 32, settled her workers' comp case for less than $6,000 plus attorney fees. But she never got the medical care she needed. The week before she was to receive the check, she was arrested while making breakfast for her 4-year-old son.

Yuliana Rocha Zamarripa's workers' comp claim for a serious knee injury at work prompted her arrest. She was shuffled from county to immigration jails for a year and blames the sexual abuse of her daughter on her inability to protect her at home.
Scott McIntyre for ProPublica

Rocha spent the next year cycling through jail and immigration detention, separated from her three children. She couldn't sleep, worrying what would happen to them if she were deported.

"I said the Lord's Prayer all the time, and I would end by asking, 'God, give me a chance to return to my children. Don't let anything bad happen to them,' " she said. "I had a feeling that something was not right."

Rocha's instincts were correct. While she was in jail, the father of her children started sexually assaulting their 10-year-old daughter, according to his arrest warrant. "I was left shattered," Rocha said tearfully, "because I didn't know what was happening."

With the help of an attorney, Rocha pleaded to a lesser charge — "perjury not in an official proceeding" — and was finally released. Because of what happened to Rocha's daughter, the attorney was able to get Rocha's deportation canceled and help her obtain a green card.

Rocha eventually received her settlement but had to spend all of it securing her release and dealing with immigration. She now walks with a limp because her injury didn't heal correctly.

"I think it's an injustice what happened to me," she said. "All because I fell, I slipped."

Using workers' comp law to engage in immigration enforcement

The sting had been meticulously planned for weeks. The day before, detectives had scoped out the site — a two-story office building resembling a Spanish colonial mansion near downtown Fort Myers. Before the arrest, they ducked out of sight to surveil the building's back entrance from across the street, according to the detective's case report.

The time and manpower weren't to nab a gang member or drug dealer, but a coordinated effort with Command to snare a 27-year-old roofer who was at a court reporter's office to testify in a deposition for his workers' comp case. A year earlier in 2014, Erik Martinez was working on a roof when a nail ricocheted and hit him in the left eye. He was seeking medical care and lost wages, but like many construction workers, he was using a false Social Security number.

Though it was ostensibly a Florida Department of Financial Services operation, a state detective had worked closely with an attorney for Lion on a plan to alert officers in the final minutes of the deposition. In between questions, the attorney emailed the detective, at one point providing a description of Martinez's clothing.

"We moved our position to the back parking lot," the detective wrote in his report, "where we awaited word that the deposition was nearing an end." Upon receiving confirmation, the detectives moved in, arresting Martinez as he exited the office.

Despite the extensive effort, the state attorney declined to prosecute. But the detective's narrative reveals a larger story: In most of the injury cases reviewed by ProPublica and NPR, state fraud detectives were handed a packet from private investigators with nearly all the information needed to make an arrest.

During an hourlong interview in Tallahassee, Simon Blank, who heads the department's Division of Investigative and Forensic Services, said his detectives conduct their own investigations and make their own decisions. Arrests at depositions, he said, only occur when they have a hard time locating somebody.

"The thing that you need to keep mind is these people are committing identity theft," Blank said. "They're taking somebody else's Social Security number or somebody else's personal information to obtain the work."

While Blank repeatedly expressed compassion for immigrant workers who are legitimately injured, he noted that people whose Social Security numbers are used could face problems with their credit or getting medical care if a claim that wasn't theirs showed up in their records.

The widow of the Mississippi man whose Social Security number Arias was using, Carolyn Lasseter, said it hadn't affected her, but she doesn't "feel sorry for people that are over here illegally." When she bought a house after her husband's death, the bank informed her that a different man had used his number to take out, and pay on, a loan, but it was easily fixed.

Blank's office has been accused by some attorneys of unconstitutionally using the workers' comp law to engage in immigration enforcement. "The real intent behind what they're doing is to regulate immigration," said Florida immigration attorney Jimmy Benincasa, "because they don't feel the federal government is doing enough."

He and others point to a 2012 U.S. Supreme Court ruling that shot down a series of Arizona immigration statutes, including one that made it a crime for unauthorized immigrants to apply for, solicit or perform work.

"Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment," the court wrote. "It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose."

The court noted that while federal law makes it a crime to obtain employment through fraudulent means, the forms and documents that workers submit to get jobs can only be used for federal prosecution — not for state enforcement.

"Our agency is not in the business of going after illegal people," Blank said. "There's quite a lot of other circumstances why people use fake names and IDs and Social Security numbers aside from immigration. You have people who might have other legal problems. You have people who are wanting to stay off the books for specific reasons, whether its divorces or liens put against them."

Among the nearly 800 cases that ProPublica and NPR identified, only five fit the reasons Blank cited. Blank seemed unaware that earlier this year, his own office's annual report noted that "nearly 100 percent" of the suspects investigated under the statute were undocumented workers.

"It appears that it's being applied in a discriminatory fashion," said Dennis Burke, the former U.S. attorney in Arizona who challenged that state's immigration statutes. "How do you justify your enforcement being 99 percent Latino surnames?"

Burke predicted Florida would have a tough time defending the law if it's ever heard on constitutional grounds. After the Arizona ruling in 2012, one attorney challenged the Florida statute's constitutionality, but both Florida and U.S. supreme courts declined to take the appeal. Unlike Arizona's law, the statute doesn't mention immigrants specifically. But Burke said the enforcement data and the stated intent to target immigrant fraud rings are problematic.

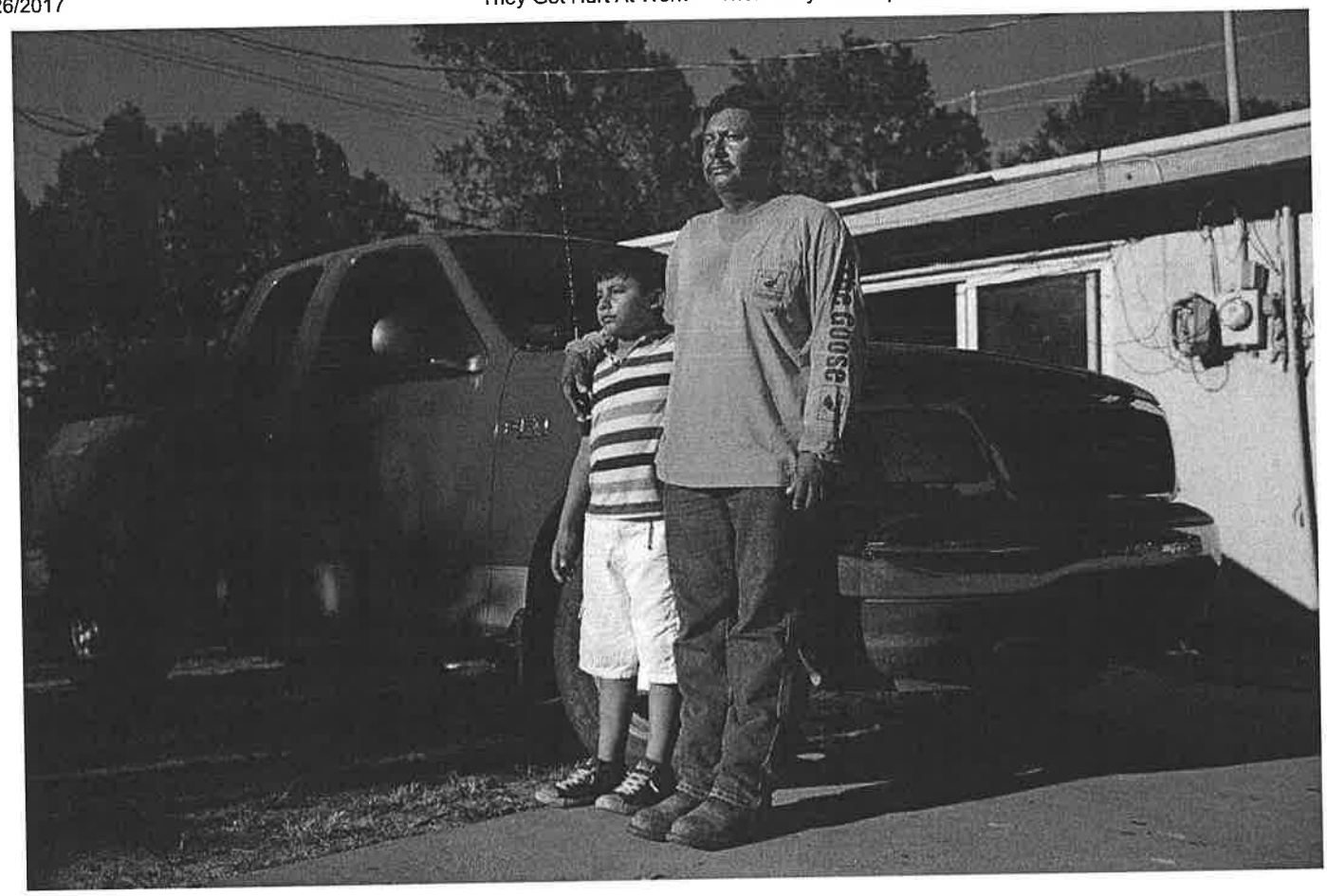
Told of what had happened to some of the arrested workers, Blank said he felt for those people but reiterated his agency's obligation to protect the workers' comp system.

"I guess that is a question that our legislature should maybe look into," he said. "What is the balance between the harm and the benefit that's being accomplished?"

"My son was watching. He saw when they put the handcuffs on me"

Juvenal Dominguez Quino worries what will happen to his 8-year-old son with special needs if he gets deported. Dominguez, 43, has lived in the United States for 19 years. But his life was thrown into uncertainty in 2014 when a construction trench he was working in collapsed, burying him in dirt and causing him to sprain his knee.

A month later, Command turned him in to state investigators after he provided a false Social Security number to an insurance adjuster. Dominguez said he told the adjuster he didn't have papers and had made the number up in order to work — details that by themselves wouldn't preclude him from receiving workers' comp. But Dominguez said the adjuster insisted she needed the number to pay him benefits. Sunz Insurance and North American Risk Services, which handled the claim, declined to comment.



Juvenal Dominguez Quino, 43, has lived in the United States for 19 years. In 2014 a construction trench he was working in collapsed, burying him in dirt and causing him to sprain his knee. Dominguez's attorney has argued for a judge to cancel his deportation because of the harmful effect it would have on his U.S.-born son, Alan.

Scott McIntyre for ProPublica

Dominguez was arrested in January 2015 as he was getting his son ready for school.

"My son was watching" from a window, he said, choking up. "He saw when they put the handcuffs on me."

At the time, Dominguez still couldn't bend his knee, so he had to sit with his legs extended across the back seat of the police car.

Dominguez pleaded no contest, and the judge sentenced him to two years' probation and ordered him to pay back nearly $19,000 in restitution to the insurance company. He was detained by ICE and put into deportation proceedings.

Michael DiGiacomo, owner of Platinum Construction, which employed Dominguez, was surprised to hear what had become of him. DiGiacomo said Dominguez was a

reliable worker, and he didn't know his documents were fake. After Dominguez got hurt, he said, his injury was in the hands of the leasing company and their insurer.

"It really sucks for him because, you know, you come and you want to work; it sucks to have to deal with that after you got hurt," he said. "They should have at least paid for his medical bills since he was hurt on the job."

Dominguez's attorney has argued for a judge to cancel his deportation because of the harmful effect it would have on his U.S.-born son. His attorney is hopeful he will get a visa to stay.

Even if he does, the insurance company scored a victory — it got Dominguez and his medical costs to go away. "I didn't want to do any more of anything," he said of his physical therapy. "I didn't want to claim anything else. I just wanted to live with it because I knew that it would only bring me more problems."

Arias' attorney Brian Carter said what the state and insurance companies are doing amounts to entrapment and ethnic profiling.

"Nobody looks at whether or not the Social Security number is valid for an individual named Tom Smith," he said. "The insurance companies are using this little issue over a Social Security number to avoid any financial responsibility, and in my opinion, ethical responsibility to take care of these individuals."

In the end, turning in Arias didn't get the insurer off the hook. Because the state attorney offered a plea deal, Normandy would have had to convince a workers' comp judge that Arias had not only used a fake Social Security number but that he had done so to obtain benefits. If it couldn't, it would have had to pay for medical treatment and lost wages potentially totaling hundreds of thousands of dollars, Carter said. So with Arias in Honduras, Normandy offered $49,000 plus attorney's fees.

Sent back to a country he hadn't lived in for 15 years, Arias felt he had no choice but to take the offer. "I arrived empty-handed," he said. "I didn't have means to put a roof over my head or feed myself or buy medications."

Despite having the settlement money, Arias said he doesn't trust the doctors in Honduras to perform a delicate back surgery. "Here, they're more likely to send you to the cemetery," he said. He hopes the United States might allow him to re-enter for humanitarian reasons, just to let him get the operation — and perhaps see his kids.

Research contributed by Meg Anderson and Graham Bishai of NPR and Sarah Betancourt of ProPublica.

Do you have information about how immigrant workers are being treated in the age of Trump? Contact Michael at michael.grabell@propublica.org.

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Obligations to Third Persons

Threatening Prosecution

When the ABA adopted the Model Rules it opted not to carry over from the predecessor Model Code a rule expressly prohibiting lawyers' threats of criminal proceedings to obtain an advantage in a civil matter. The reasoning was that other rules address such behavior, and in fact lawyers have been disciplined under more general rules for making threats as a pressure tactic.

Nevertheless, a large minority of jurisdictions retain the Model Code's specific ban. Some have even augmented it by enhancing the prohibition to include threats to report another lawyer's supposed unethical conduct.

This Special Report looks at the applicable disciplinary rules, and explores how courts and ethics committees interpret them in deciding what lawyers are—and are not—permitted to do.

Threats May Bring Disciplinary Trouble, Even Without Specific Rule

DR 7-105(A) of the Model Code prohibited a lawyer from bringing or threatening criminal charges if the sole purpose was to gain an advantage in a civil matter.

EC 7-21 set forth the rule's rationale: The criminal process is designed to protect society as a whole and is not a tool for attempting to force the settlement of private controversies. The functioning of the civil process, which is designed for the resolution of private disputes, suffers if a person is wrongly dissuaded from pursuing a remedy. Furthermore, using criminal process in this improper fashion diminishes public confidence in the legal system.

This Code provision generally operated as a total prohibition regardless of the merits of the threatened action or the aim of the lawyer in making the threat.

For example, in *Standing Comm. v. Ross*, 735 F.2d 1168 (9th Cir. 1984), a lawyer in a bankruptcy case sent a letter to the law firm hired by the opposing party to manage the property in question, demanding the firm's resignation and threatening to file charges of embezzlement if it did not resign. The lawyer argued that the opposing party had no right to control the property and that the embezzlement charges were appropriate. Given the civil context, the court found the threat to be coercive and improper.

See also *In re Farrant*, 852 P.2d 452 (Colo. 1993) (lawyer's draft letter to bankruptcy trustee purporting to reveal criminal activity by client's principal, enclosed in letter to client requesting payment of fees or withdrawal of objection to lawyer's fee petition, amounted to threat of criminal prosecution and violated DR 7-105(A) notwithstanding lawyer's disclaimer of intent to threaten); *Iowa State Bar Ass'n v. Michelson*, 345 N.W.2d 112 (Iowa 1984) (lawyer's letters stating that debtor was guilty of felony, faced up to five years in prison, and, if criminally prosecuted, would be drummed out of military, though geared primarily to obtaining repayment of debt for client and motivated by sincere belief in merit of client's position, warranted reprimand); *In re Glavin*, 484 N.Y.S.2d 933 (N.Y. App. Div. 1985) (lawyer's letter seeking restitution of money paid for unsatisfactory repair stating "You will return the money or go to jail," "I will have a warrant issued for your arrest," and "If you return the money, I will tell them not to punish you" constituted misrepresentation as well as threat, violated DR 1-102(A)(4) and DR 7-105, and warranted censure, notwithstanding lawyer's belief that letter was justified); *In re Lewelling*, 678 P.2d 1229 (Or. 1984) (lawyer's threatening to take matter to grand jury if certain funds were not paid to his client was "an intimidating tactic that is an abuse of our legal processes," warranting two-month suspension); ABA Informal Ethics Op. 1427 (1978) (lawyer's letters demanding payment and expressing views, correct or not, that recipient's use of funds constituted embezzlement and good cause for criminal action violated DR 7-105); Nassau County (N.Y.) Ethics Op. 93-13 (1993) (lawyer may not state in letter to client's former employee suspected of theft that if money is not returned district attorney will be notified, nor may lawyer state that client intends to notify district attorney, as lawyer may not circumvent disciplinary rule through acts of another); Vermont Ethics Op. 82-10 (1982) (lawyer may not state in letter to debtor that writing bad check is illegal since effect of such mention is same as direct threat).

However, some jurisdictions found ways to soften the rule's effect. See, e.g., *In re Decato*, 379 A.2d 825 (N.H. 1977) (relying on rule's inclusion of word "solely" to conclude that lawyer's letter informing recipient of possibility of filing criminal complaint for theft of services after receipt of bad check, unaccompanied by any request for payment, did not show that lawyer's sole purpose was to obtain advantage in civil matter); *In re McCurdy*, 681 P.2d 131 (Or.

1984) (declining to discipline lawyer who sent letter to parents of hit-and-run driver demanding payment for damages to his client's car and contrasting client's amicable offer to settle with driver's actions, which, he stated, could subject her to criminal conviction, jail sentence, and fine; considering letter's statement, "I am not telling you this to threaten you," together with recipients' testimony that they understood its meaning, court found no evidence of specific intent to threaten criminal charges to obtain advantage in civil matter); see also Connecticut Informal Ethics Op. 98-19 (1998); Connecticut Informal Ethics Op. 99-50 (1999).

Even absent a specific prohibition, conduct involving threats of criminal prosecution may violate one or more of the ethics rules.

See generally Annotation, *Initiating, or Threatening to Initiate, Criminal Prosecution as Ground for Disciplining Counsel*, 42 A.L.R.4th 1000 (1985); *Restatement (Third) of the Law Governing Lawyers* §98, Reporter's Note to Comment f. (2000).

Nothing Specific in Model Rules

The ABA, in accordance with the recommendation of its Commission on Evaluation of Professional Standards, omitted the prohibition in DR 7-105(A) from the ABA Model Rules. The rationale was that other provisions in the Model Rules addressed extortionate, fraudulent, and otherwise abusive behavior. ABA Formal Ethics Op. 92-363 (1992); see also *West Virginia State Bar Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992) (criticizing prohibition as "unworkable"). See generally Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 Am. J. Trial Advoc. 27 (2010).

Nevertheless, a large minority of jurisdictions retain the prohibition in their lawyer conduct rules. See, e.g., Illinois Ethics Op. 12-01 (2012) (lawyer may not participate in presenting criminal charges against defendant to collect on NSF check and should advise client not to threaten criminal charges in order to obtain payment).

Other Applicable Rules

Even absent a specific prohibition, conduct involving threats or suggestions of criminal prosecution to gain an advantage in a civil matter may violate one or more of the ethics rules. See, e.g., *State ex rel. Oklahoma Bar Ass'n v. Worsham*, 957 P.2d 549 (Okla. 1998) (lawyer's threat of criminal prosecution without basis in fact or law would violate Rule 3.1, prohibiting assertion of frivolous claims; Rule 4.1, regarding truthfulness; and Rule 4.4, prohibiting acts with no substantial purpose other than to embarrass, delay, or burden third person; threat that lawyer could influence governmental official would violate Rule 8.4(d) and (e)); Maryland Ethics Op. 2003-16, 20 Law. Man. Prof. Conduct 16 (2004) (principles underlying former DR 7-105(A) remain "basically sound," but rule was overbroad; other ethical and statutory provisions constrain lawyers' use of threats); Michigan Informal Ethics Op. RI-78 (1991) (Rules 3.1, 3.3, 3.4, 3.8, 4.1, 4.4, 8.3, and 8.4 adequately address objectionable behavior that DR 7-105(A) was intended to prohibit); ABA Formal Ethics Op. 92-363 (1992) (threatening criminal prosecution to gain advantage in civil matter may violate Rules 3.1, 4.1, 4.4, and/or 8.4).

See also Arizona Ethics Op. 93-11 (1993); Delaware Ethics Op. 1995-2 (1995); Florida Ethics Op. 89-3 (1989); New Mexico Ethics Op. 1987-5 (1987); North Carolina Ethics Op. 98-19 (1999); and West Virginia Ethics Op. 2000-01 (2000).

Threats as Negotiation Tactic

Under some circumstances, the threat of criminal charges may constitute a legitimate negotiation technique. In ABA Formal Ethics Op. 92-363 (1992), the ABA Standing Committee on Ethics and Professional Responsibility concluded that a lawyer may use the possibility of presenting criminal charges against an opposing party in a private civil matter to gain relief for the client if the criminal matter is related to the civil claim, both the civil claim and possible criminal charge are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It explains that the requirement that the civil matter be related to the threatened criminal charges "discourages exploitation of extraneous matters that have nothing to do with evaluating the claim."

In addition, the committee said that a lawyer may agree, as part of a settlement, to refrain from presenting criminal charges against an opposing party so long as the agreement does not violate applicable law.

A number of jurisdictions have agreed with the reasoning of the ABA opinion. Alaska Ethics Op. 97-2 (1997); Delaware Ethics Op. 1995-2 (1995); Michigan Informal Ethics Op. RI-78 (1991); North Carolina Ethics Op. 98-19 (1999); North Carolina Ethics Op. 2008-15 (2009); South Dakota Ethics Op. 94-3 (1994); Utah Ethics Op. 03-04 (2003); West Virginia Ethics Op. 2000-01 (2000); Wisconsin Ethics Op. 2001-01 (2000).

See also *Ruberton v. Gabage*, 654 A.2d 1002 (N.J. Super. Ct. App. Div. 1995) (court did not disapprove defense lawyer's threat, made during settlement conference in civil case, that defendant might file criminal charges against plaintiff, observing that "lawyers must be free to advance the strengths of a client's case in candid and objective ways during settlement conferences"); cf. New York City Ethics Op. 1995-13 (1995) (including condition that parties not inform law enforcement authorities of criminal matter in settlement agreement must originate with counsel for potential defendant, not potential informant; additionally, settlements that include nonreporting agreements may be unenforceable and fraught with other legal problems).

See generally Brian S. Faughnan, Michael L. Matula & Douglas R. Richmond, *Professional Responsibility in Litigation* at 436, 444-46, 459 (2011); Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. Tex. L. Rev. 713 (1997); Michael G. Daigneault & Jack Marshall, *Games Legal Negotiators Play: The Use of Threats*, 44 Fed. Law. 46 (September 1997); Patrick O. Gray, *May a Lawyer Threaten Criminal Prosecution in Order to Obtain Advantage in a Civil Matter?*, 21 J. Legal Prof.

207 (1996); Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 Am. J. Trial Advoc. 27 (2010); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm. & Mary L. Rev. 1303 (1995).

Prosecutors' Discretion

Prosecutorial discretion in bringing or forgoing criminal charges presents different issues. See ABA Formal Ethics Op. 92-363 n. 1 (1992) (opinion "does not purport to deal with issues that may be presented when one of the parties is in an official position to act or refrain from acting in connection with bringing criminal charges"). See generally *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (prosecutor did not violate due process clause by threatening to press more serious charges if defendant did not plead guilty).

What Constitutes a Threat?

In addition to the jurisdictional variations on whether, what kind, and to what extent threats are prohibited, jurisdictions also differ in their views of what constitutes a "threat." See New York State Ethics Op. 772 (2003) (no universal standard for determining "threat"; content and context must be considered); see also Nicola M. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 Geo. J. Legal Ethics 935 (2008).

Under some circumstances, the threat of criminal charges may constitute a legitimate negotiation technique.

Some jurisdictions have distinguished "threatening" from "notifying," "informing," "warning," or "calling to the attention of" persons that their behavior may violate criminal or disciplinary provisions, and some have considered the existence of an actual intent to report violations significant to whether the lawyer's sole purpose in making the threat is improper.

See, e.g., District of Columbia Ethics Op. 339 (2007) (lawyer collecting debt for client may include in demand letter simple citation to statute making it a crime to knowingly pay creditor with bad check and appropriately couched reference to potential for criminal referral, as long as threat is not made solely to gain advantage in collection matter); Michigan Informal Ethics Op. RI-78 (1991) (lawyer may properly call to attention of opposing party's counsel pertinent criminal statute, sanction, or possible prosecution, as long as sole aim is not harassment but enforcing legitimate claim of client); Missouri Informal Ethics Op. 20010149 (2001) (lawyer representing plaintiffs in civil matter relating to funds stolen by defendants may threaten to refer matter for prosecution if lawyer actually intends to do so, but may make threat conditional); Wisconsin Ethics Op. E-01-01 (2001) (in civil matter, lawyer may inform another person that person's conduct may violate criminal provision and that lawyer or lawyer's client has right or duty to report violation); Colorado Rule 4.5(b) (providing safe harbor for notifying another person in civil matter of lawyer's reasonable belief that other person's conduct may violate criminal, administrative, or disciplinary rules or statutes).

Presenting Charges

DR 7-105(A) and most of its state rule iterations prohibit not only threatening to present criminal charges, but also presenting or participating in presenting criminal charges in order to gain an advantage in a civil matter.

Only a few jurisdictions limit the prohibition to threats. See, e.g., California Rule 5-100 (Proposed Rule 3.10) (prohibiting only threat of bringing charges and not actual presentation of charges, even if by doing so lawyer gains advantage in civil dispute); see also Maine Ethics Op. 163 (1993) (collection lawyer may not notify debtor that his conduct is subject to criminal penalties or that it is being reported to authorities, but may report conduct to criminal authorities, even though restitution may be incidental benefit of report); Maryland Ethics Op. 2003-16 (2003) (lawyer may assist client in pressing criminal charges related to subject matter of civil litigation if lawyer makes no threats to opposing party).

Required by Law

In some jurisdictions, statutes require lawyers bringing civil actions to give notice of potential criminal prosecution. See, e.g., *Knoell v. Petrovich*, 90 Cal. Rptr.2d 162 (Cal. Ct. App. 1999) (letters sent by easement grantor's lawyer to grantee and city attorney indicating that grantee may have forged easement deed were not threats of criminal prosecution because they were sent either in anticipation of or as statutory condition precedent to litigation); Ohio Ethics Op. 87-9 (1987) (service of 30-day prior notice on prospective defendant demanding payment and notifying him that if payment is made he cannot be criminally prosecuted, as required by state statute governing actions for willful property damage, is not violation of ethics rules); Florida Ethics Op. 85-3 (1985) (sending statutorily prescribed notice regarding NSF check does not violate ethics rules); South Carolina Ethics Op. 07-06 (2007) (collection notices sent out in compliance with state debt collection statute do not violate Rule 4.5, even though they include threats of criminal prosecution); Utah Ethics Op. 71 (1979) (lawyer may send statutorily required notice referencing criminal statute before filing suit on dishonored check without violating ethics rules).

But see *Florida Bar v. Suprina*, 484 So. 2d 1245 (Fla. 1986) (state statute requiring notice before filing suit on mortgage could have been satisfied without threatening criminal prosecution; reprimand issued to lawyer who, attempting to obtain satisfaction on mortgage, sent letter stating that unless paid, he and his client would "do our best to have the court give you the maximum sentence both in court and in your pocketbook").

Threats Against Clients

Even the limited tolerance for certain kinds of threats evinced by ABA Formal Ethics Op. 92-363 (1992) does not generally extend to lawyers' threats of revealing confidential client information. See, e.g., *State ex rel. Counsel for*

Discipline v. Lopez Wilson, 634 N.W.2d 467, 17 Law. Man. Prof. Conduct 640 (Neb. 2001) (two-year suspension for lawyer who, after discovering client's affair with lawyer's ex-wife, threatened to reveal confidential information to divorce court and to INS if client did not pay him for services lawyer had rendered gratis); *In re Watson*, 768 N.E.2d 617 (Ohio 2002) (suspending lawyer who entered into contingent fee agreement and then tried to obtain hourly fee instead, threatening to file criminal charges against client if hourly fee not paid); *In re Huffman*, 983 P.2d 534, 15 Law. Man. Prof. Conduct 286 (Or. 1999) (two-year suspension for lawyer who threatened former client with criminal charges unless client set aside bankruptcy in which client's debt to lawyer had been discharged); *In re Trexler*, 541 S.E.2d 822 (S.C. 2001) (disbarring lawyer who stole client's settlement funds and then threatened to sue client and have her arrested if she contacted lawyer or anyone else about this matter); *Weiss v. Comm'n for Lawyer Discipline*, 981 S.W.2d 8 (Tex. App. 1998) (disbarring lawyer who, after client fired him without paying fee, threatened to file charges against client for stalking him unless client paid reduced fee); *In re Boelter*, 985 P.2d 328, 15 Law. Man. Prof. Conduct 509 (Wash. 1999) (six-month suspension for lawyer who threatened to reveal confidential information to IRS unless client paid balance due); New Hampshire Ethics Op. 2010-11/1, 27 Law. Man. Prof. Conduct 122 (lawyer may not attempt to collect fee by informing client that otherwise she intends to file IRS Form 1099, indicating taxable debt forgiveness, nor may lawyer inform IRS or any other government agency regulating client that she has forgiven unpaid legal fees). But see *In re Lim*, 210 S.W.3d 199, 23 Law. Man. Prof. Conduct 64 (Mo. 2007) (lawyer's threat to report clients to INS and then actually reporting them, though reprehensible, did not warrant discipline).

Threatening Disciplinary Action

A related issue arises when a lawyer threatens to report an opposing lawyer to disciplinary authorities.

According to ABA Formal Ethics Op. 94-383 (1994), threatening to file a misconduct complaint against the opposing lawyer in order to obtain an advantage in a civil case is "constrained" by the Model Rules—as well as by extortion statutes—even though not expressly addressed. Such threats "may violate one or more of Rules 8.4(b), 3.1, 4.1, 4.4 and 8.4(d)."

The opinion explained that the threat may not be used as a bargaining point if the misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness, or fitness as a lawyer, because in such instances the lawyer has an independent obligation under Model Rule 8.3(a) to report opposing counsel to disciplinary authorities.

The opinion stated that the threat also would be improper if the misconduct is unrelated to the civil claim, if the disciplinary charges would not be well-founded in fact and law, or if the threat has no substantial purpose or effect other than to embarrass, delay, or burden opposing counsel or his client, or to prejudice the administration of justice.

See *In re Pyle*, 91 P.3d 1222, 23 Law. Man. Prof. Conduct 249 (Kan. 2004) (lawyer's letter threatening to report opposing counsel to disciplinary agency unless settlement was reached violated Rules 4.4 and 8.4; lawyer's failure to report opposing counsel's alleged misconduct violated Rule 8.3); *Barrett v. Virginia State Bar*, 611 S.E.2d 375, 21 Law. Man. Prof. Conduct 233 (Va. 2005) (divorcing lawyer's repeated threats, with no good-faith basis, to seek disbarment of wife's counsel if she did not withdraw were made solely to obtain advantage in litigation and therefore violated Rule 3.4(i)); Wisconsin Ethics Op. E-01-01 (2001) (lawyer who seeks bargaining advantage by threatening to report another lawyer's misconduct commits misconduct, even if lawyer believes conduct raises substantial issue of honesty, trustworthiness, or fitness to practice law).

The rules in several jurisdictions specifically prohibit threats of disciplinary action, either of lawyer disciplinary charges or, more broadly, reports to any professional disciplinary authority, to gain an advantage in a civil proceeding.

Even the ethics rules' limited tolerance for certain kinds of threats does not generally extend to lawyers' threats of revealing confidential client information.

The District of Columbia and Florida, for example, prohibit threats of disciplinary charges. Illinois prohibits threats of professional disciplinary charges, while Tennessee prohibits threats of lawyer disciplinary charges. Some states, including California, Colorado, and Maine, prohibit threats of disciplinary and administrative misconduct charges in addition to threats of criminal charges. Texas additionally prohibits threatening "civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein."

Other Types of Threats

Other types of threats, including threats to file administrative complaints, threats to report suspected tax violations, threats to report the professional misconduct of persons other than lawyers, and threats to report an individual's undocumented immigration status to authorities, may also fall within the range of various jurisdictions' prohibitions. See, e.g., *State ex rel. Counsel for Discipline v. Lopez Wilson*, 634 N.W.2d 467, 17 Law. Man. Prof. Conduct 640 (Neb. 2001) (immigration); North Carolina Ethics Op. 2005-3 (2005) and North Carolina Ethics Op. 2009-5 (2009) (immigration); San Diego County Ethics Op. 2005-1 (2005) (ethical bar against threats of criminal or disciplinary action extends to such communications that are directly between client and opposing party but originate with lawyer); South Carolina Ethics Op. 11-09, 28 Law. Man. Prof. Conduct 61 (2012) (tax). They may also be found to constitute criminal acts. See generally David P. Weber, *(Unfair) Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 Marq. L. Rev. 613 (2010).

But see *In re Lim*, 210 S.W.3d 199, 23 Law. Man. Prof. Conduct 64 (Mo. 2007) (lawyer's telling clients he would withhold immigration labor certification unless they paid his bill violated Rule 1.16(d), but lawyer's threat to report clients to INS, though reprehensible, did not warrant discipline); Indiana Ethics Op. 1 of 2008 (2008) (lawyer may threaten to report real estate broker to administrative or professional licensing agency without violating ethics rules as long as conduct to be reported is related to underlying suit, lawyer has well-founded belief that conduct violates agency's regulations and report is warranted, lawyer does not state or imply ability to improperly influence agency or officials, and amount sought is reasonable approximation of amount due as restitution); New York State Ethics Op. 772 (2003) (lawyer may threaten to file administrative or disciplinary complaint against broker as long as one purpose of threat is to obtain information about broker's conduct and sole purpose is not to obtain refund to client of disputed funds).

Running Afoul of the Law

Regardless of whether threats of criminal prosecution, disciplinary proceedings, or other actions violate the ethics rules, such conduct may constitute torts, infractions of civil statutes such as the Fair Debt Collection Practices Act, or violations of criminal statutes prohibiting, for example, blackmail, extortion, intimidation, coercion, misprision, and compounding crimes. See, e.g., *State v. Hynes*, 978 A.2d 264 (N.H. 2009) (lawyer's threats to file complaints against hair salons for sex-based discrimination unless salons each paid him $1,000 constituted extortion); *Tessier v. Rockefeller*, 33 A.3d 1118, 27 Law. Man. Prof. Conduct 597 (N.H. 2011) (allegations of lawyer's threats to report plaintiff's husband, also a lawyer, to state lawyer discipline office and to initiate criminal proceedings against him stated claims for fraudulent misrepresentation and negligent infliction of emotional distress). See generally Brian S. Faughnan, Michael L. Matula & Douglas R. Richmond, *Professional Responsibility in Litigation* at 444-47, 456-57 (2011); Nicola M. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 Geo. J. Legal Ethics 935 (2008); New York City Ethics Op. 1995-13 (1995) (under various circumstances, agreements not to report crimes may themselves constitute crimes).

By Helen W. Gunnarsson

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ABA/BNA
Lawyers' Manual on Professional Conduct℠

Opinion 1995-2 (12/22/95) Threat of criminal prosecution; Settlements.

A lawyer representing a client in the administration of her husband's estate may threaten the defendant executor with criminal prosecution for a number of potentially criminal acts, including wrongful listing of the decedent's marital status as never married when he knew the decedent had married, and a shortfall in the estate of $22,400. So long as the civil and criminal matters are related, the lawyer has a well-founded belief that the criminal charges are warranted, and the lawyer does not attempt to exert improper influence over the criminal process, he may agree, as part of a settlement, not to report the potentially criminal activity to the prosecuting authorities provided it is not a violation of substantive state law to so offer. Rules 3.1, 4.1, 4.4, 8.4; DR 7-105(A); ABA 92-363.

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Fitness to Practice

Threatening Conduct Toward Client Reflects Unfitness, Warrants Suspension

A lawyer who engaged in a threatening, coercive course of conduct toward a client who the lawyer found out was having an affair with the lawyer's ex-wife was suspended for two years Sept. 28 by the Nebraska Supreme Court (*State ex rel. Counsel for Discipline v. Lopez Wilson,* Neb., No. S-01-122, 9/28/01).

The lawyer's threats to reveal the client's confidential information unless the client paid him for legal services that had actually been provided at no charge reflected adversely on the lawyer's fitness to practice, the court decided in a per curiam opinion.

Client 'Busted'—by His Lawyer.

Joseph Lopez Wilson obtained an immigration visa for Carlos Moreno and later represented Moreno in a divorce proceeding. Moreno paid for these services.

Over the years, the two men became close friends, and Lopez Wilson provided legal services to Moreno in several other matters at no charge. But during this time period, Lopez Wilson and his wife separated, and unbeknownst to Lopez Wilson, his ex-wife and Moreno began an intimate relationship.

When Lopez Wilson found out, he said that unless Moreno paid him $5,000 for professional services that Lopez Wilson had furnished gratis, he would reveal information to the Immigration and Naturalization Service that would destroy Moreno's visa status, and he also threatened to notify the court in Moreno's divorce proceeding that Moreno had misstated his assets.

Moreno eventually obtained a protective order against Lopez Wilson based on evidence that Lopez Wilson had been harassing him through phone calls, faxes, and late night visits. For example, Lopez Wilson left a note on Moreno's front door stating "[Y]ou have been busted. You better seek a new attorney."

Also, Lopez Wilson informed the INS that he was withdrawing as Moreno's attorney, and told the agency that Moreno's visa should be revoked because his employment situation had changed.

How Not to Resolve Fee Disputes.

Moreno filed an ethics complaint concerning these matters, and testified at the disciplinary hearing that Lopez Wilson did not have authorization to disclose any confidential information about him.

Lopez Wilson admitted that it "looks bad to have a restraining order against your lawyer." He asserted that any ethics violation was an isolated incident that would never happen again, but also maintained that it would be a "gross imposition" by Moreno not to pay for services rendered.

The supreme court found, by clear and convincing evidence, that Lopez Wilson engaged in conduct that reflected adversely on his fitness to practice law, in violation of DR 1-102(A)(6), and thereby also ran afoul of DR 1-102(A)(1).

On the question of discipline, the court pointed out that Lopez Wilson attempted to extract money from Moreno by threatening disclosure of confidential information. EC 2-23 states that a lawyer "should be zealous in his or her efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject."

"Threatening telephone calls, faxes, and visits to a client's home are not efforts which should be used to comply with the letter or the spirit of EC 2-23," the court wrote.

The court acknowledged that DR 4-101(C) permits a lawyer to reveal confidences or secrets necessary to collect the lawyer's fee. But that rule, the court stated, "does not permit an attorney to threaten a former client with disclosure of client confidences in order to resolve a fee dispute."

"An attorney ... is expected to use legal means to enforce his rights, not violent threats," the court declared.

Weighing Lopez Wilson's fitness to practice, the court emphasized that he used his position to exact vengeance on Moreno. "Hostile, threatening, and disruptive conduct reflects on an attorney's honesty, trustworthiness, diligence, and reliability," the court stated.

On the other hand, the court noted that Lopez Wilson felt that Moreno abused their friendship by seducing the lawyer's ex-wife while she and Lopez Wilson were trying to reconcile.

The lawyer's conduct appeared to be an isolated incident, the court found. It concluded that a two-year suspension was the appropriate sanction.

Assistant Counsel for Discipline John W. Steele, Lincoln, Neb., represented the state. Lopez Wilson, of Omaha, Neb., appeared pro se.

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Threatening Prosecution

PRACTICE GUIDE

The ABA Model Code of Professional Responsibility specifically prohibited lawyers from using the threat of criminal proceedings, the presentation of criminal charges, or the participation in criminal proceedings solely as a pressure tactic in a civil matter.

This provision was not retained when the Model Rules of Professional Conduct were adopted in 1983.

Nevertheless, almost half of all jurisdictions have preserved a version of the prohibition. Of those, some also prohibit threats of other legal actions, such as disciplinary proceedings. Even in jurisdictions that have not explicitly retained the provision, threats of criminal prosecution, disciplinary reports, or other actions may subject a lawyer to discipline under other rules or statutes.

BACKGROUND

Model Rules

The Model Rules, unlike the predecessor Model Code, do not contain a specific prohibition against threatening criminal proceedings to gain an advantage in a civil matter.

However, such conduct may subject a lawyer to discipline under Model Rule 3.1 (Meritorious Claims and Contentions), Model Rule 3.4 (Fairness to Opposing Party and Counsel), Model Rule 4.1 (Truthfulness in Statements to Others), Model Rule 4.4 (Respect for Rights of Third Persons), and Model Rule 8.4(b), 8.4(d), and 8.4(e) (Misconduct).

Model Code

"DR 7-105 Threatening Criminal Prosecution.

"(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

State Rules

A slight majority of jurisdictions no longer have a rule based on DR 7-105(A).

The others have adopted rules that are the same or similar to it, with some qualifying the prohibition and some additionally proscribing threats of other actions, most commonly disciplinary proceedings. Of those:

- many, such as Idaho, Tennessee, Texas, and Wyoming, include it as a subsection of Rule 4.4;
- others, including Connecticut, Florida, Kentucky, Massachusetts, New Jersey, New York, Oregon, and Virginia, include it as a subsection of Rule 3.4 or its equivalent;
- a few include it as a part of Rule 1.2 (e.g., Ohio), Rule 3.1 (e.g., Maine), Rule 8.3 (e.g., Hawaii), or Rule 8.4 (e.g., District of Columbia, Illinois, Louisiana); and
- some include the prohibition as a freestanding rule. See, e.g., Alabama (Rule 3.10), California (Rule 5-100; Proposed Rule 3.10), Colorado (Rule 4.5), South Carolina (Rule 4.5), and Vermont (Rule 4.5).

See generally Nicola M. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 Geo. J. Legal Ethics 935 (2008).

- For text of state ethics rules and how they vary from the ABA Model Rules, see the chapters on State Ethics Rules and State Ethics Rules—Variations, behind the Model Standards tab.

Model Code's Prohibition

DR 7-105(A) of the Model Code prohibited a lawyer from bringing or threatening criminal charges if the sole purpose was to gain an advantage in a civil matter.

EC 7-21 set forth the rule's rationale: The criminal process is designed to protect society as a whole and is not a tool for attempting to force the settlement of private controversies. The functioning of the civil process, which is

designed for the resolution of private disputes, suffers if a person is wrongly dissuaded from pursuing a remedy. Furthermore, using criminal process in this improper fashion diminishes public confidence in the legal system.

This Code provision generally operated as a total prohibition regardless of the merits of the threatened action or the aim of the lawyer in making the threat.

For example, in *Standing Comm. v. Ross*, 735 F.2d 1168 (9th Cir. 1984), a lawyer in a bankruptcy case sent a letter to the law firm hired by the opposing party to manage the property in question, demanding the firm's resignation and threatening to file charges of embezzlement if it did not resign. The lawyer argued that the opposing party had no right to control the property and that the embezzlement charges were appropriate. Given the civil context, the court found the threat to be coercive and improper.

See also *In re Farrant*, 852 P.2d 452 (Colo. 1993) (lawyer's draft letter to bankruptcy trustee purporting to reveal criminal activity by client's principal, enclosed in letter to client requesting payment of fees or withdrawal of objection to lawyer's fee petition, amounted to threat of criminal prosecution and violated DR 7-105(A) notwithstanding lawyer's disclaimer of intent to threaten); *Iowa State Bar Ass'n v. Michelson*, 345 N.W.2d 112 (Iowa 1984) (lawyer's letters stating that debtor was guilty of felony, faced up to five years in prison, and, if criminally prosecuted, would be drummed out of military, though geared primarily to obtaining repayment of debt for client and motivated by sincere belief in merit of client's position, warranted reprimand); *In re Glavin*, 484 N.Y.S.2d 933 (N.Y. App. Div. 1985) (lawyer's letter seeking restitution of money paid for unsatisfactory repair stating "You will return the money or go to jail," "I will have a warrant issued for your arrest," and "If you return the money, I will tell them not to punish you" constituted misrepresentation as well as threat, violated DR 1-102(A)(4) and DR 7-105, and warranted censure, notwithstanding lawyer's belief that letter was justified); *In re Lewelling*, 678 P.2d 1229 (Or. 1984) (lawyer's threatening to take matter to grand jury if certain funds were not paid to his client was "an intimidating tactic that is an abuse of our legal processes," warranting two-month suspension); ABA Informal Ethics Op. 1427 (1978) (lawyer's letters demanding payment and expressing views, correct or not, that recipient's use of funds constituted embezzlement and good cause for criminal action violated DR 7-105); Nassau County (N.Y.) Ethics Op. 93-13 (1993) (lawyer may not state in letter to client's former employee suspected of theft that if money is not returned district attorney will be notified, nor may lawyer state that client intends to notify district attorney, as lawyer may not circumvent disciplinary rule through acts of another); Vermont Ethics Op. 82-10 (1982) (lawyer may not state in letter to debtor that writing bad check is illegal since effect of such mention is same as direct threat).

However, some jurisdictions found ways to soften the rule's effect. See, e.g., *In re Decato*, 379 A.2d 825 (N.H. 1977) (relying on rule's inclusion of word "solely" to conclude that lawyer's letter informing recipient of possibility of filing criminal complaint for theft of services after receipt of bad check, unaccompanied by any request for payment, did not show that lawyer's sole purpose was to obtain advantage in civil matter); *In re McCurdy*, 681 P.2d 131 (Or. 1984) (declining to discipline lawyer who sent letter to parents of hit-and-run driver demanding payment for damages to his client's car and contrasting client's amicable offer to settle with driver's actions, which, he stated, could subject her to criminal conviction, jail sentence, and fine; considering letter's statement, "I am not telling you this to threaten you," together with recipients' testimony that they understood its meaning, court found no evidence of specific intent to threaten criminal charges to obtain advantage in civil matter); see also Connecticut Informal Ethics Op. 98-19 (1998); Connecticut Informal Ethics Op. 99-50 (1999).

See generally Annotation, *Initiating, or Threatening to Initiate, Criminal Prosecution as Ground for Disciplining Counsel*, 42 A.L.R.4th 1000 (1985); *Restatement (Third) of the Law Governing Lawyers* §98, Reporter's Note to Comment f. (2000).

Omitted From Model Rules

The ABA, in accordance with the recommendation of its Commission on Evaluation of Professional Standards, omitted the prohibition in DR 7-105(A) from the ABA Model Rules. The rationale was that other provisions in the Model Rules addressed extortionate, fraudulent, and otherwise abusive behavior. ABA Formal Ethics Op. 92-363 (1992); see also *West Virginia State Bar Comm. on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992) (criticizing prohibition as "unworkable"). See generally Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 Am. J. Trial Advoc. 27 (2010).

Nevertheless, as noted above, many jurisdictions retain the prohibition. See, e.g., Illinois Ethics Op. 12-01 (2012) (lawyer may not participate in presenting criminal charges against defendant to collect on NSF check and should advise client not to threaten criminal charges in order to obtain payment).

Conduct May Violate Other Rules

Even absent a specific prohibition, conduct involving threats or suggestions of criminal prosecution to gain an advantage in a civil matter may violate one or more of the ethics rules. See, e.g., *State ex rel. Oklahoma Bar Ass'n v. Worsham*, 957 P.2d 549 (Okla. 1998) (lawyer's threat of criminal prosecution without basis in fact or law would violate Rule 3.1, prohibiting assertion of frivolous claims; Rule 4.1, regarding truthfulness; and Rule 4.4, prohibiting acts with no substantial purpose other than to embarrass, delay, or burden third person; threat that lawyer could influence governmental official would violate Rule 8.4(d) and (e)); Maryland Ethics Op. 2003-16, 20 Law. Man. Prof. Conduct 16 (2004) (principles underlying former DR 7-105(A) remain "basically sound," but rule was overbroad; other ethical and statutory provisions constrain lawyers' use of threats); Michigan Informal Ethics Op. RI-78 (1991) (Rules 3.1, 3.3, 3.4, 3.8, 4.1, 4.4, 8.3, and 8.4 adequately address objectionable behavior that DR 7-105(A) was

intended to prohibit); ABA Formal Ethics Op. 92-363 (1992) (threatening criminal prosecution to gain advantage in civil matter may violate Rules 3.1, 4.1, 4.4, and/or 8.4).

See also Arizona Ethics Op. 93-11 (1993); Delaware Ethics Op. 1995-2 (1995); Florida Ethics Op. 89-3 (1989); New Mexico Ethics Op. 1987-5 (1987); North Carolina Ethics Op. 98-19 (1999); and West Virginia Ethics Op. 2000-01 (2000).

Legitimate Negotiation Technique

Under some circumstances, the threat of criminal charges may constitute a legitimate negotiation technique. In ABA Formal Ethics Op. 92-363 (1992), the ABA Standing Committee on Ethics and Professional Responsibility concluded that a lawyer may use the possibility of presenting criminal charges against an opposing party in a private civil matter to gain relief for the client if the criminal matter is related to the civil claim, both the civil claim and possible criminal charge are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It explains that the requirement that the civil matter be related to the threatened criminal charges "discourages exploitation of extraneous matters that have nothing to do with evaluating the claim."

In addition, the committee said that a lawyer may agree, as part of a settlement, to refrain from presenting criminal charges against an opposing party so long as the agreement does not violate applicable law.

A number of jurisdictions have agreed with the reasoning of the ABA opinion. Alaska Ethics Op. 97-2 (1997); Delaware Ethics Op. 1995-2 (1995); Michigan Informal Ethics Op. RI-78 (1991); North Carolina Ethics Op. 98-19 (1999); North Carolina Ethics Op. 2008-15 (2009); South Dakota Ethics Op. 94-3 (1994); Utah Ethics Op. 03-04 (2003); West Virginia Ethics Op. 2000-01 (2000); Wisconsin Ethics Op. 2001-01 (2000).

See also *Ruberton v. Gabage*, 654 A.2d 1002 (N.J. Super. Ct. App. Div. 1995) (court did not disapprove defense lawyer's threat, made during settlement conference in civil case, that defendant might file criminal charges against plaintiff, observing that "lawyers must be free to advance the strengths of a client's case in candid and objective ways during settlement conferences"); cf. New York City Ethics Op. 1995-13 (1995) (including condition that parties not inform law enforcement authorities of criminal matter in settlement agreement must originate with counsel for potential defendant, not potential informant; additionally, settlements that include nonreporting agreements may be unenforceable and fraught with other legal problems).

See generally Brian S. Faughnan, Michael L. Matula & Douglas R. Richmond, *Professional Responsibility in Litigation* at 436, 444-46, 459 (2011); Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. Tex. L. Rev. 713 (1997); Michael G. Daigneault & Jack Marshall, *Games Legal Negotiators Play: The Use of Threats*, 44 Fed. Law. 46 (September 1997); Patrick O. Gray, *May a Lawyer Threaten Criminal Prosecution in Order to Obtain Advantage in a Civil Matter?*, 21 J. Legal Prof. 207 (1996); Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 Am. J. Trial Advoc. 27 (2010); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm. & Mary L. Rev. 1303 (1995).

Prosecutorial Discretion

Prosecutorial discretion in bringing or forgoing criminal charges presents different issues. See ABA Formal Ethics Op. 92-363 n. 1 (1992) (opinion "does not purport to deal with issues that may be presented when one of the parties is in an official position to act or refrain from acting in connection with bringing criminal charges"). See generally *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (prosecutor did not violate due process clause by threatening to press more serious charges if defendant did not plead guilty).

- For discussion of prosecutors' ethics duties, see the Prosecutors chapter behind the Trial Conduct tab.

What Constitutes a 'Threat'?

In addition to the jurisdictional variations on whether, what kind, and to what extent threats are prohibited, jurisdictions also differ in their views of what constitutes a "threat." See New York State Ethics Op. 772 (2003) (no universal standard for determining "threat"; content and context must be considered); see also Nicola M. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 Geo. J. Legal Ethics 935 (2008).

Some jurisdictions have distinguished "threatening" from "notifying," "informing," "warning," or "calling to the attention of" persons that their behavior may violate criminal or disciplinary provisions, and some have considered the existence of an actual intent to report violations significant to whether the lawyer's sole purpose in making the threat is improper.

See, e.g., District of Columbia Ethics Op. 339 (2007) (lawyer collecting debt for client may include in demand letter simple citation to statute making it a crime to knowingly pay creditor with bad check and appropriately couched reference to potential for criminal referral, as long as threat is not made solely to gain advantage in collection matter); Michigan Informal Ethics Op. RI-78 (1991) (lawyer may properly call to attention of opposing party's counsel pertinent criminal statute, sanction, or possible prosecution, as long as sole aim is not harassment but enforcing legitimate claim of client); Missouri Informal Ethics Op. 20010149 (2001) (lawyer representing plaintiffs in

civil matter relating to funds stolen by defendants may threaten to refer matter for prosecution if lawyer actually intends to do so, but may make threat conditional); Wisconsin Ethics Op. E-01-01 (2001) (in civil matter, lawyer may inform another person that person's conduct may violate criminal provision and that lawyer or lawyer's client has right or duty to report violation); Colorado Rule 4.5(b) (providing safe harbor for notifying another person in civil matter of lawyer's reasonable belief that other person's conduct may violate criminal, administrative, or disciplinary rules or statutes).

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Presenting Charges

DR 7-105(A) and most of its state rule iterations prohibit not only threatening to present criminal charges, but also presenting or participating in presenting criminal charges in order to gain an advantage in a civil matter.

Only a few jurisdictions limit the prohibition to threats. See, e.g., California Rule 5-100 (Proposed Rule 3.10) (prohibiting only threat of bringing charges and not actual presentation of charges, even if by doing so lawyer gains advantage in civil dispute); see also Maine Ethics Op. 163 (1993) (collection lawyer may not notify debtor that his conduct is subject to criminal penalties or that it is being reported to authorities, but may report conduct to criminal authorities, even though restitution may be incidental benefit of report); Maryland Ethics Op. 2003-16 (2003) (lawyer may assist client in pressing criminal charges related to subject matter of civil litigation if lawyer makes no threats to opposing party).

Statutorily Prescribed Notice

In some jurisdictions, statutes require lawyers bringing civil actions to give notice of potential criminal prosecution. See, e.g., *Knoell v. Petrovich*, 90 Cal. Rptr.2d 162 (Cal. Ct. App. 1999) (letters sent by easement grantor's lawyer to grantee and city attorney indicating that grantee may have forged easement deed were not threats of criminal prosecution because they were sent either in anticipation of or as statutory condition precedent to litigation); Ohio Ethics Op. 87-9 (1987) (service of 30-day prior notice on prospective defendant demanding payment and notifying him that if payment is made he cannot be criminally prosecuted, as required by state statute governing actions for willful property damage, is not violation of ethics rules); Florida Ethics Op. 85-3 (1985) (sending statutorily prescribed notice regarding NSF check does not violate ethics rules); South Carolina Ethics Op. 07-06 (2007) (collection notices sent out in compliance with state debt collection statute do not violate Rule 4.5, even though they include threats of criminal prosecution); Utah Ethics Op. 71 (1979) (lawyer may send statutorily required notice referencing criminal statute before filing suit on dishonored check without violating ethics rules).

But see *Florida Bar v. Suprina*, 484 So. 2d 1245 (Fla. 1986) (state statute requiring notice before filing suit on mortgage could have been satisfied without threatening criminal prosecution; reprimand issued to lawyer who, attempting to obtain satisfaction on mortgage, sent letter stating that unless paid, he and his client would "do our best to have the court give you the maximum sentence both in court and in your pocketbook").

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Threats Against Clients

Even the limited tolerance for certain kinds of threats evinced by ABA Formal Ethics Op. 92-363 (1992) does not generally extend to lawyers' threats of revealing confidential client information. See, e.g., *State ex rel. Counsel for Discipline v. Lopez Wilson*, 634 N.W.2d 467, 17 Law. Man. Prof. Conduct 640 (Neb. 2001) (two-year suspension for lawyer who, after discovering client's affair with lawyer's ex-wife, threatened to reveal confidential information to divorce court and to INS if client did not pay him for services lawyer had rendered gratis); *In re Watson*, 768 N.E.2d 617 (Ohio 2002) (suspending lawyer who entered into contingent fee agreement and then tried to obtain hourly fee instead, threatening to file criminal charges against client if hourly fee not paid); *In re Huffman*, 983 P.2d 534, 15 Law. Man. Prof. Conduct 286 (Or. 1999) (two-year suspension for lawyer who threatened former client with criminal charges unless client set aside bankruptcy in which client's debt to lawyer had been discharged); *In re Trexler*, 541 S.E.2d 822 (S.C. 2001) (disbarring lawyer who stole client's settlement funds and then threatened to sue client and have her arrested if she contacted lawyer or anyone else about this matter); *Weiss v. Comm'n for Lawyer Discipline*, 981 S.W.2d 8 (Tex. App. 1998) (disbarring lawyer who, after client fired him without paying fee, threatened to file charges against client for stalking him unless client paid reduced fee); *In re Boelter*, 985 P.2d 328, 15 Law. Man. Prof. Conduct 509 (Wash. 1999) (six-month suspension for lawyer who threatened to reveal confidential information to IRS unless client paid balance due); New Hampshire Ethics Op. 2010-11/1, 27 Law. Man. Prof. Conduct 122 (lawyer may not attempt to collect fee by informing client that otherwise she intends to file IRS Form 1099, indicating taxable debt forgiveness, nor may lawyer inform IRS or any other government agency regulating client that she has forgiven unpaid legal fees). But see *In re Lim*, 210 S.W.3d 199, 23 Law. Man. Prof. Conduct 64 (Mo. 2007) (lawyer's threat to report clients to INS and then actually reporting them, though reprehensible, did not warrant discipline).

Threatening Disciplinary Action

A related issue arises when a lawyer threatens to report an opposing lawyer to disciplinary authorities.

According to ABA Formal Ethics Op. 94-383 (1994), threatening to file a misconduct complaint against the opposing lawyer in order to obtain an advantage in a civil case is "constrained" by the Model Rules—as well as by extortion statutes—even though not expressly addressed. Such threats "may violate one or more of Rules 8.4(b), 3.1, 4.1, 4.4 and 8.4(d)."

The opinion explained that the threat may not be used as a bargaining point if the misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness, or fitness as a lawyer, because in such instances the lawyer has an independent obligation under Model Rule 8.3(a) to report opposing counsel to disciplinary authorities.

The opinion stated that the threat also would be improper if the misconduct is unrelated to the civil claim, if the disciplinary charges would not be well-founded in fact and law, or if the threat has no substantial purpose or effect other than to embarrass, delay, or burden opposing counsel or his client, or to prejudice the administration of justice.

See *In re Pyle*, 91 P.3d 1222, 23 Law. Man. Prof. Conduct 249 (Kan. 2004) (lawyer's letter threatening to report opposing counsel to disciplinary agency unless settlement was reached violated Rules 4.4 and 8.4; lawyer's failure to report opposing counsel's alleged misconduct violated Rule 8.3); *Barrett v. Virginia State Bar*, 611 S.E.2d 375, 21 Law. Man. Prof. Conduct 233 (Va. 2005) (divorcing lawyer's repeated threats, with no good-faith basis, to seek disbarment of wife's counsel if she did not withdraw were made solely to obtain advantage in litigation and therefore violated Rule 3.4(i)); Wisconsin Ethics Op. E-01-01 (2001) (lawyer who seeks bargaining advantage by threatening to report another lawyer's misconduct commits misconduct, even if lawyer believes conduct raises substantial issue of honesty, trustworthiness, or fitness to practice law).

The rules in several jurisdictions specifically prohibit threats of disciplinary action, either of lawyer disciplinary charges or, more broadly, reports to any professional disciplinary authority, to gain an advantage in a civil proceeding.

The District of Columbia and Florida, for example, prohibit threats of disciplinary charges. Illinois prohibits threats of professional disciplinary charges, while Tennessee prohibits threats of lawyer disciplinary charges. Some states, including California, Colorado, and Maine, prohibit threats of disciplinary and administrative misconduct charges in addition to threats of criminal charges. Texas additionally prohibits threatening "civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein."

• See the chapters on State Ethics Rules and State Ethics Rules—Variations, behind the Model Standards tab, for information about states' rules.

Other Threats

Other types of threats, including threats to file administrative complaints, threats to report suspected tax violations, threats to report the professional misconduct of persons other than lawyers, and threats to report an individual's undocumented immigration status to authorities, may also fall within the range of various jurisdictions' prohibitions. See, e.g., *State ex rel. Counsel for Discipline v. Lopez Wilson*, 634 N.W.2d 467, 17 Law. Man. Prof. Conduct 640 (Neb. 2001) (immigration); North Carolina Ethics Op. 2005-3 (2005) and North Carolina Ethics Op. 2009-5 (2009) (immigration); San Diego County Ethics Op. 2005-1 (2005) (ethical bar against threats of criminal or disciplinary action extends to such communications that are directly between client and opposing party but originate with lawyer); South Carolina Ethics Op. 11-09, 28 Law. Man. Prof. Conduct 61 (2012) (tax). They may also be found to constitute criminal acts. See generally David P. Weber, *(Unfair) Advantage: Damocles' Sword and the Coercive Use of Immigration Status in a Civil Society*, 94 Marq. L. Rev. 613 (2010).

But see *In re Lim*, 210 S.W.3d 199, 23 Law. Man. Prof. Conduct 64 (Mo. 2007) (lawyer's telling clients he would withhold immigration labor certification unless they paid his bill violated Rule 1.16(d), but lawyer's threat to report clients to INS, though reprehensible, did not warrant discipline); Indiana Ethics Op. 1 of 2008 (2008) (lawyer may threaten to report real estate broker to administrative or professional licensing agency without violating ethics rules as long as conduct to be reported is related to underlying suit, lawyer has well-founded belief that conduct violates agency's regulations and report is warranted, lawyer does not state or imply ability to improperly influence agency or officials, and amount sought is reasonable approximation of amount due as restitution); New York State Ethics Op. 772 (2003) (lawyer may threaten to file administrative or disciplinary complaint against broker as long as one purpose of threat is to obtain information about broker's conduct and sole purpose is not to obtain refund to client of disputed funds).

Statutory Violations

Regardless of whether threats of criminal prosecution, disciplinary proceedings, or other actions violate the ethics rules, such conduct may constitute torts, infractions of civil statutes such as the Fair Debt Collection Practices Act, or violations of criminal statutes prohibiting, for example, blackmail, extortion, intimidation, coercion, misprision, and compounding crimes. See, e.g., *State v. Hynes*, 978 A.2d 264 (N.H. 2009) (lawyer's threats to file complaints against hair salons for sex-based discrimination unless salons each paid him $1,000 constituted extortion); *Tessier v. Rockefeller*, 33 A.3d 1118, 27 Law. Man. Prof. Conduct 597 (N.H. 2011) (allegations of lawyer's threats to report plaintiff's husband, also a lawyer, to state lawyer discipline office and to initiate criminal proceedings against him stated claims for fraudulent misrepresentation and negligent infliction of emotional distress). See generally Brian S. Faughnan, Michael L. Matula & Douglas R. Richmond, *Professional Responsibility in Litigation* at 444-47, 456-57 (2011); Nicola M. McMillan, *Recent Developments in the Ethical Treatment of Threats of Criminal Referral in Civil Debt Collection Matters*, 21 Geo. J. Legal Ethics 935 (2008); New York City Ethics Op. 1995-13 (1995) (under various circumstances, agreements not to report crimes may themselves constitute crimes).

APPLICATION

Family Matters

▸ A lawyer representing a father seeking to reestablish joint custody of his children after his former spouse moved them out of state told the mother's sister and sister's friend that they would go to jail for interfering with the custody order or for conspiracy to kidnap. The confrontation, which included yelling, so intimidated the sister's friend that she turned herself in to the local sheriff.

The Wisconsin Supreme Court, like the disciplinary referee, gave the lawyer the benefit of the doubt and found no violation of the ethics rule concerning threats to press criminal charges. The lawyer "might have been more interested in simply getting the children under the jurisdiction of a Wisconsin court than she was in necessarily obtaining an advantage for her client," the court concluded. The lawyer was disciplined, however, for violating Wisconsin's rule against displaying "offensive personality." *In re Ray*, 651 N.W.2d 727 (Wis. 2002).

▸ A Texas lawyer convinced his wife that their assets were at risk because of a malpractice action that a client filed against him. He proposed that they divorce to protect their assets and then reunite upon conclusion of the malpractice case. The wife reluctantly agreed, and the lawyer orchestrated the divorce in another county without her participation. After the divorce was made final, the lawyer married one of the wife's close friends and evicted the wife and the couple's child from the marital ranch. The wife also discovered that significant assets had not been included in the property division.

When the wife filed a bill of review to overturn the divorce decree, the lawyer sent a colleague with whom he shared office space to the wife with a settlement offer and a threat to have her arrested and prosecuted for an alleged burglary of the lawyer's townhouse if she didn't accept it. The colleague also suggested to the wife that the lawyer might have contacts in law enforcement who would assist him in the presentation of those charges, that the lawyer wanted to make her life miserable, and that the lawyer was also considering filing "some contempt thing" against her.

Rejecting as "utterly spurious" the lawyer's contentions that his only threat was that he "might" file criminal charges and that the mere possibility of criminal charges is not a threat, the appellate court upheld the lower court's judgment suspending the lawyer from practice for two years for violating the rule prohibiting a threat of criminal prosecution to gain advantage in a civil matter. *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 15 Law. Man. Prof. Conduct 391 (Tex. App. 1999).

Disputes With Clients

▸ During his representation of a client in a personal injury case, a lawyer paid for a rental car that the client used. After the case was settled, the rental car invoice remained unpaid, and the lawyer and client disputed responsibility for paying it. The lawyer paid the invoice and obtained a warrant for the client's arrest. Additionally, based on the warrant, a grand jury returned an indictment against the client. After the indictment, the lawyer sent a letter to the client promising that he would not pursue the criminal case if she paid him the total amount he thought she owed him.

The South Carolina Supreme Court suspended the lawyer for six months for violating the state's rule prohibiting threats of criminal prosecution, and for "pollut[ing] the administration of justice and bring[ing] the legal profession into disrepute." *In re Yarborough*, 488 S.E.2d 871 (S.C. 1997).

The opinion includes a collection of cases involving lawyers' threats on behalf of clients as well as lawyers' threats against their own clients.

▸ After a lawyer's former client won a malpractice judgment against him, the lawyer sent a letter to the ex-client's new attorney, charging that the former client and his attorney had violated wiretapping laws and offering to surrender his rights under these laws if they would abandon the malpractice action.

Michigan's disciplinary board, noting that the state's version of the Model Rules does not continue the Code's proscription against threatening to present criminal charges solely to obtain an advantage in a civil matter, found insufficient evidence of conduct prejudicial to the administration of justice and, over a dissent, dismissed the complaint. *Grievance Adm'r v. Oehmke*, No. 91-96-GA, http://www.adbmich.org/coveo/opinions/1993-01-15-91-96.pdf (Mich. Atty. Disc. Bd. 1993).

▸ A lawyer filed a collection action against his former clients for unpaid fees for representing them in connection with obtaining immigration documents and certifications allowing them to work and live in the United States. Shortly thereafter, he sent them a letter threatening to report them to the Immigration and Naturalization Service if they did not pay immediately.

The following year, he sent a letter to the INS stating that his clients "lack[ed] the good moral character needed to obtain immigration benefits" because they had "lied and deceived our office" and had an outstanding balance of "over $7000." The lawyer asked the agency to place the letter in the clients' file "to prevent them from obtaining any further immigration benefits."

The court found that withholding the clients' labor certification was a violation of Rule 1.16(d), warranting a public reprimand, but declined to adopt the disciplinary panel's recommendation that the lawyer be suspended for his

threat and "reprehensible" report to the INS. One justice filed a dissent. *In re Lim*, 210 S.W.3d 199, 23 Law. Man. Prof. Conduct 64 (Mo. 2007).

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Threats Against Ex-Colleagues

A lawyer reported his former associate to the district attorney's office for allegedly improperly withdrawing money from their joint bank account. He then told the former associate that he would ask the prosecutor to proceed with the charges unless she returned the money. The Colorado Supreme Court found that the lawyer made the threat solely to gain an advantage in a civil matter and engaged in conduct prejudicial to the administration of justice. It suspended the lawyer from practice for 30 days.

Noting that Colorado retained the Model Code prohibition when it adopted the Model Rules, the court stated: "By continuing DR 7-105(A)'s prohibition on threatening or presenting criminal charges to obtain an advantage in a civil matter through adoption of Colo. RPC 4.5, we have determined that the abuse of the criminal process by lawyers is serious enough to warrant its own rule." *People v. Sigley*, 951 P.2d 481 (Colo. 1998).

Subpoenas as Threats

During an investigation of a medical service provider's billing practices, the attorney general's office served the provider with a grand jury subpoena duces tecum. Almost three years later, a separate department of the attorney general's office issued a subpoena to the provider pursuant to a state civil statute.

In response to an inquiry from the provider, the attorney general's office stated that service of this subpoena did not preclude the possibility of its issuing another grand jury subpoena at a later date. A few months after that, it served the provider with another civil subpoena in connection with the continuing criminal investigation.

The provider moved to quash the subpoena, contending that the attorney general used it in an attempt to secure a civil recovery and not in furtherance of a legitimate continuing criminal investigation. Affirming denial of the provider's motion to quash the subpoena, the court said that the attorney general had not bound himself to exclusively civil or administrative remedies and found no evidence that the attorney general used his subpoena powers as a threat of criminal prosecution to gain civil advantage. *St. Francis Hospital—Poughkeepsie v. Spitzer*, 725 N.Y.S.2d 447 (N.Y. App. Div. 2001).

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Abuse of Official Position

A lawyer who also served as a city's law director represented a man suing his ex-wife for defamation. The defendant's son from her prior marriage flew in from Hawaii, where he was a student, to be deposed in the case. During the deposition, the lawyer became argumentative, and he warned the son not to get "smart" or he wouldn't "get out of this town" (to get back to school on time, apparently). The son responded to the effect that he would, as the court put it, "nail [the lawyer's] posterior to the wall."

The argument escalated, and the lawyer had his assistant charge the son with aggravated menacing. The son was arrested and released after posting bond. The lawyer appointed a special prosecutor, and the son hired an attorney to represent him and returned to school in Hawaii. At the hearing, which the son attended, the charges were dismissed with leave to refile, but they were never refiled.

The lawyer was suspended from practice for one year for violating both DR 7-105 and DR 7-103(A) by misusing his official position to initiate a criminal prosecution without probable cause. *Stark County Bar Ass'n v. Russell*, 495 N.E.2d 430 (Ohio 1986).

Threats as Criminal Acts

A lawyer sent almost identical letters to a number of hair salons, threatening to file civil suit unless the salons stopped charging women more than men for haircuts and paid him sums ranging from one to two thousand dollars. The lawyer was found guilty of theft by extortion, a felony. Though the state has no equivalent of DR 7-105(A), based on the guilty verdict, the New Hampshire disciplinary committee found violations of Rules 8.4(a) and (b) and recommended a two-year suspension from practice. *In re Hynes*, No. 07-001, http://www.nhattyreg.org/assets/1245192978.pdf (N.H. Prof'l Conduct Comm. 2009).

Threats to Opposing Counsel

- A Virginia lawyer repeatedly threatened his estranged wife's lawyer with sanctions and disciplinary complaints in an effort to force her to withdraw. The supreme court found the succession of direct and indirect threats, which lacked a good-faith basis, supported a conclusion that the lawyer made them solely to obtain an advantage in litigation in violation of Rule 3.4(i), warranting a three-year suspension. *Barrett v. Virginia State Bar*, 611 S.E.2d 375, 21 Law. Man. Prof. Conduct 233 (Va. 2005).

- A lawyer's motion for sanctions against opposing counsel for willful violations of discovery rules may not have been frivolous, but persistently threatening them with serious criminal and professional misconduct charges and publicly maligning them in an admittedly "aggressive" effort to settle a civil rights case could have had no substantial purpose other than to embarrass and burden them, in violation of Rules 4.4 and 8.4(a), the New Hampshire Supreme Court decided. The lawyer was publicly censured. *In re Robertson*, 626 A.2d 397 (N.H. 1993).

▸ C. Richard Comfort represented a private corporation that had been in negotiations with a landowner to purchase property for development. Comfort sent a letter to the landowner's attorney, David Swenson, stating that Swenson had engaged in unprofessional behavior by sending an open records request to Comfort's client and had a conflict of interest.

In the letter, Comfort recited the full text and comments to Kansas Rules of Professional Conduct 1.7 and 1.10. Comfort sent copies of the letter to a number of officials of a city that had also been attempting to negotiate the purchase of land from Swenson's client.

On reading the letter, Swenson told the landowner that he would have to find another attorney to represent him but did not at that time respond to Comfort. Comfort then wrote Swenson another letter reiterating his demand that Swenson withdraw his records request and threatening to report Swenson to the bar disciplinary administrator's office.

A few days later, Swenson withdrew his records request and filed a complaint against Comfort with the disciplinary administrator; the following week, Comfort filed a complaint against Swenson.

Although the court found that Comfort's first letter to Swenson had legitimate objectives, it said his publication of that letter to city officials served no substantial purpose other than embarrassing Swenson, in violation of Rule 4.4, and constituted conduct prejudicial to the administration of justice, in violation of Rule 8.4(d).

The court declined to find that Comfort had violated Rule 8.3 in threatening disciplinary proceedings in his second letter to Swenson without simultaneously making a report, noting that Comfort ultimately did file the report. However, it commented that threatening disciplinary action to obtain a legal advantage for a client amounted to "extortion attempts" prohibited by Rule 4.4. The violations were found to warrant censure. *In re Comfort*, 159 P.3d 1011, 23 Law. Man. Prof. Conduct 328 (Kan. 2007).

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Trial Conduct

Fairness to Opposing Party and Counsel

To foster the truth-seeking function of litigation and secure fair competition in the adversarial process, the legal system places boundaries on lawyers' authority to mold the evidence and testimony in their clients' cases.

This article examines some of the limitations expressed in Model Rule 3.4, "Fairness to Opposing Party and Counsel," and reviews how the restrictions have been interpreted by courts applying state versions of that rule.

The first topic is the prohibition in Rule 3.4(a) against unlawfully destroying, altering, concealing, or obstructing access to objects or information having potential evidentiary value. This provision has been applied not only to acts that constitute a criminal offense, but also to noncriminal conduct that violates discovery obligations or constitutes fraud.

The second topic is a lawyer's obligations under Rule 3.4 and decisional law not to interfere with access to witnesses and their truthful testimony. Lawyers must not arrange for witnesses to be absent or avoid service of process, and they should not dissuade witnesses from testifying. Only in narrow circumstances may lawyers discourage witnesses from cooperating with opposing counsel. Look for the boxed text discussing the limits of witness preparation.

The third section reviews constraints on payments to witnesses. Rule 3.4(b) makes it unprofessional conduct for a lawyer to offer an inducement to a witness that is "prohibited by law." The criminal law in every jurisdiction prohibits bribery and subornation of perjury, and case law supplies additional prohibitions. Furthermore, ethics opinions provide guidance about paying fact witnesses, prosecution witnesses, and expert witnesses.

Advocates Must Heed Rules on Evidence-Tampering, Dealings With Witnesses

Model Rule 3.4(a), under the umbrella title "Fairness to Opposing Party and Counsel," broadly forbids tampering with evidence. Lawyers must not "unlawfully obstruct a party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," or counsel or assist anyone to do so. These prohibitions, like the other aspects of Rule 3.4, are intended to secure fair competition in the adversary process. Rule 3.4 cmt. [1].

Similarly, Section 118(2) of the *Restatement (Third) of the Law Governing Lawyers* (2000) states that a lawyer may not "destroy or obstruct another party's access to documentary or other evidence when doing so would violate a court order or other legal requirements, or counsel or assist a client to do so."

Notably, the prohibitions in Rule 3.4(a) apply not just to lawyers who are serving in a professional capacity as a client advocate but also to those who tamper with evidence in a personal capacity. *In re Melvin*, 807 A.2d 550, 18 Law. Man. Prof. Conduct 671 (Del. 2002) (applying Rule 3.4(a) to lawyer who concealed or destroyed his estranged wife's journal, which might have aided in lodging a criminal charge against him); *Maryland Attorney Grievance Comm'n v. White*, 731 A.2d 447, 15 Law. Man. Prof. Conduct 319 (Md. 1999) (lawyer disciplined under Rule 3.4(a) for destroying autobiographical manuscript that described events bearing on her claims as plaintiff in civil action); *Disciplinary Counsel v. Robinson*, 933 N.E.2d 1095, 26 Law. Man. Prof. Conduct 539 (Ohio 2010) (lawyer's destruction of documents that had potential evidentiary value in dispute with his former firm violated Rule 3.4(a)).

'Unlawfully.'

The word "unlawfully" in Model Rule 3.4(a) piggybacks on law external to the rule without specifically identifying the sources on which the meaning of the rule depends.

At the very least, "unlawful" refers to conduct that constitutes a crime. Comment [2] states: "Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen."

Therefore, when evaluating whether certain conduct in regard to evidence would be "unlawful" and thus contrary to Rule 3.4(a), a lawyer must first understand the governing criminal law, including the elements of obstruction of justice and criminal contempt. For an excellent summary of this body of law, see J. Gorelick, S. Marzen & L. Solum,

Destruction of Evidence ch. 5 (1989 & Supp. 2010). See also Mermelstein & Decker, *Walk the Line*, 29 Los Angeles Law. 27 (2006) (discussing application of federal obstruction statutes to attorneys).

The primary federal obstruction of justice statute, 18 U.S.C. §1503, which makes it a crime to corruptly obstruct the due administration of justice, has been uniformly construed to encompass the intentional destruction of evidence relevant to pending judicial proceedings for the purpose of obstructing justice. E.g., *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991). Other federal statutes that bear on document destruction, alteration, or concealment include:

- 18 U.S.C. §401, which provides for punishment of those who disobey court orders and process, including subpoenas;

- 18 U.S.C. §1512(b), which authorizes prosecution of anyone who corruptly persuades another person to destroy, alter, or conceal documents to make them unavailable in an official proceeding;

- 18 U.S.C. §1512(c), which makes it a crime to corruptly alter, destroy, mutilate, or conceal a document with the intent to make it unavailable in an official proceeding, or otherwise obstruct any official proceeding; and

- 18 U.S.C. §1519, which makes it a crime to alter, destroy, mutilate, conceal, falsify, or make a false entry in any document with the intent to obstruct a federal investigation or bankruptcy case, "or in relation to or contemplation of any such matter or case."

On the state level, criminal laws vary widely. A large majority of states have statutes that prohibit destruction or concealment of evidence. Some state statutes follow Section 241.7 of the Model Penal Code (1980), which states: "A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he (1) alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in such proceeding or investigation."

Rule 3.4(a) does not merely forbid criminal evidence-tampering. The term "unlawfully" in the rule has been construed to cover not only criminal acts but also noncriminal conduct that violates discovery law or tort law, such as fraud. See, e.g., *Lawyer Disciplinary Bd. v. Smoot*, No. 34724, 2010 W. Va. LEXIS 134, 26 Law. Man. Prof. Conduct 727 (W. Va. Nov. 17, 2010) (by removing narrative portion of medical report in federal black lung case before giving it to client's opponent, lawyer "unlawfully" altered evidence in violation of Rule 3.4(a) even though no federal regulation required report to be disclosed). The Restatement's rule on evidence-tampering likewise goes beyond the criminal law, in that it forbids lawyers to destroy or obstruct another party's access to evidence when doing so would violate a court order or "other legal requirements." *Restatement (Third) of the Law Governing Lawyers* §118(2) (2000).

Rule 3.4(a) does not merely forbid criminal evidence-tampering. The term "unlawfully" in the rule has been construed to cover not only criminal acts but also noncriminal conduct that violates discovery law or tort law, such as fraud.

Prosecutors have constitutionally based obligations not to destroy material evidence and to produce important helpful information to the defense. Violations of these duties can subject a prosecutor to professional discipline. E.g., *Iowa State Bar Ass'n Comm. on Prof'l Ethics & Conduct v. Ramey*, 512 N.W.2d 569 (Iowa 1994); see also "Prosecutor in Duke Lacrosse Case Is Disbarred for Intentional Misconduct," 23 Law. Man. Prof. Conduct 330.

Defense lawyers complain, however, that prosecutors too rarely are disciplined for suppression of exculpatory evidence or other misconduct. See "Critical Report Spurs California Bar to Probe Whether Prosecutorial Misconduct Is Ignored," 26 Law. Man. Prof. Conduct 651.

Preserving and Destroying Evidence

Model Rule 3.4(a) forbids lawyers to facilitate a client's destruction of materials that have potential evidentiary value. This prohibition obviously covers documents subject to discovery in pending litigation. See Michigan Informal Ethics Op. RI-345 (2008) (to avoid assisting destruction of evidence, corporation's lawyer must refuse to hand over documents to company's chief executive officer if lawyer knows that documents are subject to discovery order and that CEO intends to destroy them).

On the other hand, as the *Restatement (Third) of the Law Governing Lawyers* (2000) notes in Comment c to Section 118, it would be intolerable to require that every scrap of paper be saved against the possibility that someone, somewhere, might want to review it. Therefore, the comment advises, "it is presumptively lawful to act pursuant to an established document retention-destruction program that conforms to existing law and is consistently followed, absent a supervening obligation such as a subpoena or other lawful demand for or order relating to the material."

But once litigation is reasonably foreseeable, destruction of relevant documents may be considered spoliation, even if no lawsuit has actually been filed. J. Gorelick, S. Marzen & L. Solum, *Destruction of Evidence* §3.12 (1989 & Supp. 2010); Kinsler & MacIver, *Demystifying Spoliation of Evidence*, 34 Tort & Ins. L.J. 761, 763 (1999); see also *Micron Tech. Inc. v. Rambus Inc.*, 255 F.R.D. 135 (D. Del. 2009) (as soon as there is reasonable belief that litigation is foreseeable and potential claim is identified, party is under duty to preserve evidence that it knows or reasonably should know is relevant to future litigation).

In addition, a client should not be advised to adopt a document "retention" policy that could result in the destruction of evidence relevant to a looming investigation, and even a reminder to a client to observe an existing document destruction policy at such a time may be seen as improper. See "Lawyers Debate Best Way to Advise Clients on Editing, Shredding Records Post-Andersen," 18 Law. Man. Prof. Conduct 484.

Removing part of a document before producing it to a litigation opponent may be viewed as "altering" that evidence under Rule 3.4(a).

Before advising a client about document retention and destruction, lawyers need to research applicable case law and statutes—and exercise a high degree of caution. No one-size-fits-all rule can capture, in all situations, what advice about destruction of records is improper. As the Restatement puts it in Comment c to Section 118: "No general statement can accurately describe the legality of record destruction; statutes and decisions must be consulted." The legality of the conduct may turn on such factual questions as the state of mind of the client or the lawyer, the comment adds.

See generally Crystal, *Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds*, 43 Akron L. Rev. 715 (2010); Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 Rich. J. L. & Tech. 9 (2007).

Altering Evidence

Many lawyers get in trouble under Model Rule 3.4(a) for altering a document, typically to delete something that would be harmful to the client, or to add something important that is missing. For example, numerous lawyers have been disciplined under Rule 3.4(a) for altering a personal injury client's medical records. E.g., *In re Zeiger*, 692 A.2d 1351 (D.C. 1997); *Kentucky Bar Ass'n v. Yocum*, 294 S.W.3d 437, 25 Law. Man. Prof. Conduct 599 (Ky. 2009).

Removing part of a document before producing it to a litigation opponent may be viewed as "altering" that evidence under Rule 3.4(a). E.g., *Lawyer Disciplinary Bd. v. Smoot*, No. 34724, 2010 W. Va. LEXIS 134, 26 Law. Man. Prof. Conduct 727 (W. Va. Nov. 17, 2010); District of Columbia Ethics Op. 341 (2007) (suggesting that, in at least some instances, removal of "metadata" from documents before producing them in discovery may constitute alteration that contravenes Rule 3.4(a)).

An alteration of a document that violates Model Rule 3.4(a) may also run afoul of Rule 3.4(b)'s prohibition against falsification of evidence and/or Rule 8.4's prohibition against misconduct. See, e.g., *In re Watkins*, 656 So. 2d 984 (La. 1995) (lawyer who altered physician reports regarding Social Security claimant violated not only Rules 3.4(a) and (b), but also 8.4(b), (c), and (d)); *Lawyer Disciplinary Bd. v. Smoot*, supra (removing key part of medical report before providing report to opponent violated Rules 3.4(a) and 8.4(c) and (d)).

Whether or not a violation of Rule 3.4(a) is ultimately found, removing part of a document may be viewed as misleading and sanctionable under other rules. E.g., *In re Aitken*, 787 N.W.2d 152, 26 Law. Man. Prof. Conduct 538 (Minn. 2010) (forging client's signature did not "alter" document, but did involve dishonesty and false statement); see also *In re Wilka*, 638 N.W.2d 245, 18 Law. Man. Prof. Conduct 66 (S.D. 2001) (lawyer violated Rule 3.3 by offering into evidence client's drug screening report that lawyer knew had been truncated to omit unfavorable results).

Concealing or Obstructing Access

Model Rule 3.4(a) forbids a lawyer to unlawfully obstruct a party's access to evidence or unlawfully conceal material that has potential value as evidence. See, e.g., *Briggs v. McWeeny*, 796 A.2d 516, 18 Law. Man. Prof. Conduct 332 (Conn. 2002) (lawyer's effort to keep damaging report from opponent violated Rule 3.4(a) even though her misconduct did not prejudice opponent); *In re Stover*, 104 P.3d 394, 21 Law. Man. Prof. Conduct 62 (Kan. 2005) (lawyer violated Rule 3.4(a) by refusing to give former clients access to computer that she used to maintain unauthorized website in their names); *In re Carey*, 89 S.W.3d 477, 18 Law. Man. Prof. Conduct 744 (Mo. 2002) (lawyers violated Rule 3.4(a) by submitting discovery responses denying existence of certain documents and conversations); *In re Forrest*, 730 A.2d 340, 15 Law. Man. Prof. Conduct 320 (N.J. 1999) (lawyer violated Rule 3.4 (a) by hiding fact that personal injury client had died while his claim was being litigated).

This aspect of Rule 3.4(a) can be troublesome, however, because the American legal tradition views litigants as having no general duty to reveal damaging evidence or information to the other side. See *In re Enstar Corp.*, 593 A.2d 543 (Del. Ch. Ct. 1991), rev'd on other grounds, 604 A.2d 404 (Del. 1992) (attorney's duty of fairness to opposing party does not mean that attorney must affirmatively reveal weakness of his case to his opponent); see also Maryland Ethics Op. 92-16 (1992) (lawyer for criminal defendant not obligated to turn over inculpatory documents inadvertently given to client by rookie police officer); New York County Ethics Op. 698 (lawyer representing claimant in Social Security hearing need not disclose adverse medical information if no request is made for it, administrative rules don't require disclosure, and information doesn't provide lawyer with knowledge that client's claim is false); Philadelphia Ethics Op. 93-6 (1993) (lawyer for injured motorists not required to inform defendants' insurers that clients' medical bills were fraudulently inflated, without clients' knowledge, by medical providers who submitted them to clients' no-fault insurers); Rhode Island Ethics Op. 95-19 (1995) (lawyer who is aware that opposing party intends to enter judgment against client need not volunteer information that client changed address).

Rule 3.4(a) does not itself create a duty of disclosure. *Sherman v. State*, 905 P.2d 355 (Wash. 1995). But as discussed above, a lawyer's concealment, withholding, or obstruction of access to evidence violates Rule 3.4(a) if the lawyer's conduct is "unlawful," which refers not only to criminal conduct but also to conduct that violates

noncriminal legal obligations to produce the evidence, as in civil discovery. 1 G. Hazard, W. Hodes & P. Jarvis, *The Law of Lawyering* §30.4 at 30-6 (3d ed. Supp. 2004-2).

Accordingly, concealing or obstructing access to information that must be disclosed under discovery rules has been held to violate Rule 3.4(a). E.g., *Florida Bar v. Burkich-Burrell*, 659 So. 2d 1082 (Fla. 1995); *In re Dwight*, 834 P.2d 382 (Kan. 1992); *Mississippi Bar v. Mathis*, 620 So. 2d 1213 (Miss. 1993); *In re Herkenhoff*, 866 P.2d 350 (N.M. 1993).

A lawyer who interprets discovery requests narrowly to avoid revealing damaging information runs the risk of violating Rule 3.4(a), especially when the lawyer intends to create misimpressions in the mind of opposing counsel. E.g., *Mississippi Bar v. Land*, 653 So. 2d 899 (Miss. 1994) (lawyer violated Rule 3.4(a) by intentionally framing discovery responses to conceal damaging evidence that would have provided opposing party with new theory of liability).

Physical Evidence of Client Crime

What should a lawyer do who comes into possession of physical evidence of a crime, such as the gun used in a shooting or money stolen from a bank?

The Restatement provides a suggested course of action. The lawyer "may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence." Then, the lawyer must "notify prosecuting authorities of the lawyer's possession of the evidence or turn the evidence over to them." *Restatement (Third) of the Law Governing Lawyers* §§119(1), (2) (2000).

Various criminal laws circumscribe the lawyer's conduct in this situation, including statutes that criminalize the concealment or destruction of evidence and statutes that criminalize possession of contraband or fruits and instrumentalities of crime.

Some question exists whether courts will uphold criminal sanctions against defense lawyers whose conduct violates such laws. See, e.g., *Clark v. State*, 261 S.W.2d 339 (Tex. Crim. App. 1953) (Texas concealment statute implicitly excludes defense lawyers); *People v. Belge*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), aff'd, 359 N.E.2d 377 (N.Y. 1976) (dismissal of criminal charges against lawyer whose client told him about location of dead bodies and who went there and photographed them but delayed revealing that information for many months); *Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. Super. Ct. 1986) (Pennsylvania statutes that prohibit hindering prosecution and tampering with physical evidence are unconstitutionally overbroad when applied to attorneys representing criminal defendants).

But these criminal laws nevertheless shape the professional obligation of a lawyer who comes into possession of physical evidence. See Model Rule 3.4(a) (lawyer may not "unlawfully" conceal or obstruct access to evidence). Hence, as an ethical matter a lawyer may not take possession of fruits or instrumentalities of a crime and do nothing. *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967), aff'd, 381 F.2d 713 (4th Cir. 1967); see also West Virginia Ethics Op. 98-02 (1998) (criminal defense lawyers who come into possession of fruits or instrumentalities of crime may not use ethics rules or attorney-client privilege to shield potential evidence from law enforcement officials, and should consider in advance how to deal with this situation).

Instead, according to most case law, lawyers must hand physical evidence of a crime over to the proper authorities. *Morrell v. State*, 575 P.2d 1200 (Alaska 1978); *Hitch v. Pima County Superior Court*, 708 P.2d 72 (Ariz. 1985); *People v. Lee*, 83 Cal. Rptr. 715 (Cal. Ct. App. 1970); *Commonwealth v. Stenhach*, supra; *State ex rel. Sowers v. Olwell*, 394 P.2d 681 (Wash. 1964).

Statutes criminalize the concealment or destruction of evidence and the possession of contraband or fruits and instrumentalities of crime. These laws shape the professional obligations of a lawyer who winds up with physical evidence of a crime.

Ethics committees likewise generally advise counsel to turn over physical evidence of a crime. E.g., Maryland Ethics Op. 90-24 (1990); Nevada Ethics Op. 10 (1988); Pennsylvania Ethics Op. 95-1 (1995); Virginia Ethics Op. 953 (1987); see also Oregon Ethics Op. 2005-105 (2005) (lawyer who takes possession of murder weapon from client charged with murder must make weapon available to prosecutor, but should do so anonymously or through intermediary to avoid implicating the client).

Most authority permits the lawyer in possession of physical evidence of a crime to spend a reasonable amount of time examining the evidence before turning it over. E.g., *Commonwealth v. Stenhach*, supra. Some authority views it as proper for the lawyer to have the evidence tested. E.g., *State ex rel. Sowers v. Orwell*, supra; North Carolina Ethics Op. 221 (1995). On the other hand, the lawyer must not tamper with or alter the evidence, so the safer route is to make a motion that the defense be allowed to have tests performed on the evidence. Pennsylvania Ethics Op. 95-1 (1995).

Comment [2] to Model Rule 3.4, which the ABA amended in 2002, reminds lawyers to be alert to the law governing possession of physical evidence of client crimes. Applicable law may permit a lawyer to take temporary possession of the evidence to conduct a limited examination that will not alter or destroy its material characteristics, the comment notes. It also points out that applicable law may require the lawyer to turn the evidence over to the police or prosecutor's office, depending on the circumstances.

Some authority indicates that in some circumstances a lawyer may return physical evidence of a crime to its source. E.g., *Commonwealth v. Stenhach*, supra; North Carolina Ethics Op. 221 (1995) (unless evidence is contraband or there is court order or law requiring its delivery to authorities, lawyer must return it to source, advising the source of legal consequences of possession or destruction of evidence).

Regarding the idea of returning the physical evidence to the site, the Restatement notes in Comment c to Section 119 that this course will often be impossible. At a minimum, the comment says, this option likely will be unavailable because the attorney usually will know that the client or another person would destroy the evidence if it was simply returned.

A California appellate court declared that if defense counsel receives, possesses, alters, or moves physical evidence pertaining to a crime for which the client has been charged, the lawyer should tell the court. *People v. Superior Court*, 237 Cal. Rptr. 158 (Cal. Ct. App. 1987).

A lawyer generally cannot reveal or be forced to reveal privileged communications that surrounded the lawyer's possession of the physical evidence or contraband. *People v. Superior Court*, supra (while physical evidence which lawyer retrieved using information provided by client—and location from which lawyer retrieved it—was not protected by attorney-client privilege, fact that item was discovered by defense only after discussion with client was protected); *State v. Green*, 493 So. 2d 1178 (La. 1986) (weapon itself not protected but source was); Nevada Ethics Op. 10 (1988). But see *Commonwealth v. Ferri*, 599 A.2d 208 (Pa. Super. Ct. 1991) (applying balancing test and holding that criminal defense lawyers whose former client turned over to them clothing he had worn on night of crime could not rely on attorney-client privilege to avoid providing chain-of-custody testimony that was needed to make clothing admissible at former client's trial).

Falsifying Evidence

As another aspect of the duty of fairness owed to the opposing party and counsel, Model Rule 3.4(b) prohibits a lawyer from falsifying evidence. Accord *Restatement (Third) of the Law Governing Lawyers* §118(1) (2000) (lawyer "may not falsify documentary or other evidence").

Many different acts have led to professional discipline for falsifying evidence. Examples include:

- Testifying falsely in a dispute with an ex-client. *In re Stover*, 104 P.3d 394, 21 Law. Man. Prof. Conduct 62 (Kan. 2005).

- Manufacturing documents. E.g., *In re Manning-Wallace*, 695 S.E.2d 257 (Ga. 2010); *In re Poole*, 125 P.3d 954, 22 Law. Man. Prof. Conduct 59 (Wash. 2006).

- Including false statements in affidavits, certifications, or testimony. E.g., *In re Mickerson*, 662 N.E.2d 1027 (Mass. 1996).

- Signing the client's name on a document without indicating that the lawyer signed it for the client. E.g., *Am. Airlines Inc. v. Allied Pilots Ass'n*, 968 F.2d 523 (5th Cir. 1992).

- Falsely notarizing a document. E.g., *In re Elowitz*, 866 P.2d 1326 (Ariz. 1994).

- Backdating a document. E.g., *Iowa State Bar Ass'n Comm. on Prof'l Ethics & Conduct v. Bauerle*, 460 N.W.2d 452 (Iowa 1990).

- Creating a backdated document. *In re Poole*, supra.

- Altering a document, such as deleting, adding, or changing language or substituting pages. E.g., *In re Rosenzweig*, 838 P.2d 1272 (Ariz. 1992); *In re Watkins*, 656 So. 2d 984 (La. 1995).

- Staging a fake automobile accident in order to collect money. *In re Caulfield*, 683 So. 2d 714 (La. 1996).

Rule 3.4(b) applies not only when lawyers are acting as an advocate for a client, but also when lawyers falsify evidence while handling their own legal problems. *In re Poole*, supra (lawyer disciplined for fabricating document in fee dispute with ex-client).

Frequently the lawyer's conduct violates not only the prohibition against falsifying evidence but some other part of Rule 3.4. E.g., *In re Rosenzweig*, supra (lawyer violated Rule 3.4(a) and (b) when he added language to installment note after it was signed).

The duty not to falsify evidence also implicates a lawyer's obligations to the tribunal under Rule 3.3, and lawyers who falsify evidence are often disciplined for violating both rules, as well as Rule 8.4's more general prohibition against misconduct. E.g., *In re Oberhellmann*, 873 S.W.2d 851 (Mo. 1994).

Counseling Falsehoods

As part of the broader prohibition against creating or using false evidence, Model Rule 3.4(b) prohibits a lawyer from counseling or assisting a witness to testify falsely. This duty to the opposing party and counsel complements the lawyer's corresponding duty to the tribunal under Rule 3.3. Similarly, the Restatement provides that a lawyer shall not "knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence." *Restatement (Third) of the Law Governing Lawyers* §120(1)(a) (2000).

Although Rule 3.4(b) does not expressly limit its applicability to instances in which the lawyer knows that he is counseling or assisting a witness to testify falsely, it has been construed to include such a knowledge requirement. See, e.g., *In re Shannon*, 876 P.2d 548 (Ariz. 1994) (lawyer did not know that revised answers to interrogatories were untrue so as to permit finding that he violated Rule 3.4(b)).

In its most dramatic application, Rule 3.4(b)'s prohibition against counseling falsehoods bars a lawyer from suborning perjury by intentionally inducing a witness to give false testimony. Most cases of discipline for counseling falsehoods involve this type of flagrant misconduct. E.g., *In re Attorney Discipline Matter*, 98 F.3d 1082 (8th Cir. 1996) (during recess lawyer instructed divorce client to deny adulterous incident). The lawyer's acquittal on a criminal charge of suborning perjury does not preclude professional discipline for the underlying misconduct. Id.

Rule 3.4(b)'s prohibition can be applied in other contexts that do not involve a direct instruction to lie. For example, a lawyer may "assist" a witness to testify falsely within the meaning of Rule 3.4(b) by remaining silent and taking no remedial action when the witness gives false testimony. See, e.g., *In re Feld*, 815 A.2d 383, 19 Law. Man. Prof. Conduct 49 (N.H. 2002) (lawyer tolerated client's false denials in discovery responses).

Of particular note is 18 U.S.C. §1512(b), which provides penalties for "[w]hoever knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person," with intent to "(1) influence, delay or prevent" the testimony of any person in an official proceeding. The term "misleading conduct" is defined to mean, among other things, "knowingly using a trick, scheme, or device with intent to mislead." §1515(a)(3)(E). It is an affirmative defense that the defendant intended only to encourage the witness to testify truthfully. §1512(d).

Procuring Absence of Witness

In general, it is a crime to induce a witness to withhold testimony, to absent himself from any proceeding to which he has been summoned, or to avoid legal process summoning him to testify. E.g., Model Penal Code §241.6(1)(c) (1980); see *United States v. Schaffner*, 715 F.2d 1009 (6th Cir. 1983) (prosecution of lawyer who advised his client to hide witness from service of subpoena); *In re Holmes*, 193 Cal. Rptr. 790 (Cal. Ct. App. 1983) (lawyer found in contempt for assisting her husband to avoid service of subpoena directing him to testify as witness in civil action).

Such conduct is clearly "unlawful" within the meaning of Model Rule 3.4(a)'s prohibition against "unlawfully" obstructing the opponent's access to evidence. See, e.g., *In re Geisler*, 614 N.E.2d 939 (Ind. 1993) (lawyer obstructed prosecutor's access to evidence and assisted witnesses' effort to withhold evidence in violation of Rule 3.4(a) by knowingly assisting witnesses' efforts to be unavailable for service of subpoenas); Rhode Island Ethics Op. 91-9 (1991) (lawyer may not advise or cause potential witness in pending litigation to leave jurisdiction for purpose of becoming unavailable to testify); Utah Ethics Op. 99-06 (1999) (lawyers may not ethically devise plea agreements in criminal cases that call for police officer to ignore subpoena in defendant's parallel state administrative proceeding).

This interpretation of Rule 3.4(a) is consistent with a large body of case law holding that lawyers may not persuade witnesses to flee or hide to prevent the opposing party from obtaining their testimony. E.g., *Snyder v. California State Bar*, 555 P.2d 1104 (Cal. 1976) (lawyer disbarred for advising clients to be unavailable for depositions and for other violations); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Hohnbaum*, 554 N.W.2d 550 (Iowa 1996) (lawyer acted unethically by encouraging client to stay away from civil trial for purpose of frustrating jury's search for truth).

Ethics opinions too echo this rule. E.g., New York County Ethics Op. 711 (lawyer may not advise witness to make himself unavailable); see also *Restatement (Third) of the Law Governing Lawyers* §§116(2) and (3) (2000), which provide respectively that a lawyer may not "unlawfully obstruct another party's access to a witness" or "unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify."

Dissuading Witness From Testifying

While arranging for a witness to be absent from trial or hide from a subpoena clearly violates Rule 3.4(a), more subtle efforts to discourage testimony favorabe to the opposing party can do so as well. For example, in *Harlan v. Lewis*, 982 F.2d 1255 (6th Cir. 1993), a defense lawyer in a medical malpractice action told another physician who had treated the alleged victim that he too could be sued and that without his testimony the suit would probably not be successful. The court of appeals upheld the district court's decision to sanction the lawyer $2,500 for violating Rule 3.4(a)'s prohibition against unlawfully obstructing another party's access to evidence or from counseling anyone to conceal information having potential evidentiary value.

See also *In re Stanford*, 48 So. 3d 224, 26 Law. Man. Prof. Conduct 677 (La. 2010) (criminal defense lawyers obstructed access to evidence in violation of Rule 3.4(a) by asking crime victim to sign "confidentiality agreement" that had potential to inhibit her from testifying at trial and could have impeded prosecution of criminal case against their client); *In re Smith*, 848 P.2d 612 (Or. 1993) (reprimanding lawyer for conduct prejudicial to administration of justice for sending letter to examining doctor threatening to sue him and insurer if doctor expressed particular medical opinion); Nevada Ethics Op. 23 (1995) (lawyer may not discourage witness from testifying or urge witness to be uncooperative with opposing counsel); Utah Ethics Op. 04-06 (2004) (corporate counsel would obstruct access to evidence, in violation of Rule 3.4(a), by claiming to represent all corporate employees whose testimony is relevant); Virginia Ethics Op. 1426 (1991) (lawyer may not obstruct investigation of criminal matter by entering into discussions with victim's mother and attempting to gain her cooperation); cf. *In re Mertz*, 712 N.W.2d 849, 22 Law.

Man. Prof. Conduct 237 (N.D. 2006) (defense lawyer's threat to sue alleged victim for defamation did not violate Rule 3.4(a) because client had plausible defamation claim).

An attempt to silence a witness may also implicate other disciplinary rules or laws. See, e.g., *Addamax Corp. v. Open Software Found. Inc.*, 151 F.R.D. 504 (D. Mass. 1993) (counsel accused of suborning perjury); *Florida Bar v. Machin*, 635 So. 2d 938 (Fla. 1994) (prejudice to administration of justice).

A prosecutor may not dissuade a defense witness from testifying by threatening to charge the witness with perjury or by offering to give the witness favorable treatment for not testifying against the defendant. See *Drobney v. Comm'r of Internal Revenue*, 113 F.3d 670 (7th Cir. 1996) (commenting that if government attorney intimidated defense witness by threatening to charge him with perjury, such conduct would be serious ethical impropriety in addition to criminal violation); *In re Bonet*, 29 P.3d 1242, 17 Law. Man. Prof. Conduct 555 (Wash. 2001) (prosecutor violated Rule 3.4(b) and other rules when he offered to drop criminal charges against defense witness if witness would agree to invoke his Fifth Amendment right against self-incrimination and make himself unavailable to defense in ongoing trial).

Lawyers should avoid advising witnesses of their right not to appear in court if not subpoenaed. For one thing, such advice may violate the lawyer's ethical obligation when dealing with a person who is not represented by counsel. Model Rule 4.3 prohibits a lawyer, in dealing with an unrepresented person on a client's behalf, from giving the unrepresented person legal advice other than the advice to secure counsel, if the lawyer reasonably should know that the interests of the unrepresented person conflict with the interests of the client. See also *State v. Martindale*, 527 P.2d 703 (Kan. 1974) (lawyer disciplined for truthfully answering witnesses who asked whether they were obligated to wait in courthouse if not under subpoena and for failing to inform court why witnesses were absent).

Discouraging Cooperation With Opposing Counsel

Model Rule 3.4(f) permits a lawyer to request a client's relative or an employee or other agent of a client to refrain from giving information to an opposing party's lawyer in the absence of compulsory process, so long as the lawyer reasonably believes that the person's interests will not be adversely affected by declining to do so.

Except in that limited situation, it is improper to request that anyone other than a client not talk to counsel for the opposing party. Rule 3.4(f); *Harlan v. Lewis*, 982 F.2d 1255 (6th Cir. 1993); *Briggs v. McWeeny*, 796 A.2d 516, 18 Law. Man. Prof. Conduct 332 (Conn. 2002); accord *Restatement (Third) of the Law Governing Lawyers* §116(4) (2000).

Although secrecy provisions in settlement agreements are apparently quite common, some commentators have argued that Rule 3.4(f) bars lawyers from arranging a noncooperation agreement as part of a settlement of a civil action. Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 Or. L. Rev. 481 (2008); Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 Hofstra L. Rev. 1 (2002) (also arguing that these noncooperation agreements could amount to obstruction of justice).

▸ **Corporate counsel** must keep this rule in mind in seeking to curb employees' contacts with opposing counsel. See Colorado Ethics Op. 120 (2008) (corporation's lawyer may not instruct corporate constituent to refrain from providing information to opponent unless lawyer reasonably determines that instruction will not be harmful to constituent); Utah Ethics Op. 04-06 (2004) (corporate counsel may request any employee whose interests will not be adversely affected to refrain from informally speaking with opposing counsel); Wisconsin Ethics Op. E-07-01 (2007) (organization's counsel may ask—not require—constituents to refrain from speaking to opposing lawyer).

Corporate counsel must keep Rule 3.4(f) in mind in seeking to curb employees' contacts with an opposing attorney.

The exception in Rule 3.4(f) for a client's employees applies to current employees. Utah Ethics Op. 04-06 (2004); Wisconsin Ethics Op. E-07-01 (2007). According to the Restatement, a request that a former employee not be interviewed by another party is appropriate only if the person continues to maintain a confidential relationship with the former employer, "or if the person possesses extensive confidential information of the former employer." §116 cmt. e.

In Comment e, the Restatement takes the position that a lawyer may inform any person of the right not to be interviewed by any other party, but may not request that a person exercise that right or try to induce noncooperation, except when permitted by the exception in the rule. The comment also indicates that a lawyer may advise a person of the right to insist on conditions such as having counsel present at the interview, and may insist that a person comply with a legal obligation of confidentiality to the lawyer's client.

▸ Much of the case law involves **prosecutors** who have discouraged witnesses from talking to defense counsel. An example is *State v. Hofstetter*, 878 P.2d 474 (Wash. Ct. App. 1994). After reviewing authority from other jurisdictions, the court held that "it is improper for a prosecutor to instruct or advise a witness not to speak with defense counsel except when a prosecutor is present." A prosecutor may, however, inform witnesses of their right to choose whether to give a pretrial interview and their right to determine who shall be present at the interview, the court said.

▸ **Criminal defense lawyers** have the same obligation not to discourage witnesses from speaking to the prosecutor. *In re Stanford*, 48 So. 3d 224, 26 Law. Man. Prof. Conduct 677 (La. 2010) (criminal defense lawyers violated Rule 3.4(f) and other rules by asking crime victim to sign "confidentiality agreement" that had potential to

inhibit her from testifying at trial); *In re Alcantara*, 676 A.2d 1030 (N.J. 1995) (lawyer's request that client's co-defendant refrain from giving testimony favorable to state violated Rule 3.4(f)). But see *Hannon v. Superior Court*, 564 P.2d 1203 (Cal. 1977) (defense lawyer not guilty of suppressing evidence for urging defense witness to remain silent prior to trial).

Offering Prohibited Inducements

Model Rule 3.4(b) makes it unprofessional conduct for a lawyer to offer an inducement to a witness that is "prohibited by law." Comment [3] to the rule states that "it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."

Section 117 of the *Restatement (Third) of the Law Governing Lawyers* (2000) forbids lawyers to offer or pay a witness any consideration "(1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time in providing evidence, except that an expert witness may be offered and paid a noncontingent fee; (2) contingent on the content of the witness's testimony or the outcome of the litigation; or (3) otherwise prohibited by law."

The "prohibited by law" phrase in Rule 3.4(b) makes it necessary for lawyers to look outside the rule to ascertain which inducements are prohibited by law and therefore unethical. The criminal law in every jurisdiction prohibits bribery and subornation of perjury, and decisional law supplies additional prohibitions.

In particular, witnesses may not be paid for "telling the truth," because they are legally obligated to do so anyway. *Golden Door Jewelry Creations Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516 (S.D. Fla. 1994); *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986); *In re Kien*, 372 N.E.2d 376 (Ill. 1977). But see *Florida Bar v. Cillo*, 606 So. 2d 1161 (Fla. 1992) (lawyer did not commit professional misconduct by paying former client, who had filed spurious complaint against him, to tell truth in disciplinary proceeding; however, court added that rules should be developed to make clear that compensation is improper unless factfinding body knows about it and approves it).

Fact Witnesses

Witnesses may be paid for their actual expenses in attending court and a reasonable compensation for time lost in testifying, provided that payment is not conditioned on the content of the testimony. See Alaska Ethics Op. 93-2 (1993) (Rule 3.4(b) permits lawyer to reimburse nonlawyer or expert witness for expenses and lost time, but lawyer should be careful that compensation meets some objective standard of reasonableness in view of witness's occupation and normal wages); California Ethics Op. 1997-149 (1997) (reasonable compensation is permitted and may be based on witness's usual pay if employed, most recent rate of pay if unemployed, or what others earn for comparable activity); Colorado Ethics Op. 103 (1998) (expenses incurred and reasonable value of witness's time); Delaware Ethics Op. 2003-3 (2003) (out-of-pocket expenses and lost income opportunities); Kentucky Ethics Op. E-400 (1998) (reasonable expenses and lost income actually incurred); New Hampshire Ethics Op. 1992-93/10 (1993) (reimbursement for attorneys' fees that witness incurred defending contempt action arising out of litigation); South Carolina Ethics Op. 08-05 (2008) (when witness insists that his own lawyer be present during interview but does not want to pay for it, lawyer may advise client to pay fees of witness's lawyer); Vermont Ethics Op. 2009-6 (reimbursement for lost wages is permissible but must be disclosed).

Rule 3.4(b) permits compensation of a fact witness for time spent in preparing to testify, provided that the payment is not conditioned on the content of the testimony and is not otherwise prohibited.

Ethics opinions take the view that it is proper under Rule 3.4(b) to compensate an occurrence witness for time spent in preparing to testify at a deposition or trial, provided that the payment is not conditioned on the content of the testimony and that the payment does not violate the law of the particular jurisdiction. ABA Formal Ethics Op. 96-402 (1996); Arizona Ethics Op. 97-07 (1998); California Ethics Op. 1997-149 (1997); Colorado Ethics Op. 103 (1998); Connecticut Informal Ethics Op. 92-30 (1992); Delaware Ethics Op. 2003-3 (2003); Illinois Ethics Op. 87-5 (1988); Kentucky Ethics Op. E-400 (1998); Wisconsin Ethics Op. E-90-3 (1990). Contra Pennsylvania Ethics Op. 95-126 (1995) (Rule 3.4(b) and state's witness compensation statute can be read to disfavor compensation to nonexpert witnesses for time invested in preparing for testimony).

Compensation to fact witnesses beyond these types of payments, such as a flat fee for cooperation or a nonmonetary benefit of some sort, violates Rule 3.4(b). E.g., *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003) (improper for lawyer to negotiate agreement for fact witness to receive "bonus" depending on usefulness of information she provided); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gailey*, 790 N.W.2d 801, 26 Law. Man. Prof. Conduct 725 (Iowa 2010) (lawyer offered illegal inducement by relaying his son's offer for wife to receive favorable asset distribution in their upcoming divorce if wife would agree to shade her testimony in criminal case against her husband); *In re Bruno*, 956 So. 2d 577, 23 Law. Man. Prof. Conduct 272 (La. 2007) (attorney's $5,000 payment to witness in tort class action was prohibited inducement).

It is clearly improper for a lawyer to pay a fact witness a fee that is contingent on the outcome of the case. *West Virginia State Bar Comm. on Legal Ethics v. Sheatsley*, 452 S.E.2d 75 (W. Va. 1994) (reprimanding lawyer who drafted agreement in which client promised to pay potential witness for information relating to client's litigation, with additional payment in event of favorable outcome); Arizona Ethics Op. 97-07 (1998).

Prosecution Witnesses

Prosecutors frequently promise contingent fees to informants and offer witnesses "compensation" beyond payment for their expenses, such as witness protection programs and favorable plea bargains. Courts in criminal cases generally tolerate these practices so long as the arrangement is disclosed to the defense. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987). But see *United States v. Cervantes-Pacheco*, 826 F.2d at 316 (Rubin, J., concurring) (stating that paying contingent fee to informant based on outcome of criminal case violates Rule 3.4(b)).

The issue of inducements to government witnesses in federal prosecutions came to the forefront in 1998 when a panel of the U.S. Court of Appeals for the Tenth Circuit held that the federal law that prohibits the giving of gratuities in return for testimony, 18 U.S.C. §201, forbids prosecutors to obtain a witness's testimony in return for an offer to extend leniency to the witness in his own prosecution. *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). The court decided to rehear the case en banc, and vacated the controversial panel decision. On rehearing, the court held that Section 201 does not forbid the longstanding practice of leniency for testimony. *United States v. Singleton*, 165 F.3d 197, 14 Law. Man. Prof. Conduct 613 (10th Cir. 1999) (en banc). Since then, federal appeals courts have uniformly rejected the argument that leniency-for-testimony deals violate Section 201. E.g., *United States v. Lowery*, 166 F.3d 1119, 15 Law. Man. Prof. Conduct 51 (11th Cir. 1999).

Expert Witnesses

With respect to expert witnesses, compensation must be reasonable but need not reflect the expert's lost wages or expenses. Under the common law in most jurisdictions, it is improper to pay an expert witness a contingent fee. Rule 3.4(b) cmt. [3]; *Person v. Ass'n of Bar of City of New York*, 554 F.2d 534 (2d Cir. 1977); Kentucky Ethics Op. E-394 (1996); cf. *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874 (Ind. Tax. Ct. 1993) (acknowledging prevailing rule that it is inappropriate to pay expert witness contingent fee and citing cases supporting that view, but holding that testimony of experts paid with contingent fee is not subject to exclusion solely on that basis). But see District of Columbia Ethics Op. 233 (opining that firm may contract with nonlawyer consultants to share "success fee" that client pays law firm in event of favorable outcome of client's case, and explaining that the D.C. version of Rule 3.4 permits payments of contingent fees to expert witnesses so long as they are not based on some percentage of recovery).

For criticism of the rule against compensating an expert witness on a contingent basis, see Note, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 So. Cal. L. Rev. 1363 (1991).

There is some disagreement as to whether it is ethical to pay a contingent fee to a consultant to analyze a case and supply outside testifying experts, who are paid fixed fees. For example, compare Pennsylvania Ethics Op. 2001-24 (2001), advising that such an arrangement would be contrary to the prohibition against paying a witness based on the witness's testimony or outcome of the case, with *Ojeda v. Sharp Cabrillo Hosp.*, 10 Cal. Rptr.2d 230 (Cal. Ct. App. 1992), upholding the validity of a contingent fee contract between the plaintiff and a medical-legal consulting service in which the service agreed to review relevant records and provide local experts to testify in exchange for a percentage of any recovery, with the outside experts to be compensated on an hourly flat basis. For guidance on this issue, see ABA Formal Ethics Op. 87-354 (1987), which notes that such an arrangement poses many of the same problems raised by direct payment of a contingent fee to an expert, and advises that a lawyer who recommends such an arrangement may violate the Model Rules.

By Joan C. Rogers

Lawyers' Efforts to Prepare Witnesses Must Stop Short of Counseling or Assisting Falsehoods

Extensive witness preparation is an expected and even essential part of trial preparation. See *Restatement (Third) of the Law Governing Lawyers* §116(1) (2000) (lawyer "may interview a witness for the purpose of preparing the witness to testify").

However, Model Rule 3.4(b), which prohibits helping a witness to testify falsely, has the effect of placing an outer limit on witness preparation, to prevent overzealous preparation from prompting perjury. In Comment b to Section 116, the Restatement provides a helpful list of activities that are permissible during witness preparation. Among other things, the comment suggests that a lawyer may discuss the applicability of law to the events in issue, rehearse testimony, and "suggest choice of words that might be employed to make the witness's meaning clear." See also *Iowa Supreme Court Attorney Disciplinary Bd. v. Gailey*, 790 N.W.2d 801, 26 Law. Man. Prof. Conduct 725 (Iowa 2010) ("A lawyer is allowed to explain the consequence of a witness's testimony without fear of being accused of counseling or assisting a witness to testify falsely").

The lawyer should take care, however, not to put words in the witness's mouth. See *In re Mitchell*, 262 S.E.2d 89 (Ga. 1979) (lawyer disbarred for encouraging six witnesses to testify to same fictitious name); *In re Eldridge*, 82 N.Y. 1961 (N.Y. 1880) (lawyer suspended for writing out answers for witness).

To stay on the right side of the line, a lawyer should remind the witness to tell the truth, and have a factual basis for any suggestions or recommendations to the witness during the preparation session. See *Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993) (lawyers did not violate Rule 3.4(b) by

including previously undisclosed statements in language of witness's draft affidavit, where they had factual basis for doing so, brought disputed portions to witness's attention, and made sure that she signed it only if she agreed with its contents).

For further discussion, see "Witness Preparation Memos Raise Questions About Ethical Limits," 14 Law. Man. Prof. Conduct 48.

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(UNFAIR) ADVANTAGE: DAMOCLES' SWORD AND THE COERCIVE USE OF IMMIGRATION STATUS IN A CIVIL SOCIETY

This article argues that the coercive use of immigration status or "status coercion" in civil proceedings and negotiations is fundamentally unethical and potentially illegal. For attorneys attempting to take advantage of unauthorized immigration status, such conduct very likely violates an attorney's ethical obligations under the Rules of Professional Responsibility and wrongfully takes advantage of an overly vulnerable population. For the judiciary, the article argues for a more proactive approach in maintaining the perception of fairness and justice in civil proceedings for all parties, regardless of immigration status. Additionally, for both legal and lay persons, status coercion may constitute the crime of extortion, and this article establishes how status coercion in most cases fills the required elements of extortion.

Part I of the article discusses in reported and unreported decisions the various fora where the described harms most often occur, including specifically commercial disputes, custody litigation and employment law issues where case outcomes have hinged on immigration status, and analyzes the impetus for the harms and the consequences, where appropriate, of the same. Part II of the article looks at ethical obligations, primarily those imposed by the Rules of Professional Responsibility on attorneys and the Model Code of Judicial Conduct for judges. Part II also looks in a more narrow perspective at potential criminal prohibitions and sanctions regulating this type of behavior affecting all parties. Part III suggests potential remedies available to the unauthorized immigrant in both civil and immigration proceedings when faced with status coercion. Part IV concludes that current ethical and legal obligations imposed on community members should be sufficient to prevent status coercion in ***614** *commercial and civil contexts in the vast majority of cases. The article concludes that as unauthorized immigrants are one of the most vulnerable and susceptible populations to harm done to them, the ethical rules governing lawyers and judges should clearly state, and be understood, as prohibiting this type of coercion.*

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*615 I. Introduction

The legend of Damocles is a familiar one.[1] While often used to express the sentiment that a tyrant is never able to live without fear,[2] it is more commonly used to describe scenarios involving a sense of impending doom.[3] When Damocles looked up and saw the sword above him suspended by a single horse hair, he realized the precariousness of his situation and quickly sought to extricate himself from the source of danger. For many unauthorized immigrants,[4] Damocles' sword is represented by the ever-present threat of removal.[5] In most instances removal represents a severe adverse outcome for the unauthorized immigrant. Recognizing the power of such a threat may turn knowledge of someone's unauthorized status into a sword that is able to extract gains for the one who wields it, and it turns out that this particular sword is wielded often in a wide range of circumstances in what I refer to as "status coercion."

***616** In 2008, a homeowner in an Atlanta suburb attempted to sell his home.[6] After listing the home, a neighbor came forward with an offer. At first the buyer, Ms. Griffin, requested a postponement of the closing due to problems in locking her interest rate; however, the parties agreed to a move-in arrangement where Ms. Griffin would pay rent until the sale closed.[7] Shortly thereafter, there was a delay by the seller, Mr. Jimenez, due to a problem with title. Mr. Jimenez had listed his minor daughter as the owner of record due to her U.S. citizenship. In order to complete the home sale, a conservatorship was needed to transfer title from the daughter back to her father. In the interim, the relationship between the parties soured. Ms. Griffin claimed that Mr. Jimenez had agreed to waive three months rent due to his delay in closing, while Mr. Jimenez's attorney argued that the offer had not been a firm offer, nor was it accepted in a timely fashion. Ultimately, a judge ordered Ms. Griffin to pay retroactive rent and vacate the property.[8]

While the story above sounds like a typical souring of a deal between a buyer and seller of a home, what happened next was not so ordinary. Ms. Griffin, somehow aware that Mr. Jimenez was an unauthorized immigrant, contacted the FBI, local police, local media, the state attorney general, the governor's office, and others. The office of her Congressman, U.S. Rep. Tom Price, also contacted U.S. Immigration and Customs Enforcement ("ICE").[9] In addition to allegedly damaging the property, Ms. Griffin also attempted to have the Georgia State Real Estate Commission revoke the license of the real estate agent involved. Thereafter, Ms. Griffin contacted Mr. Jimenez's employer regarding his unauthorized status which resulted in termination of his employment, and finally, Ms. Griffin posted bright red signs in the yard, which read: "This house is owned by an illegal alien."[10] Unsurprisingly, ICE agents subsequently arrived at Mr. Jimenez's residence and placed him in removal proceedings.

Ms. Griffin, who has not attempted to buy another home because she is unable to afford one, said: "At the end, do I feel bad the family got in trouble? No, not at all."[11] Specifically mentioning the fact that she was the cause of Mr. Jimenez's employment termination, Ms. Griffin ***617** said: "[O]nce I realized my family had seven days to get out of a house that a family's not even legally supposed to own . . . I did let his employer know."[12] For those familiar with cratered negotiations (no matter the subject of the deal), the emotions expressed are nothing new. Ms. Griffin's statement that "I don't feel bad for anything that happens to the Jimenez family at this point" is not terribly unusual, though the consequences to the Jimenez family are.

So the question arises, when, if ever, is it proper to use an unauthorized immigrant's status against him in a civil or

commercial context? As cathartic as the venting process for Ms. Griffin may have been to her, this article suggests that it is almost never proper to use unauthorized status in civil proceedings and commercial negotiations because of ethical and legal constraints.[13] Part II of this article will discuss the various fora where the described harms most often occur, analyze the impetus for the harms, and discuss the consequences, where appropriate, of the same.[14] Part III of this article will look at ethical obligations, primarily those imposed by the Rules of Professional Responsibility on attorneys and the Model Code of Judicial Conduct for judges.[15] Part III will also look in a more narrow perspective at potential legal prohibitions and sanctions regulating this type of behavior. Part IV will suggest potential remedies available to the unauthorized immigrant in both civil and immigration proceedings when faced with status coercion.[16] Part V will conclude that current ethical and legal obligations imposed on community members should be sufficient to prevent status coercion in commercial and civil contexts in the vast majority of cases.[17] In addition, states should adopt specific rules or issue ethical opinions on point to provide guidance to all attorneys and judges faced with these situations. As unauthorized immigrants are one of the most vulnerable and susceptible populations to harm done to them under color of law, the ethical rules governing lawyers and judges should clearly state, and be understood, as prohibiting this type of coercion.

*618 II. (Over)Zealous Advocates

Unauthorized immigrants are in a uniquely disadvantaged negotiating position any time their unauthorized immigration status is known by the opposing party.[18] There are those who believe that such a bargaining position comes part and parcel with unauthorized status.[19] They believe that proper representation of clients requires exploiting the fact of unauthorized presence, even to the point of suggesting that attorneys representing unauthorized immigrants must disclose their clients' status to prevent their own commission of a crime.[20] Nor is this viewpoint limited in scope as articles,[21] cases,[22] and court transcripts[23] in a wide range of practice areas document the aggressive approach many attorneys take in pursuing an advantage based on their opponent's *619 unauthorized immigration status.[24] This article posits robust ethical and criminal limits on zealous advocacy and private actors that are present in cases of status coercion.

A. Negotiation Tactics in Commercial Dealings/Commercial Litigation

One area of high concern, and perhaps the most likely to be underreported, is the coercive use of unauthorized immigration status in commercial negotiations. The reason for the lack of reported cases is most likely the fact that the threats of reporting the unauthorized immigrant to ICE were successful.[25] Unsurprisingly, one area that is well represented in both case law and academic literature is employment and labor law.[26] In terms of workplace conditions, threats to report immigrants to ICE, and the inability to adequately defend oneself against a dominant party, employers have long taken advantage of unauthorized immigrants' precarious legal position.[27]

*620 Typical abuses include unilateral reductions in pay and denials of benefits.[28] In a comprehensive national study, almost half (forty-nine percent) of day laborers reported being denied all wages for completed work, and nearly half reported being denied required breaks, food, and water.[29] Interestingly, the population surveyed did not consist entirely of unauthorized immigrants; however, it seems that it did consist of seemingly unauthorized immigrants which the employers assumed would not report the workplace misconduct.[30] In addition to day laborer hiring practices, misconduct regarding immigration status is also quite prevalent in union-forming/busting situations. Fifty percent of companies with a majority of its workforce comprised of unauthorized immigrants in union-busting situations made threats of reporting the unauthorized immigrants to ICE.[31]

While this type of employment-based discrimination against unauthorized immigrants has existed for decades, if not centuries, recent animosity towards unauthorized immigrants has begun to be expressed in almost any litigation involving an unauthorized immigrant.[32] A recent California case brought by unauthorized immigrants illustrates the techniques employed by counsel.[33] In Mendoza v. Ruesga, the *621 defendant, an immigration consultant,[34] charged six unauthorized immigrants between $15,000 and $16,000 each to obtain work permits and legal residence.[35]

The defendant, Ruesga, applied for immigration relief for which the plaintiff applicants were ineligible.[36] Subsequently, the defendant alleged that he could utilize his "inside contacts" within the immigration service to remove impediments to obtaining amnesty.[37] Notably, according to the defendant's own testimony, the plaintiffs wanted to utilize only "truthful evidence."[38] Regardless of that fact, the defendant provided letters falsely stating that he had known the plaintiffs since 1982,

and provided letters from a farm labor contractor that falsely stated that the plaintiffs had worked for the company beginning in 1982.[39] The plaintiffs sued the defendant for violation of the consumer protection Immigration Consultants Act ("ICA").[40]

Demonstrating a fair amount of chutzpah, defendant responded to the complaint by raising the affirmative defense of unclean hands.[41] The defendant alleged, and a jury agreed, that the plaintiffs should not prevail on their claim for violation of the ICA or the breach of fiduciary duty due to their own unclean hands resulting primarily from their unauthorized status and the following of defendant's instructions on which documents to sign.[42] The court of appeals reversed, holding "as a matter of law the unclean hands doctrine is not an affirmative defense to an ICA cause of action."[43] The court noted that "[t]he dishonesty of undocumented immigrants cannot be countenanced, of course, but the Legislature was undoubtedly aware of that potential when it enacted the ICA and subsequent amendments."[44]

Therefore, even in a case where the unauthorized immigrants ***622** prevailed, the tactics are clear. Defendant's counsel, as in Mendoza, are relying on plaintiffs' unauthorized immigration to invoke both the doctrine of unclean hands and in pari delicto[45]--both of which necessarily involve the assumption that the unauthorized immigrants should be prohibited from seeking a judicial remedy for an apparent wrong that they have committed. Even while ruling against these arguments (which prevailed at the trial level in Mendoza), and stating the need to protect this class of individuals, the appellate court left us to ruminate on the "dishonesty of undocumented immigrants," which is inherent in their status.[46]

While Mendoza was an instance in which opposing counsel was clearly involved in invoking unauthorized status, in many instances the opposing party acts unilaterally. In United States v. Farrell,[47] hotel operators essentially imprisoned nine Filipinos by confiscating their immigration documents, paying them approximately fifty percent of minimum wage, and wrongfully requiring payment for initial travel expenses and certain immigration filings.[48] In addition to the almost absolute control of the workers' lives, which included managing their money, restricting their ability to travel from their apartment to the hotel, and their contact with anyone in the local community, the hotel operators also attempted to utilize the threat of removal and police action by calling in the chief of police to speak with the workers. After the chief spoke with them, the hotel operators remained outside of the immigrants' apartment, not allowing them to leave, even to purchase food.[49] Interestingly in this case, the high level of criminal harassment and threat of removal was visited on authorized immigrants. However, the threat of removal, which in this case depended on employment from the hotel operators, allowed for exceptionally cruel status coercion.[50]

While private parties acting unilaterally in such a fashion is unsavory and potentially illegal,[51] similar conduct pursued by counsel seems even ***623** more objectionable. Barring a very small subset of cases where unauthorized immigration status may be relevant such as with lost wages,[52] in most cases, one of the primary purposes for introducing the issue is likely intimidation and coercion.[53] In North Carolina, the only state that appears to have an ethics opinion directly on point, one attorney made two separate inquiries.[54] In the first, she asked whether it was permissible, in a civil lawsuit, "to threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations."[55] Upon receiving a negative response, in a follow-up query four years later, the attorney asked whether it was permissible to simply report the plaintiff or a witness to immigration authorities as long as no threat was made.[56] In both cases, the North Carolina State Bar Ethics Committee held that such conduct was impermissible.[57] Two points should be made of these two inquiries: one, the attorney apparently believed the issue was a close one given the written inquiries, and two, no other state has adopted similar opinions that would provide guidance to counsel regarding any ethical constraints. In fact, given the prevalence of judicial opinions and anecdotal evidence in which coercive negotiation or litigation tactics arise, it would appear that many attorneys believe status coercion is acceptable advocacy.

In regard to civil litigation and employer-employee litigation, which is discussed much more in depth below, the Supreme Court of Washington recently decided Salas v. Hi-Tech Erectors.[58] In Salas, the Washington Supreme Court reversed both the trial court and court of appeals who had allowed evidence regarding Mr. Salas's immigration status in a negligence action.[59] The employer's argument as to relevancy ***624** was that the plaintiff's future income could be affected by his immigration status and potential removal, and therefore was properly before the jury.[60] While the argument may have had some merit in the abstract, the plaintiff had resided in the United States since 1989, owned a home, and had three children while residing here.[61] Therefore, while the immigration issue was relevant for Rule 401 purposes,[62] the court held that its probative value was substantially outweighed by its prejudicial effect.[63]

Similar to Salas, in Wal-Mart Stores, Inc. v. Cordova,[64] the plaintiff brought a tort claim against Wal-Mart for injuries

sustained while shopping. Wal-Mart attempted to reduce damages based on earnings capacity given the plaintiff's tenuous residency in the United States.[65] The court categorically rejected Wal-Mart's theory.[66] Although pre-Hoffman,[67] Cordova's holding that immigration status is irrelevant to lost earning capacity[68] was subsequently affirmed ten years later as the court held that any immigration policy that weighed against awarding backpay was not applicable to common law tort damages.[69]

B. Custody Proceedings / Divorce Settlement

One area in which the literature regarding use of immigration status is more developed is in custody proceedings.[70] The typical case involves *625 mixed-status families[71]--where the immigration status of one parent is different from the other parent.[72] Mixed status does not necessarily indicate that one parent is an unauthorized immigrant, though that situation is not uncommon when the parent with authorized immigration status tries to take advantage of the other's immigration vulnerability.[73]

In addition to parties and their attorneys using immigration status coercively, judges themselves have engaged in such behavior. Statements such as "I have a problem with your immigration situation" are not uncommon.[74] Given the best interests legal framework involved in custody proceedings,[75] courts have wide latitude in considering relevant factors. In Rodriguez v. Rico,[76] a judge, relying on the legal permanent resident father's erroneous argument that the children could only obtain authorized status in the father's custody, awarded custody of two unauthorized immigrant children to the legal permanent resident father even though the children had not had any contact with the father for the preceding seven years.

Rodriguez is just illustrative. The number of custody cases where immigration status is the sole or primary determinative factor is impressive. If the parties or counsel are committed to bringing immigration status into the proceedings, but do not wish to be seen as clearly attempting to seek advantage based on that status, there are *626 other ways to obliquely bring immigration status into the proceedings. One way is through the issue of employment (or lack thereof). Either the parent is unemployed (a negative factor in the best interest analysis),[77] or the parent is employed, and as a result of immigration status is therefore in violation of the law (also a potential negative factor).[78] In an Idaho case, the authorized immigrant father brought up the issue as one of driving privilege in that the unauthorized immigrant mother and her family were unable to obtain valid drivers' licenses.[79] This Idaho Custody Case is particularly jarring as the authorized immigrant father repeatedly physically and sexually abused his former wife (who was between fifteen and sixteen years old at the time).[80] Incredibly, after finding the father to be a "habitual perpetrator of domestic violence," the court awarded joint legal custody to the father on the grounds that the mother and her parents are not licensed to drive, may someday be subject to removal, and that "it is in the best interests of the minor children to have a parent or guardian, (who has legal custody of these children), to also have legal status as a lawful resident in this country."[81]

Of course not all courts are receptive to arguments based on status.[82] In Montes, the court "question[ed] the wisdom of having a child with a woman from another country and then when the marriage falls apart, attempting to use that to apparently automatically obtain custody of a child."[83] The court further noted the authorized parent's "exaggerated sense of entitl [ment]" which "expressed itself in taking positions with the government that can't possibly benefit the child. That appears to be in effect a power play."[84] In conclusion, the court strongly stated to the *627 father: "As far as I can tell, in order to attempt to gain advantage in this custody dispute, you really have created a terrible situation for the entire family."[85]

Even more worrisome than the coercive use of immigration status in ordinary custody decisions is coercive use by an abusive spouse.[86] Congress itself expressed concern when passing the Violence Against Women Act (VAWA), noting that domestic violence is "'terribly exacerbated in marriages where one spouse is not a citizen and the non-citizen's legal status depends on his or her marriage to the abuser.'"[87] Courts that make custody determinations based primarily or solely on immigration status may be enabling the abusers to make good on their threats.[88]

Given the protective nature and purpose of the VAWA statute, it is not surprising that applicants may file petitions without notice to the alleged abuser, and further, that such petitions are to be treated confidentially.[89] The Department of Homeland Security has imposed guidelines and has even sought a broader application of coverage than the language of the statute would imply on its face.[90]

In the divorce setting, judges have had very mixed results. In one case, a judge prevented a divorce from occurring given the adverse immigration consequences foreseen for the immigrant spouse or child.[91] However, in other cases unauthorized

immigrants have been able to ***628** avoid orders of child support on the grounds that they lacked work authorization.[92] In an especially egregious case of duplicity (on both sides), a judge was very critical of the husband who had obtained legal immigrant status for himself and his daughter, but had failed to do so for his wife, whom he had also subjected to domestic violence.[93] In other cases, judges have not been immune to bias even when no custody issue is present.[94]

In Lee v. Kim, the immigrant wife alleged she was a victim of domestic abuse, but rather than focusing on the abuse, the judge focused on potential immigration benefits that the wife may have been eligible for as a victim of domestic violence.[95] Even though the wife was previously referred to a domestic violence restraining order clinic and a mental health worker, the judge refrained from asking any questions as to the allegations of physical and sexual abuse.[96] It is almost certain that had the wife appeared before the judge in a motion for a restraining order that did not have immigration implications, a line of questioning into the alleged abuse would have been the focus of the hearing.[97]

C. Employment Litigation

Employment is perhaps the one area in which immigration status should be considered relevant depending on the type of relief sought;[98] and given the predictable tension between employers and employees in any lawsuit between them, it is not surprising that immigration status ***629** has often surfaced in civil suits ranging from wrongful firing, to labor organizing, to workmen's compensation and torts resulting from workplace injury.[99] In employment litigation suits, as in custody or divorce proceedings, given the relationship between them, the parties are likely to have very good levels of knowledge regarding the immigration status of the individuals involved.[100] Given that knowledge, it is unsurprising that unscrupulous employers would try to take advantage of the tenuous position of the immigrant.

In one nation-wide survey, twenty-five percent of workers whose employers had received a no-match letter[101] from the Social Security Administration about them were not fired until they complained about worksite conditions.[102] An additional twenty-one percent whose employers had received no-match letters reported that no action was taken until they began union or organizing activities.[103] In the National Labor Relations Board case In re Tuv Taam Corp., the employer attempted to justify its unfair labor practices related to labor organizing on the grounds that the individuals it fired were allegedly unauthorized.[104] Others reported that either their employers discharged them from their position and rehired them from temp agencies at lower wages and without benefits, or that they did not fire them, but rather continued their employment while reducing wages or benefits.[105]

***630** The one area of consensus where courts have held immigration status to be relevant has concerned the remedy of backpay for wrongful termination.[106] In 2002, the U.S. Supreme Court decided Hoffman Plastic Compounds, Inc. v NLRB, holding (against the argument of the NLRB), that unauthorized immigrants are prohibited from receiving an award of backpay for work not rendered even if they have been discharged in violation of the National Labor Relations Act (NLRA).[107] With the passage of IRCA in 1986, Congress explicitly made it a separate criminal offense for companies to knowingly employ unauthorized immigrants. Given that congressional signpost, the Court held that the policy against unlawful employment therefore trumped the NLRA's policy against deterring discriminatory conduct by an employer at least as far as it constrains the NLRB in remedies that it could elect to award the wrongfully terminated employee.[108]

Interestingly, it appears that both federal and state courts have since limited Hoffman's scope.[109] In 2004, the Ninth Circuit Court of Appeals held that Hoffman does not apply to Title VII discrimination claims.[110] In Rivera, the Ninth Circuit noted that, in contrast to the NLRA, Title VII requires private enforcement, the policies behind Title VII are to strongly punish and deter violators, and Title VII is interpreted by ***631** courts rather than an administrative body.[111] Primarily because of these differences as well as the great weight of authority on its side, the court concluded, "In sum, the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases."[112] Other courts have similarly concluded that Hoffman does not apply to Fair Labor Standards Act claims or workers compensation claims.[113]

While one attorney has published a playbook for introducing evidence of immigration status in insurance defense cases,[114] it appears from a careful review of current case law that immigration status is generally only relevant in two situations, one in which the immigrant seeks backpay for wrongful termination which would be governed by Hoffman, and the other in a defense against an unlawful failure to hire case when the defense is based on immigration status. Furthermore, contrary to the playbook author's contention that counsel representing the unauthorized immigrant may themselves face criminal charges

and disciplinary charges for failing to affirmatively notify the court and opposing counsel of their client's immigration status,[115] it appears that the suggested conduct would in fact clearly violate the immigrant's attorney's ethical obligations to his or her client.[116]

*632 D. Debt Collection

Another area where unauthorized immigrants are susceptible to coercion based on immigrant status is debt collection.[117] New York City, which has one of the most robust consumer protection laws in the country, explicitly prohibits debt collection agencies from threatening to report the debtor to immigration authorities.[118] Federal law is not as clear, though it also appears that such threats would run afoul of the Fair Debt Collection Practices Act (FDCPA).[119] In addition to the general prohibition on harassing conduct, the FDCPA also prohibits threats implying that nonpayment would result in the arrest or imprisonment of the immigrant if the debt collector or creditor does not intend to take such action.[120] Notably, under both New York City law, which provides a much clearer prescription against the use of immigration status, and federal law, the penalties are less than severe.[121]

E. State Action and Crime Reporting

Although this paper deals primarily with civil proceedings and settings, at times the government is involved as a quasi-private actor. Like their private counterparts, these state actors are not immune from engaging in status coercion. In Doe v. Miller,[122] the directors of the Illinois Department of Public Aid (IDPA) and the Illinois Food Stamp *633 Program[123] attempted to require all members of a household to provide verification of immigration status prior to approving the application for food stamps.[124] Where the department ascertained the immigrant to be unauthorized, the caseworkers were required to report to the former Immigration and Naturalization Service (INS), even though the child-applicants were U.S. citizens who were eligible for the aid sought.[125] On the basis of this policy, the IDPA succeeded in pressuring numerous eligible applicants into withdrawing their application for food stamps to avoid being reported to the INS.[126] While IDPA was ultimately unsuccessful in their attempts to collect and report immigration status, the action is a succinct example of coercive state acts against unauthorized immigrants.

Another setting in which the state may play a substantial role is the decision to seek to terminate parental rights. In some cases, the state has argued that citizen adoptive parents were "better" and the United States was a "better" place to live regardless of the standard presumption that would seek a reunion between parent and child.[127] In seeking to terminate a parent's rights, a caseworker in a Nebraska case *634 testified that the mother, having been removed to Guatemala, failed to comply with a case plan established by the department.[128] The caseworker testified to this point even though she had been unable to monitor the mother's progress due to her location in a foreign country, and additionally, at no time did the caseworker provide a translated copy of the case plan when her general practice was to do so.[129] The trial court ultimately terminated the immigrant's parental rights noting "'[b]eing in the status of an undocumented immigrant is, no doubt, fraught with peril and this would appear to be an example of that fact,'"[130] appearing to imply at least, that having parental rights terminated is simply one potential side-effect of being in the United States without authorization.

In Arizona, recently passed SB 1070 could have allowed for police officials who work in the local schools to question students about their immigration status in the event they have "reasonable suspicion" that a student is unauthorized.[131] This type of provision could contradict the essential holding in Plyler v. Doe that states must give unauthorized immigrants access to public schools,[132] and which has resulted in a policy of no immigration enforcement in school areas.[133] Allowing officers located on school grounds to question students, even students who have been subjected to abuse or bullying by their classmates, as to their *635 immigration status may likely act as a coercive threat that could see many children pulled from school entirely.[134]

In 2004, California Congressman Rohrabacher proposed a bill that would have required emergency room personnel to have notified immigration authorities if any patients were unauthorized immigrants.[135] The law, which would have required the hospital to turn over the immigrants after treatment, appears to technically satisfy the Emergency Medical Treatment and Active Labor Act of 1986 which prohibits hospitals from refusing to treat patients in emergency situations, regardless of immigration status.[136] In addition to the general notification language, the bill would have required emergency room personnel to fingerprint or photograph any unauthorized immigrant and report the individual to the Department of Homeland

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Security for removal.[137]

Although admittedly not in a private or quasi-private setting, another disturbing way in which the state could use immigration status ill-advisedly is with victims who report crime. Stories abound of unauthorized immigrants reporting crimes, only to find themselves being questioned as to status, detained, and ultimately placed in removal.[138] Stories of police and immigration officials requesting bribes from the immigrants if they wish to avoid being placed in removal are not difficult to locate.[139] While immigrants are vulnerable in civil ***636** proceedings to status coercion, criminal and immigration proceedings generally present even more dire circumstances. The message to immigrants in these cases is clear, report crime at your own risk,[140] and this message is not new.[141] What is also clear is that the unauthorized immigrant community is especially susceptible to victimization,[142] that coercion based on immigration status is not limited to the civil sector, and that safeguards are needed.[143]

Therefore, in addition to the status coercion that goes on in virtually every type of civil disagreement in which immigration status is a lever to gain advantage, states and the federal government have also engaged in status coercion, sometimes in ways more subtle than others, to deter or inhibit victims from reporting crimes, to prevent eligible individuals from receiving benefits, and to deter emergency medical care among others. In order to carry out these actions, individuals need to be involved, and therefore, there should be some accountability at the ***637** individual level depending on the role of the actor involved. In the case of attorneys, the ethical guidelines in the Rules of Professional Conduct should provide a floor of ethical behavior, not a ceiling.[144]

III. Constraints on Immigration Status Threats

A. Criminal Law Constraints

When an immigrant is being threatened with a loss of property or something else of value, the threatening party, whether a lawyer or nonlawyer, may be engaging in the crime of extortion depending on the relevant state's definition of the crime. Extortion is generally defined as the dispossession of the property of another through threat.[145] The New York Penal Code defines extortion as obtaining property of another by compelling or inducing the person to deliver such property to another by threatening that upon failure to deliver the property, the actor or another will:

> (iv) [a]ccuse some person of a crime or cause criminal charges to be instituted against him; or (v) [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
>
> (ix) [p]erform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.[146]

New York's extortion law, which is similar to the law in many other jurisdictions, and the Model Penal Code,[147] which also includes a provision similar to provision (ix) above, may apply in some cases of status coercion even when the primary purpose of reporting immigration status to the authorities is spite or vengeance, and no material benefit accrues to the extorting party.[148] In many jurisdictions; ***638** however, there is an affirmative defense[149] to the crime of extortion which applies if "the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge."[150] In many cases in which immigration status is used coercively, the party seeking advantage will be in a position to have reliable knowledge of the other's immigration status, especially in custody or employment disputes. The second prong of the affirmative defense requires that the alleged extortionist's sole purpose be to compel or induce the immigrant to take "reasonable action" to make good the wrong.[151]

In that provision there is significant room for effective advocacy on behalf of the immigrant, depending on the level of knowledge of the extorting party. The first obstacle in asserting the affirmative defense for any party, whether an attorney or

a lay person, attempting to obtain an advantage or benefit by threatening removal is whether the attempt to seek removal is for the "sole purpose" of having the immigrant seek to correct his or her current immigration status. Unlike the Rules of Professional Conduct which govern an attorney's conduct, purposefully vague terms like "substantial purpose" and "legitimate advocacy" are not present. "Sole," defined as "having no sharer" and "being the only one," has a clear meaning.[152] Presumably, therefore, any ancillary purpose, such as gaining an advantage in a civil proceeding or even pure spite or vengeance as demonstrated in the home sale anecdote in the Introduction, should not suffice to present a valid affirmative defense.

Additionally, in New York, the affirmative defense is only applicable when the victim would be charged with a crime.[153] The Model Penal ***639** Code contains no such limitation, but it does limit the opportunity to utilize such defense to those occasions where the extorting party "honestly claimed" the property obtained from extortion "as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services."[154] This relevancy limitation is exceedingly important in that any case in which immigration status is irrelevant or only tangentially related may prohibit the use of this defense against extortionary conduct. Indeed, even where immigration status is relevant to the underlying action, it is unlikely that the property or benefit obtained by the extorting party from threatening or obtaining removal is itself relevant to the damages, if any, sought by the extorting party.

Federal extortion statutes may also be applicable if the extorting party is attempting to obtain an advantage by threatening to inform authorities about federal crimes.[155] The federal extortion statute would most likely be applicable if the unauthorized immigrant had committed a federal crime such as entry without inspection or entry after removal.[156] As both state and federal extortion statutes encompass language defining the crime as a threat to obtain or demand something of value, obvious cases in which the extorting party seeks pecuniary gain seem to clearly constitute extortion, while claims in custody battles also seem to constitute an attempt to obtain something of value to the unauthorized immigrant. Finally, for all actors, even threats to seek the removal of immigrants based on feelings of spite or vengeance may, depending on the jurisdiction, meet the elements of extortion and subject the extorting party to criminal liability.[157]

B. Ethical Constraints on Attorneys

It appears fairly clear that attorneys representing unauthorized immigrants are required to maintain their clients' immigration status confidential unless otherwise directed or required by law, and are not required to affirmatively notify opposing counsel or the court of their clients' immigration status.[158] This requirement applies provided that ***640** the attorneys do not know that their "[client] intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding,"[159] or the attorneys themselves are not "knowingly . . . fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[160] Unlawful presence[161] or unauthorized entry[162] alone are not likely to trigger required disclosure given that the crime of unauthorized entry is complete upon entry,[163] and that unlawful presence without more is only a civil violation.[164] Even when an attorney knows that a client possesses false immigration documents, which may be considered a continuing crime, it is unlikely that an attorney would have to disclose the client's immigration status unless the "client took some subsequent action in the context of the [current civil] proceedings that affected the integrity of the process, such as lying on the stand or presenting false evidence."[165]

While not affirmatively disclosing a client's unauthorized immigration status seems a logical extension of the traditional attorney-client privilege,[166] the question is much more difficult when opposing counsel is engaged in litigation tactics specifically aimed at uncovering immigration status.[167] Some attorneys seeking such information may couch their conduct in terms of "zealous advocacy,"[168] even when the ***641** status is unrelated to the underlying claim. While there may be a few, select cases where immigration status is relevant to the claim,[169] and therefore properly subject to discovery and disclosure in court, for the vast majority of cases, those attorneys seeking to discover or introduce such evidence should tread carefully in light of their ethical obligations.[170]

Regardless of whether immigration status is relevant or not in the underlying civil action, attorneys seeking to discover or introduce immigration status need to be cognizant of several ethical constraints.[171] Primary among the ethical obligations are Rules 4.4(a), and 8.4(d). Rule 4.4 provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ."[172] Comment 1 to Rule 4.4(a) notes the burden of zealous advocacy on behalf of a client but tempers such advocacy by prohibiting attorneys from disregarding the rights of

third parties through "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."[173]

1. Immigration Status Not Relevant or Only Tangentially Related

a. Rules of Evidence

The easier instances of status coercion for attorneys to defend against are those where immigration status is not relevant to the underlying action,[174] only tangentially related, or prohibited from disclosure by local rulings.[175] Relevancy is generally determined by *642Federal Rules of Civil Procedure 26(b)[176] and its state counterpart prior to trial, and by Federal Rules of Evidence 401[177] and 402,[178] and their state counterparts at trial. In both cases, the rule is not absolute. Federal Rule of Civil Procedure 26 specifically provides that it may be limited by court order,[179] and Federal Rule of Evidence 403 limits the admissibility of relevant evidence if the probative value of that evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[180] In cases involving unauthorized *643 immigrants, courts have frequently expressed fear of the prejudicial effect that information may have on the finder of fact.[181]

Attorneys have also attempted to impeach witnesses, party and nonparty alike,[182] on the basis of untruthfulness or the criminal acts of unlawful entry or fraudulent document use.[183] However, Federal Rules of Evidence 404(b) and 608(b) are both clear in their (in)applicability to the admissibility of prior acts.[184] In both cases, the Rules strongly prohibit evidence of past acts or specific instances of conduct for the purpose of attacking credibility.[185] Even in those instances where an unauthorized immigrant has used fraudulent documents, whether knowingly using another's social security number or making misrepresentations on employment or drivers' license forms, courts have not looked favorably on the argument that unauthorized immigration status is indicative of a lack of truthfulness.[186]

TXI Transportation is a remarkable example of an attempt to *644 introduce immigration status in an irrelevant situation.[187] In TXI Transportation, the plaintiff in a wrongful death and survivor action sought to bring into evidence the fact that the truck driver employee of the defendant was an unauthorized immigrant.[188] The plaintiff's primary contention and stated purpose for introducing evidence of immigration status was that the unauthorized immigrant would not be truthful in statements to the court as he had previously misrepresented his immigration status.[189] While the line of questioning regarding immigration status was allegedly for impeachment purposes, the plaintiff's counsel referred to the employee's immigration status over forty times; referred to him as an illegal immigrant thirty-five times; referred to his prior deportation seven times; referred to the employee using a "falsified" Social Security number thirty-two times; referred to the employee's license being "invalid" or "fraudulently obtained" sixteen times; and referred to the employee as a "liar" seven times for having stated on his employment application that he was authorized to work in the United States.[190]

In this case, the plaintiff also appeared to intentionally seek the removal of the employee immigrant. Plaintiff's counsel asked the investigating Texas State Trooper whether she knew the immigrant was "in this country illegally."[191] Inquiries regarding immigration status to an investigator attempting to determine fault in an automobile accident serve no purpose other than to attempt to incite prejudice. Even conceding that immigration status may have been relevant to the automobile accident investigation and therefore admissible under Federal Rules of Evidence 402, this type of questioning is clearly designed to inflame negative sentiments, and as such should be kept out pursuant to Federal Rules of Evidence 402. In TXI Transportation, both the trial court and appellate court disagreed, on differing grounds. The trial court allowed the line of questioning as relevant and not *645 prohibited by Rule 403 after initially granting a motion in limine to keep such evidence out.[192] The court of appeals agreed that there was error, but ruled that any such error was harmless.[193]

The Texas Supreme Court disagreed that the error was harmless quoting the lone dissent at the Court of Appeals, "[the] repeated injection into the case of Rodriguez's nationality, ethnicity, and illegal-immigrant status, including his conviction and deportation, was plainly calculated to inflame the jury against him."[194] The Texas Supreme Court concluded: "Such appeals to racial and ethnic prejudices, whether 'explicit and brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very basis of our judicial policy."[195]

b. Rules 3.1 & 3.4- Frivolousness

When engaging in tactics similar to those used in TXI Transportation, and indeed, in any cases in which immigration status is not relevant, counsel attempting to discover or admit such evidence should be concerned about Model Rule of Professional

Conduct 3.1.[196] Rule 3.1 prohibits an attorney from bringing or defending a proceeding, or arguing an issue therein unless doing so is not frivolous.[197] Where Rule 3.1 presents difficulties to those defending against inquiries into immigration status is that determining whether a claim is "frivolous" is exceedingly difficult.[198] Additionally, drafters of the 2002 Model Rules of Professional Conduct, in order to make the standard less subjective, deleted language that held an action to be frivolous if it was primarily motivated for the purpose of "harassing or maliciously injuring ***646** another."[199] Rule 3.4 is the corollary to Rule 3.1 for frivolous discovery requests.[200] In both instances, the key issue is determining frivolousness.[201] Therefore, when presented with a case such as TXI Transportation, it is difficult to state clearly that the plaintiff's arguments were frivolous, especially when both the trial and appellate courts acquiesced in the presentation of the immigration-based arguments.[202]

c. Rule 4.4- Substantial Purpose

Of the two primary ethical rules that suggest caution for counsel attempting to utilize some form of status coercion, Rule 4.4(a) is most clearly on point.[203] As noted above, Rule 4.4(a) prohibits action that "ha[s] no substantial purpose other than to embarrass, delay or burden a third person."[204] Impliedly then, Rule 4.4(a) would allow an action intended to embarrass, delay, or burden a third person provided that it did in fact have a substantial purpose,[205] although at least one court has suggested that there might be a limit to the type of action taken.[206] In cases where immigration status is irrelevant to the underlying action, that substantial purpose is likely to be lacking.[207] In closer cases, or perhaps where immigration status is relevant yet barred by the court due to potential prejudice, the question is much more difficult. In some cases, it may come down to a determination of what "no substantial purpose" means.[208]

***647** As might be expected, determining the definition of "substantial purpose" most often, but not always, arises in disciplinary proceedings.[209] Massachusetts courts have broadened the scope of the language to mean "some legitimate purpose."[210] In Discipline of an Attorney, the attorney in question who represented a gas utility submitted, to the trooper's supervisor, the transcript of the deposition of a state trooper assigned to investigate an explosion.[211] The alleged purpose of such action was to one, "protect his client's 'legitimate concerns in other fire and explosion matters,"' and two, for the trooper's supervisor to "remove the trooper from further fire investigation work and require him to obtain special training," which action would certainly weigh in the attorney's favor in attacking the trooper's credibility in the underlying action.[212]

In sanctioning this behavior, the court found it did not run afoul of Massachusetts DR 1-102(A)(5) (conduct prejudicial to the administration of justice). The court believed itself to be confronted with balancing zealous, vigorous advocacy against the processes of orderly trial. In this matter, the court held that to sanction the attorney would "'chill the less courageous attorney in his efforts to represent his client effectively."'[213]

Reading "substantial" as "legitimate" does serious disservice to the purpose and scope of Rule 4.4, and is more akin to the New York State Bar Association's proposed amendment to the Rule which would have deleted "substantial" altogether when the Rule was being debated in 1983.[214] In Kligerman, the court combined the "substantial" and ***648** "legitimate" tests to require counsel to demonstrate a "substantial legitimate purpose" when taking action that may "have the incidental effect of causing" harassment or embarrassment to a third party.[215]

In 2007, the Kansas Supreme Court was faced with interpreting the scope of Rule 4.4.[216] In the Kansas case, the attorney proposed an entirely subjective test based solely on the actor's perception of the situation.[217] The Kansas Supreme Court rejected the pure subjective approach, but reaffirmed its prior decision noting that while an attorney's subjective motive or purpose is relevant, the ultimate decision is to be made on an objective basis.[218] The Comfort court concluded: "A lawyer cannot escape responsibility for a violation based on his or her naked assertion that, in fact, the 'substantial purpose' of conduct was not to 'embarrass, delay or burden' when an objective evaluation of the conduct would lead a reasonable person to conclude otherwise."[219]

In Comfort the court recognized that the attorney "had legitimate objectives,"[220] but found that the means employed "served no substantial purpose other than to embarrass [opposing counsel]."[221] In Royer, the Kansas Supreme Court was confronted with an attorney who facilitated the sale of a soon-to-be condemned building to an indigent third party for $1. In facilitating the sale, the attorney's goals were to transfer the ownership of property from his client prior to condemnation or demolition that his client would be required to pay for, and to transfer the financial burden of demolition to the indigent individual, and ***649** therefore, indirectly to the city who would then have to bear the cost.[222]

The Royer Court analogized respondent's actions to a similar case in Kentucky, where the Kentucky Supreme Court found that, "even though [counsel's] actions served a legitimate purpose and an illegitimate purpose," counsel had violated Rule. 4.4.[223] In Royer, the respondent was disciplined even though one member of the hearing panel objected to the violation of Rule 4.4 given that even though counsel embarrassed, delayed, and unreasonably burdened two third parties, his "substantial purpose of advancing his clients' financial interests precludes a finding of violation of [Rule] 4.4."[224]

How then should attempts to introduce immigration status be treated under Rule 4.4(a)? It appears that the favored interpretation of Rule 4.4(a) requires a "substantial" purpose, and of the courts that have used the term "legitimate," it seems that the proper reading should be that an attorney's purpose in introducing immigration status must be both legitimate and substantial.[225] Legitimate purposes alone should not suffice according to the plain language of Rule 4.4(a), and an illegitimate although substantial purpose should likewise not be given weight by any tribunal.

However, even this favorable reading of 4.4(a) for attorneys defending against status coercion may be insufficient to help the immediately affected client. Potential remedies, both civil and immigration, are discussed below,[226] but the affected attorney should be careful in how to respond to such tactics in order to avoid professional misconduct.[227] Simply reporting ethical misconduct, when such reporting would not likely be construed as being carried out to seek advantage, should not violate the Model Rules.[228]

Therefore, when immigration status is irrelevant to the underlying ***650** action, as it seemed to be in TXI Transportation, it is difficult to conclude that there was a substantial, legitimate purpose other than to embarrass and inflame hostile anti-immigrant sentiment. Under such a reading then, plaintiff's counsel would have violated Rule 4.4. If immigration status is tangentially related, and therefore possibly relevant,[229] the argument for seeking disciplinary action is more difficult, but not impossible. In both Shepherd and Royer, the courts allowed that a substantial purpose alone may not be sufficient depending on the illegitimate purpose involved.[230] In a case where the illegitimate purpose is to create bias in the finder of fact, public policy should strongly favor a finding of misconduct.[231] One of the clearest stated purposes of the Model Rules of Professional Conduct is that lawyers should "use the law's procedure only for legitimate purposes and not to harass or intimidate others."[232]

The difficulty in imposing sanctions in the cases where immigration status is tangentially related comes from proving that counsel's stated purpose in discovering or introducing such information is either illegitimate or insubstantial. Referring again back to TXI Transportation, both the trial court and court of appeals allowed the line of questioning directed at immigration status to stand.[233] Therefore, the job of the attorney from the Board of Professional Responsibility to show a violation of Rule 4.4 is much more difficult, at least in the present. As the issue of status coercion and its reach becomes better known, judges, as well as opposing counsel, will be left with less of a safe harbor than they currently believe themselves to have.

As a final thought on the scope of Rule 4.4, it will be difficult for affected counsel and the judges involved to determine when immigration status is irrelevant, or a lack of substantial purpose present, as counsel who attempt to seek such information become more creative. ***651** As seen in the Idaho Custody Case, the issue was purportedly one of driving privileges.[234] Additionally, courts in custody cases have been persuaded by arguments that legal guardians should be lawfully present in case medical treatment is needed for which consent is required.[235] If the issue is a tort action in a motor vehicle accident, aggressive counsel will likely argue that the unauthorized immigration status is relevant as the individual involved either obtained a license fraudulently or was driving without a license or insurance. In any of these scenarios, it is easy to see how low the bar is in determining relevancy. In these situations, it will be incumbent on counsel opposing such tactics and on the judiciary to resist these tactics when it is clear that the primary purpose is to harass as defined under Rule 4.4(a), or to engage in conduct prejudicial to the administration of justice under Rule 8.4(d).[236]

d. Rule 8.4- Conduct Prejudicial to the Administration of Justice

The second most relevant Model Rule of Professional Responsibility is Rule 8.4(d) which provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."[237] Comment 3 to Rule 8.4 is illustrative:

> 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. Legitimate

> advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of [Rule 8.4].[238]

While immigration status itself is not mentioned in the comment, there is a colorable argument that in many cases discrimination based on an individual's unauthorized immigration status is simply a proxy for national origin-based discrimination. In addition, the argument that ***652** only suspect classes under a traditional due process or equal protection analysis are protected under the language of Rule 8.4(d) and its accompanying Comment 3 ring hollow as sexual orientation and socioeconomic status are not suspect classes.[239] Indeed, the language identifying protected categories is contained only in the Comment, not the Rule. Therefore, even if immigration status is not considered to fall within the penumbra of national origin, discrimination based on it or any other category that is demonstrative of a prejudice arguably results in a violation of Rule 8.4(d) as such conduct adversely affects the administration of justice.

The phrase "legitimate advocacy" does not violate paragraph (d), and it is similar in its effect to Rule 4.4(d)'s "substantial" modifier, Federal Rules of Evidence 403 "substantially outweighed," and Rule 3.1's interpretation that an argument or action must not be "primarily motivated" for harassment. In every instance, conduct or evidence that is prejudicial may be allowed into an action, but only to a certain point along the continuum. Whereas the other concessions were made to encourage advocacy, the Rule 8.4 concession was made, at least partially, due to concerns over free speech.[240] The problem of course, as with Rule 4.4, is that neither the Rule nor the comment defines what represents legitimate advocacy.[241]

Beginning in 1994 with the ABA Young Lawyers Division, several proposals were submitted over the years which would have codified the now-current Comment 3.[242] The ABA Standing Committee on Ethics and Professional Responsibility reacted to the proposal at the February 1994 ABA Midyear meeting with a modification. In it, the Standing Committee ***653** put forth for the first time the language of "legitimate advocacy."[243] In a proposed comment, the Standing Committee provided the only explanatory text regarding "legitimate advocacy" suggesting "[p]erhaps the best example of [conduct that manifests bias yet is legitimate advocacy] is when a lawyer employs these factors, when otherwise not prohibited by law, in selection of a jury."[244]

Following the initial inability to adopt a formal rule prohibiting discriminatory or biased conduct, the ABA Criminal Justice Section in 1998 proposed a broader version of 8.4(d) that would have held it to be professional misconduct for a lawyer to act in any discriminatory fashion if the purpose was to abuse anyone involved in the judicial process, "to gain a tactical advantage" or to harass.[245] However, like its predecessors, this proposal was also withdrawn prior to any vote.[246] Finally, in 1998, the current version of Comment 3 was proposed and adopted at the 1998 ABA Annual Meeting.[247] Therefore, in terms of status coercion, attorneys are again left reading tea leaves to determine in what circumstances the introduction of immigration status represents legitimate advocacy.

Reported cases on what constitutes "legitimate advocacy" are few, and the ones that are reported, generally, are those where the improper behavior is clearly egregious.[248] The disciplined attorney in In re Thomsen, while representing the husband, made repeated references in a divorce proceeding of the wife's presence around town with a "black ***654** man."[249] The court held that such conduct was offensive, was unprofessional, and would serve to encourage future intolerance.[250] The issue of legitimate advocacy was easily dealt with as the court noted that both parties stipulated that the man's race was irrelevant to the dissolution proceeding.[251]

Similarly, in United States v. Kouri-Perez, the court held that "unnecessary and offensive references to ancestry" violated Rule 8.4.[252] Therefore, as noted above in reference to Rule 4.4, when immigration status is irrelevant to the underlying action, any comments regarding such status should be considered unnecessary and not representative of any type of legitimate advocacy. Applying Rule 8.4 to closer questions of relevancy is more difficult.

In Kansas, the burden of proof for a violation of Rule 8.4 is showing "prejudice to the administration of justice."[253] In applying that standard, Kansas courts look at harm that is "'hurtful,' 'injurious,' [or] 'disadvantageous.'"[254] While the standard is less than clear, courts have upheld it against challenges based on vagueness.[255] In fact, its breadth may be beneficial to attorneys combating the use of status coercion. It appears that if immigration status is ever invoked when such status is irrelevant to the underlying action, such invocation is almost necessarily "hurtful," and if the immigration status once

disclosed is used to enable a removal of the immigrant, the conduct is almost certainly injurious or disadvantageous to the immigrant.

***655** It appears, therefore, that conduct that is "legitimate advocacy" is not just non-frivolous advocacy which Rules 3.1 and 3.4 already govern, but is something more, and that "something" appears to be determined by relevancy and purpose. However, while these potential claims of misconduct are easily made in the abstract, disciplinary boards and courts may be loath to impose sanctions on conduct that has not clearly been labeled "prejudicial" in the past and which is not clearly frivolous.[256] To remedy that fault, counsel combating the coercive use of status should put both the court and opposing counsel on notice as early as possible that it considers such action to be misconduct.[257] As one court aptly remarked: "Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric."[258] Attorney conduct or questioning that focuses on one aspect of a client or witness, especially when irrelevant to the underlying matter, would appear to fall in that description.

e. Threatening Action to Gain Advantage

In the former Model Code of Professional Responsibility, it was misconduct to present or threaten to present criminal charges "solely to obtain an advantage in a civil matter."[259] While that provision failed to make it into the Model Rules of Professional Conduct,[260] the ABA Committee on Ethics and Professional Responsibility has issued a Formal Opinion stating that, although such conduct is not expressly prohibited, threatening criminal charges to gain an advantage in a civil proceeding would be misconduct if the alleged criminal act was not relevant to the civil claim, if the lawyer did not believe the criminal charges to be well-founded, or if the threat could be considered an attempt to encourage the misperception of improper influence.[261]

***656** Similar to the Model Rules outlined above, under the Model Code the criminal charges must not have been threatened "solely" to obtain an advantage in a civil proceeding. The ABA opinion purposefully omitted the "solely" issue, and instead focused on relevancy.[262] Presumably then, in order for the threat of criminal action to be validly made, it must be relevant to the underlying civil action, well-founded, and not purport an improper influence over the criminal process. Only if all three criteria are met would the "threat []be ethically permissible under the Model Rules."[263]

Assuming, as we have in this Part, that immigration status is irrelevant or only tangentially related to the underlying action, a threat of removal should therefore be improper under Formal Opinion 92-363, and by extension Rule 8.4, as being prejudicial to the administration of justice.[264] The lynchpin in the analysis, however, is whether threatening removal is equivalent to threatening criminal proceedings. In some ways the two proceedings are very similar. In both immigration and criminal proceedings, charges may only be brought by government attorneys, the process is adjudicated by a judge, and the party found guilty is subject to some type of sanction. There are differences which suggest that the two processes are not equivalent. Immigration judges are employees of the Executive Office of Immigration Review, an office ***657** of the Department of Justice, and subject to dismissal by the Attorney General.[265] In addition, the Supreme Court has held that deportation (now removal) is not punishment.[266]

There is then, the possibility that a disciplinary board could find that threatening or procuring the removal of an individual is not tantamount to threatening criminal proceedings, but such outcome should be unlikely. Given the similarities of the outcomes to the participants involved--an adjudicative process initiated by the government that results in loss of freedom--regardless of the Supreme Court definition of punishment, a disciplinary board tasked with eliminating bias and irrelevant conduct aimed solely at obtaining an advantage in a civil proceeding should equate the two and find a violation of Rule 8.4 where immigration status is irrelevant or only tangentially related to the underlying action even when opposing counsel has a well-grounded belief in the unauthorized status of the immigrant.[267] Furthermore, given Formal Opinion 94-383 which prohibits threatening disciplinary actions, ***658** which are structurally very similar, to seek an advantage, a disciplinary board should not be dissuaded from sanctioning the threat of removal.[268]

f. Rule 8.4(b) - Criminal Acts

Rule 8.4(b) states that it is professional misconduct for a lawyer to commit a criminal act that calls into question that lawyer's "honesty, trustworthiness or fitness as a lawyer."[269] While any crime may reflect adversely on a lawyer, traditionally only crimes of "moral turpitude" have resulted in sanctions under Rule 8.4(b).[270] A crime such as extortion as discussed in Part II.A,[271] would seem to be one of the clearest violations of the rule as such behavior shows a lack of honesty and

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trustworthiness.[272]

Even if a party attempting to gain advantage by threatening criminal charges (or perhaps removal in other jurisdictions), reasonably believes the charges to be well-founded and either relevant or the sole purpose depending on the jurisdiction, if there is no substantial purpose in making the threat other than to harass or embarrass, counsel for the extorting party would be subject to disciplinary proceedings for violating Rule 4.4(a).[273] Attorneys seeking to gain an advantage by threatening to adversely use opponent's immigration status should strongly consider whether their conduct would violate either criminal law or disciplinary ***659** rules, and therefore also result in a subsequent violation of Rule 8.4.[274] As one commentator put it, "Little distinguishes a lawyer who resorts to blackmail to coerce private advantage from a mob goon wielding a baseball bat . . . . Lawyers who fail to understand that symmetry invite ethical punishment, criminal prosecution and disgorgement of anything gained by themselves or their clients . . . ."[275]

g. Rule 8.4(a) - Acting Vicariously

Attorneys attempting to introduce evidence of immigrant status or seeking the removal of the opposing party should be ethically prohibited from doing so under the various rules cited above. These attorneys should also be prohibited from counseling their clients to themselves report the immigrant.[276] Such behavior is not similar to the Rule 4.2 exception that allows parties to communicate directly even though both have legal representation.[277] Take the following example where the attorney seeking removal states something along the lines of "although I am prohibited from contacting immigration authorities to report the opposing party, and I cannot counsel you to do so, you are not bound by any rules were you to independently report the immigrant." This type of behavior is not akin to allowing both parties to discuss the matter without representation should they choose to, but is much more similar to the attorney prodding his client to act in a way in which he or she would be prohibited from acting. To state it another way, the proposed language is more like requesting his client to pass along a message from the attorney to the opposing party, which is prohibited, than it is simply allowing the parties to discuss the matter.[278]

2. Relevancy - When Unauthorized Immigrant Status Should Matter

While immigration status should remain off limits in the vast majority of civil disputes, there are a slight amount of cases where it is undeniably a central part of the contested issue and as such, it could be ***660** properly before a finder of fact.[279] The central question, therefore, is how to best handle the issue from the immigrant's perspective, as well as limiting any adverse incidental actions such as the initiation of removal proceedings by the opposing party, its counsel, judicial employees, or witnesses to a proceeding.

a. Confronting the Issue

Even though immigration status may be relevant to the particular dispute, opposing counsel must still limit their actions to ethically sanctioned conduct.[280] In North Carolina, for example, the State Bar's Ethics Opinions unambiguously state, regardless of relevancy, that opposing counsel may not threaten reporting the immigrant to immigration authorities, nor may the counsel simply report the immigrant to immigration authorities. Furthermore, simply because immigration status is relevant, does not mean it will pass Rule 403's prohibition against unfair prejudice and confusion of the issue.[281]

While Rule 3.1's relatively low threshold of no frivolous arguments may be inapposite, Rules 4.4 and 8.4 are much less so.[282] While allowing evidence or testimony of immigration status may be required in some instances, the manner in which it is done may still be policed. Prejudicial statements regarding immigration status have been grounds for reversals of trial court decisions in the past, and would likely continue to present problems for counsel if the manner in which the evidence is introduced is to embarrass a third person with no other substantial purpose,[283] or is unfairly prejudicial to the administration of justice.[284]

In the Shepherd and Royer cases discussed above, even a substantial purpose was ineffective in combating an alleged Rule 4.4 violation. Likewise, counsel seeking safe-harbor by arguing that their tactics constitute legitimate advocacy may still run afoul of Rule 8.4's ***661** prohibition on conduct prejudicial to the administration of justice depending on the manner in which the evidence is sought, obtained, or entered into evidence.[285] In one case, a former attorney of the immigrant, who was to represent the immigrant with an immigration application, threatened the immigrant with disclosure of certain confidential

information if the immigrant were to file a grievance against the petitioner. Although the immigration status of the immigrant was relevant to the case in establishing the alleged attorney-client relationship, the court found numerous ethical violations in the conduct of the attorney.[286]

Therefore, actions such as making repeated statements regarding immigrant status in a judicial setting, notifying or inviting immigration enforcement personnel to civil proceedings, threatening to report the immigrant to immigration authorities, reporting the immigrant to immigration authorities, and any other action determined to be status-based coercion should be prohibited even when immigration status is relevant to the underlying proceeding on the grounds that such actions are prejudicial to the administration of justice, done for the primary purpose of harassment, highly prejudicial, and perhaps even frivolous.[287]

b. Initial Strategic Options

If immigration status is relevant and presented properly in an adjudicative setting, the immigrant has fewer options available to him or her. One option is strategic, proactive disclosure.[288] While benefits might include removing leverage from the opposition, establishing credibility with the finder of fact, and educating the bench, even proponents of this strategy recognize that it is highly risky and that the risks may substantially outweigh the benefit.[289] At the other end of the ***662** spectrum is simply counseling the client to refrain from pursuing his or her claim.[290] While unattractive, it likely guarantees that the client meets one of his or her goals in remaining undetected by immigration authorities. An additional option is to attempt to claim a privilege, such as the Fifth Amendment right against self-incrimination.[291]

One potentially significant problem with a Fifth Amendment claim in immigrant-initiated cases, if the claim is even applicable,[292] is whether such a claim would result in a dismissal of the action.[293] While the modern trend seems to be moving away from outright dismissal, such a result is theoretically possible.[294] Another potential problem is whether judges would make negative inferences from the immigrant's refusal to testify, especially if the judge had previously deemed immigration status relevant and the action was initiated by the immigrant.[295] Other options such as protective orders and motions in limine, though imperfect, are also potentially available to insulate the immigrant from unnecessary adverse consequences in the civil action or potential immigration proceedings and are discussed further in Part IV.A infra.

C. Ethical Constraints on the Judiciary

The Model Code of Judicial Conduct contains many of the same rules and regulations found in the Model Rules of Professional Conduct. As such, much of the discussion above regarding the ethical constrains on attorneys regarding status coercion could be applicable to judges ***663** depending on the context of the case. In the judicial context, when dealing with unauthorized immigrant status, the issue is not usually one of judicial unfairness or intentional mistreatment of unauthorized immigrants, but rather a misunderstanding of the intersection of civil law and procedure with that of immigration law.[296] Such behavior is generally not misconduct, but other more offensive behavior may be, and is typically easily identified.[297]

The most applicable rules from the Model Code of Judicial Conduct are Rule 1.2: Promoting Confidence in the Judiciary;[298] Rule 2.2: Impartiality and Fairness;[299] Rule 2.3: Bias, Prejudice and Harassment;[300] and Rule 2.6, Ensuring the Right to Be Heard.[301] In addition, Rule 2.3 also requires judges to prohibit the lawyers practicing before them from engaging in biased or prejudicial fashion.[302] The underlying principles in each of the four rules above are the integrity and impartiality of the judiciary and the confidence with which its rulings are perceived by the general public, including unauthorized immigrants.[303]

A common query from the bench is whether the judges have an affirmative duty to report unauthorized immigrants to immigration ***664** authorities. One Florida family law judge who felt that he was required to report unauthorized immigrant children stated: "[t]hey're violating the law, and I'm a judge. . . [d]on't I have some type of obligation to the system to report it . . . when it's smack-dab right out in front of me?"[304] The district's chief judge did not object to the practice but said that judges "must be mindful of action that harms the system."[305] In fact, judges are not required to report unauthorized immigrant or any illegal activity they become aware of in the course of a proceeding, but are allowed to treat the matter as an issue of discretion.[306]

In using their discretion, judges are to weigh a number of circumstances, including the likelihood of injury if the reported misconduct goes unreported.[307] The policy behind granting discretion to ***665** judges is that the "primary purpose of a legal

proceeding is to ascertain the truth, and if litigants or witnesses know that the judge presiding at a trial is obligated to report illegal conduct revealed in the course of litigation, [they] might be unwilling to testify truthfully."[308] In the only reported judicial ethics advisory committee opinion discussing a judge reporting an unauthorized immigrant, the opinion agreed with past precedent regarding knowledge of misconduct, and found that the matter is one for the judge's discretion.[309]

Since judges are not required to report unauthorized immigrants, their dealings with them should be regulated solely by the applicable Judicial Code of Conduct. While racially inflammatory conduct is obviously prohibited,[310] judges should clearly delineate acceptable patterns of behavior in any civil setting involving unauthorized immigrants so as to promote the integrity and impartiality of the judiciary,[311] and further undertake to learn relevant aspects of immigration law as appropriate.[312] In the family law arena, decisions awarding custody or terminating parental rights on the basis of unauthorized immigrant status alone suggest a lack of impartiality and fairness, which should be central to every judicial proceeding, and which must be upheld to maintain confidence in the judiciary.[313]

Judges allowing attorneys to engage in prejudicial conduct, which occurs in almost every instance of status coercion, appear to violate Rule 2.3(c), which requires the judges to maintain a courtroom free of bias, prejudice, and harassment.[314] While Rule 2.3(d) allows judges and lawyers to make legitimate references to race, national origin, ethnicity ***666** etc. when relevant,[315] the manner in which such evidence is presented should also conform to the applicable ethical standards and Rules of Evidence prohibiting unfair prejudice. Furthermore, in any case in which immigration status is introduced and not relevant, the judge should immediately act to prevent counsel from proceeding along a path whose sole purpose is to cloud issues and elicit an emotional response from the finder of fact.

Lastly, judges should be mindful of Rule 2.6's pronouncement that every person be accorded their lawful right to be heard.[316] Rule 2.6 may be involved if the judge unfairly attempts to encourage a settlement by invoking immigration status or implying that the party would be wise to settle given the unauthorized immigration status and potential adverse action that could be taken against him or her.[317] Even though such a statement may be accurate and the immigrant may indeed be reported to immigration authorities by the opposing party or opposing counsel,[318] such a statement is tantamount to telling the immigrant that this type of use of immigration status is sanctioned in that it succeeded in forcing a settlement. For the vast majority of cases, unauthorized immigration status is irrelevant to the underlying action, and for those which it is relevant, the immigrant should be allowed to continue his or her civil action without being pressured into a settlement solely or primarily on the basis of that status.[319]

Therefore, while nearly all judges refrain from prejudicial conduct themselves, they should be aware that allowing biased conduct from the attorneys in their courtroom is also a violation of their Code of Judicial Conduct. Furthermore, in cases in which immigration status is involved, the judges should make early determinations as to relevancy and how the issue will be treated. Additionally, in some cases the judges might be required to inquire of practitioners or experts in immigration law if they are uncertain how it might affect their ruling, and especially if they are basing their decision on their understanding of immigration law. In any event, judges, in almost every instance except perhaps with violent ***667** offenders, should avoid affirmative referrals to immigration authorities because such referrals decrease access to the judicial system, reduce overall confidence in the system, and may be discriminatory if a judge selectively refers cases. While failure to follow these standards may be misconduct in some cases, the worse effect is that it might allow bias and prejudice into the courtroom, impugn the integrity of the court's rulings and further harm, under color of law, an already disadvantaged and vulnerable class of individuals.

IV. Remedies

A. Civil Action Tactics

In civil proceedings, unauthorized immigrants' counsel has a variety of options to respond to status coercion depending on the setting, the stage of the proceeding, and the balance of the goals and fears of the client. The option of simply refraining from bringing a suit will not be discussed here as it essentially concedes the validity of using immigration status offensively in civil proceedings.

1. Protective Orders

Protective orders are available both during the discovery phase of any litigation,[320] as well as through the trial and potentially beyond.[321] In Centeno-Bernuy, the court, in prohibiting the employer from contacting immigration and law enforcement authorities, noted specifically that as a result of the employer's conduct "[p]laintiffs are reluctant to appear in court to pursue their rights because they are afraid that [their employer] will immediately contact authorities and have them arrested and deported, thereby making it difficult, if not impossible, for them to pursue the [FLSA and wage and hour] litigation."[322] While at least one court has found that an order prohibiting contact with law enforcement authorities violates the reporter's First Amendment Rights,[323] the ***668** Centeno-Bernuy court thought otherwise. The court concluded that the employer had "no constitutional right to make baseless accusations against plaintiffs to government authorities for the sole purpose of retaliating against the plaintiffs for filing the [action]."[324]

Courts that have ruled on protective orders regarding immigration status have commented at length regarding the policy behind granting them. In Rivera, the Ninth Circuit defended the protective order because to do otherwise would allow employers

> to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct the district courts to grant discovery requests for information related to immigration status in every case . . . under Title VII, countless acts of illegal and reprehensible conduct would go unreported.[325]

Allowing opposing parties to discover immigration status and related documentation has a demonstrable chilling effect on any immigrant party with a valid claim.[326] One court went on to note "[t]here is an in terrorem effect to the production of such [immigration] documents. It is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation."[327] Consequently, allowing the discovery of immigration status is likely to deter valid claims of illegal activity, increase the potential for bias and prejudice in a hearing, and potentially have the "perverse effect of encouraging employers to hire undocumented workers" in order to continue evading responsibility for their own illegal actions.[328]

***669** 2. Motions In Limine

If immigration status is known or discovered prior to the commencement of trial, counsel could move in limine[329] for an order prohibiting opposing counsel from commenting or in any way mentioning immigration status.[330] In deciding the motions in limine, courts generally rely on the same case law and public policy grounds as they do with protective orders.[331] When a motion in limine is appropriate, some commentators have suggested filing the motion in limine early in a proceeding in order to alert the court to the issue.[332]

3. Domestic Violence Protection Order

As mentioned above, one unauthorized immigrant was able to obtain a protective order that was to prevent her non-immigrant spouse from contacting law enforcement or immigration authorities.[333] While the Meredith court struck down the order on First Amendment grounds, other states have more favorable law.[334] Indeed, even the Meredith court ***670** noted that while the order sub judice was overly broad, a more narrowly tailored order may have withstood constitutional scrutiny.[335] The Meredith court also implied that immigration authorities themselves may sanction a party who is attempting to use government complaints to harass.[336]

4. Modify or Limit Claims and Relief Sought

Since Hoffman, unauthorized immigrants are precluded from seeking lost wages in NLRA cases,[337] and opposing counsel has not been hesitant in trying to broaden Hoffman's scope.[338] Additionally, by including lost wage claims the unauthorized immigrant's counsel may have unwittingly made immigration status relevant to the proceedings.[339] By removing any claim for lost wages, counsel can remove the Hoffman issue from the dispute, and potentially therefore make immigration status irrelevant to the underlying proceeding.[340]

5. Settlement Agreement that Includes No Report Component

A potentially risky option if the matter proceeds to settlement is to include a no report component that would prohibit the non-immigrant party from contacting law enforcement or immigration authorities at any time post-settlement. Such agreements are likely to fall within ethical guidelines if initiated by the unauthorized immigrant, but may be subject to challenge regarding their enforceability.[341] Attorneys drafting ***671** this type of settlement agreement need to take care that the agreement does not, itself, constitute a crime such as compounding a crime[342] or is in any other way illegal.[343] As the ABA Standing Committee on Ethics and Professional Responsibility has also agreed that lawyers may ethically participate in this type of agreement,[344] it appears that, depending on the jurisdiction,[345] such an agreement would be enforceable, and furthermore should not be subject to the First Amendment claims presented in protective order litigation.[346]

6. Bifurcated Trial

Some courts have utilized a bifurcation process separating trials involving unauthorized immigration status into guilt and damages phases, allowing evidence of immigration status only in the damages phase, in order to remove any potential prejudice from the adjudicative phase.[347] In one case, a defendant sought bifurcation arguing that the unauthorized immigrant plaintiff might otherwise benefit from "undue sympathy."[348] At the appellate court level in Salas, the court of appeals seemed to indicate that the plaintiff was at fault for failing to request bifurcation in order to mitigate any potential prejudice.[349] This decision was unequivocally overruled on appeal.[350]

***672** 7. Motion for Summary Judgment

In most cases, if opposing counsel or the opposing party reports the unauthorized immigrant's status to immigration authorities, summary judgment would not be the typical remedy.[351] However, that may not be the case where the reporting of the immigrant is done in retaliation of a protected employment activity.[352] If the retaliatory conduct adversely affects the employee and was primarily caused by the protected activity, summary judgment may be the appropriate remedy for the immigrant.[353]

8. Additional Miscellaneous Approaches

There are a variety of other options available depending on the circumstances involved. Depending on the case and jurisdiction, filing suit under a pseudonym may be an option acceptable to the unauthorized immigrant.[354] Additionally, confidentiality agreements are a possibility, though in some cases they will inspire little faith in the unauthorized immigrant if the opposing party has already demonstrated a willingness to coercively use immigration status.[355] Finally, depending on the severity of misconduct regarding immigration status, counsel could also move for a mistrial.[356]

***673 B. Immigration Court Tactics**

While the unauthorized immigrant may have a fairly versatile set of options in a civil proceeding, his or her options in immigration court, should he or she be placed in removal proceedings will be very limited. Assuming that the individual is indeed removable and does not qualify for any relief from removal or has already been removed, the basic options are: 1) continuances; 2) deferred action; 3) parole; and 4) stay of removal.

1. Continuances

The simplest technique for the unauthorized immigrant to prolong his or her stay in the United States is a motion to continue.[357] Unlike civil proceedings in which a continuance may be sought orally, immigration judges generally require written motions to be filed.[358] In the motion to continue, counsel should set forth the reason for the motion, accompanied by evidence of the same, and suggest a date for the rescheduled hearing.[359] The immigration judge, in his or her discretion may grant the motion "for good cause shown."[360] This option may be more or less attractive to the unauthorized immigrant depending on the progress of the immigrant's civil action or dispute, as well as whether or not the immigrant is being detained. For any case in which the civil action is very near resolution and the immigrant has not been detained, the motion to continue should be the first course of relief sought.

2. Deferred Action

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Deferred action, the ICE equivalent of prosecutorial discretion,[361] is relief which allows the unauthorized immigrant to remain in the United States.[362] In a sense, it acts as an informal stay of removal.[363]***674** Historically, deferred action has been difficult to obtain.[364] While no formal guidelines exist since the retraction of the Operations Instruction in 1997,[365] several INS/DHS interoffice memoranda exist which set forth factors for determining whether to grant discretion.[366] Both memoranda cited above enumerate certain factors such as legal permanent resident status, criminal history, humanitarian concerns, the likelihood of removal, past cooperation with authorities, military service, fairness, and efficiency.[367]

In terms of seeking deferred action due to an unresolved civil dispute, certain cases will likely receive more favorable treatment than others. Given the guidelines' stated criteria of humanitarian concerns and efficiency, cases of marital dissolution or custody proceedings where the non-immigrant has used status coercion to gain an unfair advantage, especially if the case is one of domestic abuse, and workplace cases involving wrongful termination due to unlawful discrimination or prohibited retaliatory conduct may have a greater chance of success. As deferred action, like any grant of prosecutorial discretion, exists primarily to allow ICE to make the best use of their resources, unauthorized immigrants faced with status coercion in appropriate cases should make the argument that they have already been taken advantage of, and allowing the status coercer to use the immigration process against the immigrant perverts any notion of fairness or humanitarian concerns.

***675** 3. Parole

If an unauthorized immigrant has been detained by DHS, the unauthorized immigrant may be eligible for conditional parole prior to the conclusion of any removal hearing.[368] While the remedy is fairly limited in scope, if granted, the immigrant would be allowed to remain in the United States until his or her immigration case was adjudicated, allowing him or her to pursue the civil action. If parole is granted, DHS, in its discretion, may revoke this parole at any time.[369]

If the unauthorized immigrant has already been removed, the immigrant may apply for parole to reenter the country if he or she is able to demonstrate "urgent humanitarian reasons" or "significant public benefit."[370] Provided that the immigrant is not being removed pursuant to § 235 (expedited removal),[371] DHS may grant parole subject to certain conditions. In considering which conditions to apply, DHS considers all relevant factors which include: 1) the giving of an undertaking or bond; 2) community ties; and 3) agreement to reasonable conditions.[372] For those immigrants subject to removal under § 235, the eligibility is restricted to those who, in addition to the humanitarian or public benefit reasons, are able to show that they do not present a security risk or risk of absconding, and further, that they fall within one of the delineated groups which includes: "[a]liens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States."[373]

Given the higher barrier for parole for individuals subject to § 235 expedited removal,[374] an alien not subject to expedited removal should also be able to use to his or her advantage the ongoing civil action and the fact that the immigrant will most likely appear as a witness in the ***676** proceeding. Typically, this type of parole will terminate "upon accomplishment of the purpose for which [it] was authorized."[375]

4. Stays of Removal

While in most instances, a stay of removal would be inapplicable to an unauthorized immigrant for the purpose of pursuing litigation, if the immigrant is also testifying against an individual in any state or federal prosecution, the immigrant may apply to DHS for a stay of removal.[376] The grant of the stay is discretionary, and DHS will generally also consider the same factors pertinent to a determination of whether or not to parole an immigrant seeking admission.[377] While this remedy is effective, its limited scope may render its utility to be negligible for maintaining presence to pursue or contest a civil action.

V. Conclusion

Considering the fact that status coercion is an attempt to gain advantage over another in a civil dispute by threatening, in the eyes of the immigrant, a significant punishment, it appears that it should be considered more offensive than actually is the case. As with Damocles, the sword of removal is ever-present for unauthorized immigrants, and in many cases the threat of removal is the primary reason these immigrants forego a legal remedy to which they are entitled. Were the threatened punishment the bringing of criminal charges or a disciplinary complaint, such behavior would clearly be proscribed,[378] and

furthermore, nearly every attorney knows that such behavior is ethically prohibited. However, given the prevalence of status coercion in civil disputes, it appears that many attorneys either distinguish the threat of removal from a criminal complaint, or given the vulnerability of the targeted individual, believe that such action may be taken with impunity under the guise of zealous advocacy.

Neither position is legally tenable. When immigration status is irrelevant to the underlying proceeding, an attorney may be violating a half dozen or more rules of professional conduct.[379] Even when immigration status is relevant to the proceeding, if opposing counsel *677 attempts to use such information coercively, he or she is still likely violating several rules including the improper use of judicial proceedings and conduct prejudicial to the administration of justice.[380] To date, only one state has adopted a specific legal opinion prohibiting the threatened use of reporting immigration status as well as the actual reporting of the immigrant to ICE without any threat.[381] While the general ethical rules of the remaining forty-nine states should be construed as covering status coercion as detailed above,[382] these states should also consider adopting specific ethics opinions for the explicit purpose of stating unequivocally to the practicing bench and bar that such behavior is not permissible.

What then of the homeowner example cited in the introduction? As no attorney was involved on behalf of the aggrieved purchaser, the only remedy against a lay individual may be the crime of criminal extortion. Even then, the aggrieved potential purchaser could assert the exception or affirmative defense "if the [potential purchaser] reasonably believed the threatened charge to be true and that [her] sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge."[383] It is not clear from the facts that the vindictive potential purchaser was being anything other than vindictive in seeking the unauthorized immigrant's expulsion from the country. Her action in reporting may then qualify as compelling the unauthorized immigrant to correct the wrong of unlawful presence. Sadly then, this particular case may therefore lie in the category of actions which are morally repugnant but not yet criminal; however, as the vast majority of status coercion cases tend to revolve around an attempt at gain, it is likely that other similar actors may run afoul of the law.

Additionally, the judiciary must act to prevent such tactics from occurring in their courtrooms. From discovery through trial and beyond, the judges should be mindful of the ethical implications of status coercion, and they should be prepared to utilize protective orders, grant motions in limine preventing the use of immigration status in court, refuse to admit evidence that is unduly prejudicial, bifurcate trials when necessary, and generally take any action necessary to ensure the administration of justice to a vulnerable population.

While this paper has focused on a more mechanical examination of *678 criminal and ethical rules that govern conduct that would be considered status coercion, there is a larger, deontological question as well. While beyond the scope of this article, the author has been struck by the clamor of the arguments on either side of the divide (which largely mirror the overarching themes in immigration reform or enforcement) as to why each side is correct with regard to adherence to natural "rules" and "duties." I do not believe the argument as to natural law is as close an issue as some would suggest. It seems clearly inimical to suggest a natural law that would countenance vindictive or extortionary behavior which serves no greater societal good, benefits a perceived bad actor, and is only justifiable on the grounds that all laws must be enforced even if the unlawful conduct is entirely unrelated to the separate civil dispute at issue.

The ultimate conclusion then, is that while there are tactics to combat the effectiveness of status coercion in both civil and immigration proceedings,[384] such tactics should be unnecessary. Attorneys who engage in extortionary behavior based on immigration status impugn the credibility and quality of the judicial system, and thereby undermine its effectiveness. Unauthorized immigrants who believe they will be subjected to such behavior are less likely to report misconduct and attempt to enforce their own rights. Therefore, allowing status coercion in civil proceedings perversely incentivizes attorneys and their clients to further engage in negative and sometimes unlawful treatment of unauthorized immigrants. The attorneys responsible for these actions should be sanctioned for ethical misconduct. In order for that to happen, attorneys need to earnestly self-police,[385] and the disciplinary bodies tasked with enforcing ethical conduct need to appropriately apply the ethical standards. Promulgating new, specifically-tailored opinions regarding the inappropriateness of status coercion will grant the disciplinary bodies the dual advantage of irrefutably clear law and prior notice.

Footnotes

a1 Assistant Professor at Creighton University School of Law. The author would like to give special thanks to Professors Stephen Legomsky and Peter Margulies for their thoughtful comments and advice, and to the organization ASISTA, which works closely with advocates of immigrant survivors of domestic violence and sexual assault, for sharing access to its members and their experiences. The author would also like to thank researchers Emily Solverson and Patrick Mack for their tireless assistance.

1 Berger Evans, Dictionary of Mythology 66 (Dell Publishing 1991) (1970).

2 The moral behind Damocles' story was stated best by Shakespeare, "[u]neasy lies the head that wears a crown." William Shakespeare, The Second Part of King Henry the Fourth act 3, sc. 1, line 34.

3 See Evans, supra note 1, at 66.

4 According to estimates, there are approximately twelve million unauthorized immigrants currently living in the United States. Jeffrey S. Passel & D'Vera Cohn, A Portrait of Unauthorized Immigrants in the United States, at i (2009), http://pewhispanic.org/files/reports/107.pdf (explaining that as of 2008, there were approximately 11.9 million unauthorized immigrants in the United States). These individuals are frequently referred to, among many other terms, as "unauthorized immigrants," "undocumented immigrants," or "illegal aliens." For consistency and clarity, I shall refer to these individuals as "unauthorized immigrants." See, e.g., Keith Cunningham-Parmeter, Fear of Discovery: Immigrant Workers and the Fifth Amendment, 41 Cornell Int'l L.J. 27, 29 n.7 (2008) (highlighting and outlining previous commentators' discussions on proper terminology for unauthorized immigrants).

5 The term "removal" encompasses the two formerly distinct categories of hearings for exclusion or deportation. 8 U.S.C. §1229a (2006); see also Stephen H. Legomsky, Restructuring Immigration Adjudication, 59 Duke L.J. 1635, 1641 (2010).

6 See Homeowner's Illegal Status Exposed After Aborted Sale, FoxNews.com, Nov. 17, 2008, http://www.foxnews.com/story/0,2933,453011,00.html.

7 Id.

8 Id.

9 Id.

10 Id.

11 Id.

12 Id.

13 See infra Part III.A. & B.

14 See infra Part II.

15 See infra Part III.

16 See infra Part IV.

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17 See infra Part V.

18 See David P. Weber, Halting the Deportation of Businesses: A Pragmatic Paradigm for Dealing with Success, 23 Geo. Immigr. L.J. 765, 783-84 (2009) (noting the untenable bargaining position of the unauthorized immigrant in commercial negotiations when threatened with immigration-related consequences).

19 See J.J. Knauff, A Defense Primer for Suits by Illegal Aliens, 61 Baylor L. Rev. 542, 577 (2009) (proposing various tactics to utilize unauthorized status to protect against damage awards, attack expert witnesses, and dismiss lawsuits on assorted grounds).

20 Id. The article goes so far as to suggest that counsel for the unauthorized immigrant has an ethical duty to disclose the immigrant client's unauthorized status to the court to avoid committing the crime of misprision of felony (the concealment of a felony). Id. at 570-71. This proposition is patently incorrect, even on the factual pattern set forth in the original article. Id. at 543-44; see also 18 U.S.C. §4 (2006) (federal misprision of felony statute). The section provides:
Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.
18 U.S.C. §4. Active concealment, whether physical or verbal, is required for the elements to be established. See Christopher Mark Curenton, The Past, Present, and Future of 18 U.S.C. §4: An Exploration of the Federal Misprision of Felony Statute, 55 Ala. L. Rev. 183, 185-86 (2003) (explaining the dichotomy between physical and verbal concealment, and noting the heightened standard for verbal concealment to include cases such as "knowingly providing the police with completely false information"); see also Roberts v. United States, 445 U.S. 552, 558 n.5 (1980) (requiring some affirmative act of concealment); United States v. Worcester, 190 F. Supp. 548, 565-66 (D. Mass. 1960) (summarizing federal court holdings as requiring "active concealment" rather than "mere failure to disclose" for the establishment of the crime of misprision of felony). Last, not all immigration violations are felonies. For example, unlawful entry is only a federal misdemeanor. 8 U.S.C. §1325(a).

21 See, e.g., Knauff, supra note 19.

22 See, e.g., TXI Transp. Co. v. Hughes, 306 S.W.3d 230 (Tex. 2010).

23 See, e.g., Transcript of Hearing Record, Montes v. Montes, No. TD-028738 (Cal. Super. Ct. Jan. 6, 2006) (on file with author).

24 By way of anecdotal evidence, while researching this article the author sent out an e-mail to a listserv for attorneys who practice or have an interest in the immigration implications of the Violence Against Women Act ("VAWA"), and within fifteen minutes e-mails from academics and practitioners across the country began to arrive sharing their experiences involving status-based coercion, including a case where a judge, on testimony from a battering spouse, ordered a battered spouse to report herself to Immigration and Customs Enforcement ("ICE") for removal. E-mail from Laura A. Russell, Supervising Attorney, The Legal Aid Soc'y, Bronx Neighborhood Office, to David P. Weber, Assistant Professor, Creighton Univ. Sch. of Law (May 20, 2010, 20:11 CST) (on file with author).

25 One attorney stated that every single client of his, when confronted with a threat to report his/her unauthorized immigration status decided to forego seeking any legal remedy. E-mail from Louis Valencia II, Attorney, to David P. Weber, Assistant Professor, Creighton Univ. Sch. of Law (May 20, 2010, 14:15 CST) (on file with author). The results are often similar in the employment litigation context; though it appears that unauthorized immigrants who commence proceedings in any of the identified areas are more likely to pursue their claim to a final resolution. See also Russ Buettner, For Nannies, Hope for Workplace Protection, N.Y. Times, June 3, 2010, at A1 (noting that domestic workers in New York fear that a proposed law providing workplace guarantees to all workers, authorized or not, will not benefit unauthorized immigrants as they would likely be unwilling to report violations to a government agency for fear of being discovered).

26 See infra Part II.C.

27 The power and economic utility of possessing authorized status in the United States labor market cannot be overemphasized. After the 1986 Immigration Reform and Control Act ("IRCA"), unauthorized immigrants who were able to adjust their status to that of legal permanent resident saw their wages increase dramatically, even when controlling for factors like education, language ability, and length of residency in the United States. See Francisco L. Rivera-Batiz, Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States, J. Population Econ. 91, 100-06 (1999) (noting that authorized immigrants earn approximately forty percent more than unauthorized immigrants, and that over fifty percent of that difference is likely due to discrimination against unauthorized immigrants).

28 A recent national study of 264 day labor sites around the country examining workplace abuse of unauthorized immigrants found widespread and systematic abuse:
Nearly half of all day laborers (49 percent) have been completely denied payment by an employer for work they completed in the two months prior to being surveyed. Similarly, 48 percent have been underpaid by employers during the same time period. The nonpayment and underpayment of wages is a particular problem in the Midwest where 66 percent of day laborers were denied their wages in the two months prior to being surveyed, and 53 percent were underpaid.
Abel Valenzuela Jr. et al., On the Corner: Day Labor in the United States 14 (2006), http://www.today.ucla.edu/portal/ut/document/onthecorner.pdf.

29 Id.

30 See id.; see also Mary Beth Sheridan, Pay Abuses Common for Day Laborers, Study Finds, Wash. Post, June 23, 2005, at A01 (quoting non-profit attorney Steve Smitson). Attorney Smitson stated: "What we find is, many day laborers are documented. But the employers just assume they're undocumented. They assume they're afraid to report the crime." Id.

31 Kate Bronfenbrenner, No Holds Barred: The Intensification of Employer Opposition to Organizing, Econ. Pol'y Inst. May 20, 2009, at 12, http://www.epi.org/publications/entry/bp235/.

32 See generally Benny Agosto Jr. & Jason B. Ostrom, Can the Injured Migrant Worker's Alien Status be Introduced at Trial?, 30 T. Marshall L. Rev. 383 (2005) (highlighting personal injury and loss of earnings litigation where defendants attempted to use the plaintiffs' unauthorized status to influence the outcome of the proceedings).

33 Mendoza v. Ruesga, 86 Cal. Rptr. 3d 610 (2008).

34 An "immigration consultant" is defined as a "person who gives nonlegal assistance or advice on an immigration matter." Cal. Bus. & Professions Code §22441 (2009). See also Mendoza, 86 Cal. Rptr. 3d at 619.

35 Mendoza, 86 Cal. Rptr. 3d at 614.

36 Id. at 615.

37 Id.

38 Id. at 616.

39 Id.

40 Id. at 615.

41 The doctrine of unclean hands essentially states that a party seeking equitable relief must not have behaved poorly. "[The party]

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must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim." Id. at 616-17.

42 Id. at 616.

43 Id. at 619.

44 Id.

45 The doctrine of in pari delicto is the principle that a plaintiff who has participated in a wrongdoing or is equally culpable may not benefit from the wrongdoing. Black's Law Dictionary 806-07 (8th ed. 2004).

46 Mendoza, 86 Cal. Rptr. 3d at 619.

47 United States v. Farrell, 563 F.3d 364 (8th Cir. 2009).

48 Id. at 367-68.

49 Id. at 371-72.

50 Id. at 372-73 (noting that because the immigrants believed themselves to be subject to physical harm and to removal, such a threat appears to have been a threat of force that could constitute illegal coercion and involuntary servitude).

51 In one contract dispute case, a trial court (subsequently reversed) barred an employer from threatening to contact immigration authorities and suggested that doing so may constitute involuntary servitude. Vintage Health Res., Inc., v. Guiangan, 309 S.W.3d 448, 458 (Tenn. Ct. App. 2009).

52 See infra Part III.B.2.

53 Transcript of Hearing Record at 14, Montes v. Montes, No. TD-028738 (Cal. Super. Ct. Jan. 6, 2006) (on file with author) (noting apparent "power play" by reporting immigration status in an attempt to gain custody of a child).

54 N.C. State Bar Formal Ethics Op. 15 (2009).

55 N.C. State Bar Formal Ethics Op. 3 (2005).

56 N.C. State Bar Formal Ethics Op. 15 (2009).

57 N.C. State Bar Formal Ethics Op. 15 (2009); N.C. State Bar Formal Ethics Op. 3 (2005).

58 Salas v. Hi-Tech Erectors, 230 P.3d 583 (Wash. 2010). Mr. Salas was injured when he slipped and fell twenty feet from his employer's ladder which did not meet code requirements. Id. at 584.

59 Id.

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60 Id. at 584-85.

61 Id. at 585.

62 Fed. R. Evid. 401.

63 Salas, 230 P.3d at 587 (reversing the trial court on an "abuse of discretion" standard).

64 Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768 (Tex. Ct. App. 1993).

65 Id. at 770 n.1.

66 Id. ("Texas law does not does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity, nor will this Court espouse such a theory.").

67 See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (prohibiting unauthorized immigrants from receiving backpay as such an award would be contrary to the policies espoused in the Immigration Reform and Control Act of 1986).

68 Cordova, 856 S.W.2d at 768. Lost earnings capacity must be distinguished from lost wages. Lost earnings capacity is recovery for the loss of capacity to earn money prospectively. Id. at 770. Lost wages or backpay are generally defined as wages not earned due to wrongful termination or injury. Hoffman Plastic, 535 U.S. at 142, 149.

69 Tyson Foods, Inc. v. Guzman, 116 S.W. 3d 233, 244 (Tex. Ct. App. 2003).

70 Professor David B. Thronson has written extensively in this area. See, e.g., David B. Thronson, Choiceless Choices: Deportation and the Parent-Child Relationship, 6 Nev. L.J. 1165 (2006); David B. Thronson, Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody, 59 Hastings L.J. 453 (2007); David B. Thronson, Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts, 11 Tex. Hisp. J.L. & Pol'y 45 (2005) [hereinafter Thronson, Of Borders and Best Interests].

71 See Thronson, Of Borders and Best Interests, supra note 70, at 49, 52 (noting that of noncitizen-headed families with children, eighty-five percent are mixed status).

72 MiaLisa McFarland & Evon M. Spangler, A Parent's Undocumented Immigration Status Should Not be Considered Under the Best Interest of the Child Standard, 35 Wm. Mitchell L. Rev. 247, 259 (2008) (noting the complications of mixed families of multiple immigrants where some family members may be able to legalize their status while others are not).

73 See Thronson, Of Borders and Best Interests, supra note 70, at 56.

74 See id. at 54 (citing In re M.M., 587 S.E.2d 825, 831 (Ga. Ct. App. 2003)).

75 See, e.g., In re Pryor, 320 N.E.2d 973, 976 (Ohio Ct. App. 1993) (stating that the primary consideration courts employ when determining custody cases is the best interest and welfare of the child standard). The courts base their review of this standard by examining the totality of the circumstances which includes a number of factors specified by statute. Ohio Rev. Code Ann. §3109.04(F)(1) (LexisNexis 2008 & Supp. 2010). The factors include: the wishes of the parents and the child; the child's

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relationship with parents, siblings, and others involved in the child's life; the child's ability to adjust; the mental and physical health of the child, parents, and others involved; the parent more likely to obey court orders and decisions; compliance with child support payments; and the criminal history of the parents. Id.

76 120 P.3d 812, 816-17 (Nev. 2005) (holding that district court has the discretion to consider a parent's immigration status in custody hearings, and noting further that district court's reliance on erroneous immigration advice was harmless error).

77 In re Duenas, No. 05-1751, 2006 WL 3314553, at *8 (Iowa Ct. App. Nov. 16, 2006) (granting custody to the father, a legal permanent resident because the mother, an unauthorized immigrant, did not have a job or driver's license). The district court in Duenas noted that the mother's unauthorized immigration status "complicate[d] the custody issue." Id. at *3.

78 See McFarland & Spangler, supra note 72, at 259.

79 All identifying information, such as party names, case number, and date, has been redacted from this case. A redacted copy of the case is on file with the author.

80 The level of abuse is shocking and includes, among other things, forced intercourse at the hospital while the unauthorized immigrant mother was being hospitalized for medical complications with her pregnancy. Eventually the forced social contact caused the mother to enter into premature labor. See case cited supra note 79, at 2-3.

81 See case cited supra note 79, at 8-9.

82 See, e.g., Transcript of Hearing Record, Montes v. Montes, No. TD-028738 (Cal. Super. Ct. Jan. 6, 2006) (on file with author).

83 Id. at 8.

84 Id. at 14.

85 Id. at 49.

86 See, e.g., Gail Pendleton, Ensuring Fairness and Justice for Noncitizen Survivors of Domestic Violence, Juv. & Fam. Ct. J., Fall 2003, at 69, 69.

87 Id. (quoting H.R. Rep. No. 103-395, at 26-27 (1993)).

88 See id. at 71 (noting that the abusers often are the initial parties to contact ICE, and that oftentimes the abusers then claim that the marriage was fraudulent).

89 See Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1953 (1994); see also Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The confidentiality of VAWA petitions is codified at 8 U.S.C. §1367 (2006).

90 See Memorandum from John P. Torres, Director, Office of Detention and Removal Operations, and Marcy M. Forma, Director, Office of Investigations, to Field Office Directors and Special Agents in Charge (Jan. 22, 2007), http://www.aila.org/content/default.aspx?bc=1016<<vertical bar>>6715<<vertical bar>>8412<<vertical bar>>24578<<vertical bar>>21720 (establishing confidentiality protocol for treatment of aliens who qualify or may qualify for relief under VAWA benefits or T or U nonimmigrant visas); see also United States v. Hawke, No. C-07-03456, 2008 WL 4460241, at *6 (N.D. Cal.

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Sept. 29, 2008) (holding that 8 U.S.C. §1367(a) should be read as stating "denied on the merits" rather than simply "denied," and thereby denying the alleged abuser's request to obtain a copy of the VAWA application).

91 See Thronson, Of Borders and Best Interests, supra note 70, at 60-61 (citing Velez v. Velez, No. 10 14 81, 1994 Conn. Super. LEXIS 3139, at *5-13 (Conn. Super. Ct. Dec. 7, 1994)).

92 See id. at 70 (citing Ali v. Tiwana, No. FA030473530S, 2003 Conn. Super. LEXIS 2535, at *7 (Conn. Super. Ct. Sept. 5, 2003)).

93 Rocano v. Rocano, No. 20726/02, 2006 WL 1594480, at *14 (N.Y. Sup. Ct. Apr. 12, 2006).

94 Transcript of Proceedings at 13-14, Lee v. Kim, No. F0105876 (Ca. Sup. Ct. Oct. 23, 2009) (on file with author).

95 Id. ("If she's found to be a victim of domestic violence, then she can file to remain in the country under [VAWA]. It's the only way at this point; is that right?")

96 See Brief of Appellant at 6, 15, Lee v. Kim, No. A127393 (Cal. Ct. App. May 3, 2010).

97 At times, the bias is race specific even if the individual is legally present in the United States. In a Nebraska court in 2003, a judge ordered that a Mexican-American father was prohibited from speaking "the Hispanic language" to his daughter if he did not wish to have his "visitation rights ... severely limited." Darryl Fears, Judge Orders Neb. Father to Not Speak 'Hispanic,' Wash. Post, Oct. 17, 2003, at A3. While the father did not suffer from status coercion in his case, it appears that his ancestry was used against him negatively in the custody proceeding.

98 See In re Tuv Taam Corp., 340 N.L.R.B. 756, 761 (2003) (suggesting that unauthorized immigrant status may be relevant in an unlawful failure to hire claim if the matter is defending on the basis of the individual's immigration status).

99 See, e.g., Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002) (holding that unauthorized immigrants are not entitled to receive an award of backpay, as such an award would be contrary to the policies espoused in the Immigration Reform and Control Act of 1986).

100 See infra notes 109-113 and accompanying text.

101 A no-match letter is a letter sent by the Social Security Administration ("SSA") to an employer when an employer-submitted W-2 differs from the SSA's database regarding an employee's social security number. See Aramark Facility Serv. v. Serv. Employees Intern. Union, Local 1877, AFL CIO, 530 F.3d 817, 826 (9th Cir. 2008).

102 Chirag Mehta et al., Social Security Administration's No-Match Letter Program: Implications for Immigration Enforcement and Workers' Rights 16 (2003), http://www.nilc.org/immsemplymnt/SSA_no-match_survey_final_report_ 11-20-03.pdf.

103 Id.

104 In re Tuv Taam Corp., 340 N.L.R.B. 756, 756 (2003). Tuv Taam was one of the first post-Hoffman cases to discuss backpay and reinstatement for cases involving unauthorized immigrants. Id. at 760. In its ruling, the Board held that the allegations of unauthorized status, and therefore the applicability of the remedies of reinstatement and backpay, were issues to be decided at the compliance phase of the proceedings. Id. The Tuv Taam Board noted that "[t]ypically, an individual's immigration status is irrelevant to a respondent's unfair labor practice liability under the Act." Id.

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105 Mehta, supra note 102, at 18, 23 (identifying situations in which employers have reduced unauthorized immigrants' wages, sometimes by as much as fifty percent after receiving no-match letters).

106 See, e.g., Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 148-49 (2002) (holding that unauthorized immigrants are not entitled to receive an award of backpay, as such an award would be contrary to the policies espoused in the Immigration Reform and Control Act of 1986).

107 Under Hoffman and its progeny, unauthorized immigrants are still entitled to receive compensation for work actually performed. See Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1277 (N.D. Okla. 2006); Galaviz-Zamora v. Brady Farms, Inc. 230 F.R.D. 499, 501-03 (W.D. Mich. 2005).

108 Hoffman, 535 U.S. at 149. This ruling prohibited the NLRB from awarding backpay for work not performed, as the unauthorized employees could not be said to be "'unavailable for work,'" or reinstatement of employment. Id. at 158. The Court noted that its ruling did not prevent the NLRB from imposing other sanctions such as cease and desist orders and posting notices of its past violations. Id. at 152. Insofar as the wrongfully terminated immigrant, however, such sanctions provide little to no benefit.

109 See, e.g., Flores v. Albertson, Inc., No. CV 01-00515 AHM, 2002 U.S. Dist. LEXIS 6171, at *17-18 (C.D. Cal. April 9, 2002) (stating that Hoffman is inapplicable to a Fair Labor Standards Act case); Design Kitchen & Baths v. Lagos, 882 A.2d 817, 830 (Md. Ct. App. 2005) (holding that Maryland's workers compensation law applies to all employees regardless of immigration status); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2003) (noting that "every case citing Hoffman since it was rendered has either distinguished itself from it or has limited it greatly").

110 Rivera v. Nibco, Inc., 364 F.3d 1057, 1066-67 (9th Cir. 2004) (rejecting defendant's argument that Hoffman precludes the award of backpay to an unauthorized immigrant regardless of the federal statute at issue).

111 Id. at 1067-68. Contra Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998) (holding that an employee was not entitled to Title VII remedies barring a showing of employment authorization). Egbuna has been distinguished on various grounds in the Fourth, Fifth and D.C. Circuits. See Olvera-Morales v. Int'l Labor Mgmt. Corp., No. 1:05CV00559, 2008 U.S. Dist. LEXIS 3502, at *31-33 (M.D.N.C. Jan. 1, 2008); Zirintusa v. Whitaker, No. 05-1738, 2007 U.S. Dist. LEXIS 29, at *15-16 (D.D.C. Jan. 3, 2007); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003).

112 Rivera, 364 F.3d at 1069.

113 See, e.g., Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (holding that Hoffman does not bar backpay under the FLSA); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (doubting whether Hoffman applies to FLSA case and citing to similar cases concluding that it does not); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003) (holding that IRCA did not preclude an illegal alien from receiving temporary total disability payments); Cherokee Indus., Inc. v. Alvarez, 84 P.3d 798 (Okla. Civ. App. 2003) (holding that unauthorized immigrant could receive workers compensation benefits).

114 See Knauff, supra note 19 at 545-46 (dismissing holdings in three recent Texas cases distinguishing Hoffman as "obiter dictum and not controlling").

115 Id. at 570-71 (suggesting that failure to proactively disclose the client's immigration status may constitute misprision of felony (affirmatively concealing a felony offense of another)). See supra note 20 and accompanying text detailing why representation of an unauthorized immigrant does not constitute misprision of felony, and further explaining that not all immigration violations are even felonies.

116 See Christine M. Cimini, Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation, 61 Stan. L. Rev. 355, 402-04 (2008) (identifying the tension between attorney-client confidentiality and required mandatory disclosures imposed on attorneys).

117 See Robert Gearty, Debt Collectors 'Would Call 3 or 4 Times a Day,' Victim Says, N.Y. Daily News, July 19, 2009, available at http:// www.nydailynews.com/money/2009/07/20/2009-07-20_debt_cowboys_would_call_3_or_4_ times_a_day_victim_says.html (reporting on collection agents who threatened to "send immigration to the house").

118 See Press Release, Office of the Mayor, N.Y. City, Mayor Bloomberg and Consumer Affairs Comm'r Mintz Announce New Debt Collection Regulations to Protect New Yorkers from Being Harassed for Debts They Do Not Owe (May 17, 2010), available at http:// www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%C2F%C2Fwww.nyc.gov%C2Fhtml%C2Fom%C2Fhtml%C2F2010a%®pr211-10.html&cc=unused1978&rc=1194&ndi=1.

119 Fair Debt Collection Practices Act §806, 15 U.S.C. §1692d (2006) (prohibiting debt collectors from engaging "in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt").

120 Id. at §1692e(4).

121 Under the FDCPA, the injured party can collect any actual damages, and up to $1,000 of additional damages if the court allows. Id. at §1692k(a)(1), (2)(A). Under New York City law, violators of the unfair collection ordinance could be liable for not less than seven hundred dollars and not more than one thousand dollars per instance. N.Y. City Admin. Code §20-494 (2010). In either case, the sanctions imposed likely pale in comparison to the harm suffered by the immigrant from any resulting removal action.

122 573 F. Supp. 461 (N.D. Ill. 1983).

123 This case was decided prior to the 1996 enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which made almost all unauthorized immigrants and nonimmigrants ineligible for almost all public assistance and federal benefits, including health and disability benefits, food assistance, housing, and other similar benefits provided by the federal government. Pub.L. 104-193, §§400-04, 110 Stat. 2105, 2260-67 (1996). However, the minor petitioners in Miller would still be eligible for federal benefits today as U.S. citizens. Id. at §§401, 431.

124 IDPA's insistence on receiving the relevant immigration status of all household members stems from their misplaced reliance on 7 U.S.C. §2020(e)(17) (1982). The statute required the relevant state entity to "determin[e] ... that any member of a household is ineligible to receive food stamps because that member is present in the United States in violation of the Immigration and Nationality Act." The statute's legislative history, which was noted by the court, was directed at determining which unauthorized immigrants were improperly attempting to obtain food stamps on their own behalf. House Comm. on Agriculture, Food Stamp Amendments of 1980, H.R. Rep. No. 96-788, at 414. Additionally, the legislative history specifically provided that state agencies were not to interpret the law as requiring them to act as "outreach officers of INS." Id. at 135-37.

125 Miller, 573 F. Supp. at 463.

126 Id. at 464-65 (detailing six different families in which the unauthorized parents applied for food stamps on behalf of the citizen children and where all six families eventually withdrew their applications due to the threat of being reported to the INS if they continued to pursue food stamps for their children).

127 See, e.g., In re Angelica L. v. Maria L., 767 N.W.2d 74 (Neb. 2009). In that case, the physician treating the premature baby of the immigrant told her that if she did not follow the physician's instructions, the physician would report her to immigration. Id. at 81. The immigrant was investigated by the Department of Health and Human Services (DHHS), "[b]ut after investigation, all reports were deemed unfounded." Id.

128 Id. at 83-84.

129 Id.

130 Id. at 88. On appeal the Nebraska Supreme Court overturned the ruling, noting that the "juvenile court seemingly ignored the overwhelming evidence provided in the home studies," but focused on the state's argument that "living in Guatemala would put them at a disadvantage compared to living in the United States." Id. at 93-94. The court concluded "[the mother] did not forfeit her parental rights because she was deported." Id. at 94.

131 2010 Ariz. Sess. Laws ch. 113; see also Alan Gomez, Schools Unsure of New Arizona Immigration Law, USA Today, June 14, 2010, available at http:// www.usatoday.com/news/nation/2010-06-14-immigration_N.htm. School officials and law enforcement were both unsure of how to proceed under the newly passed law, as the Arizona Peace Officer Standards and Training Board, tasked with developing training for handling the new law had said that it would not provide training regarding the role of officers located on school grounds as such "unique situations ... [are] too problematic and the issues too specific (to be) included in a statewide training program." Id. Arizona subsequently passed an amendment to S.B. 1070 limiting law enforcement officers' ability to question immigration status to only when an officer is making a "lawful stop, detention or arrest." 2010 Ariz. Sess. Laws ch. 113.

132 See Plyler v. Doe, 457 U.S. 202, 230 (1982).

133 See Mary Ann Zehr, Arizona Immigration Law Creates Uncertain Role for School Police, Education Week, June 14, 2010, available at http:// www.edweek.org/ew/articles/2010/06/16/35arizona_ep.h29.html?tkn=TQXF%2BD6Aa4p5eSqgsIA%®5uf9g0agwnL5h0l6&cmp =clp-edweek (noting that many have interpreted Plyler as prohibiting schools from engaging in any activity that may have a "chilling effect" on an individual's right to education).

134 See Gomez, supra note 131 (noting school officials' attempts to calm and reassure the local community that the school would not be conducting random immigration status checks as a result of the passage of S.B. 1070).

135 See Erin Walsh, Bill Would Force Hospitals to Report Illegal Immigrants, N. Country Times, Dec. 17, 2003, available at http:// www.nctimes.com/news/local/article_a313fb0a-8c24-5680-88de-aa9adaeffa84.html. The bill was ultimately defeated 331-88. See Undocumented Alien Emergency Medical Assistance Amendments of 2004, H.R. 3722, 108th Cong. (2004).

136 42 U.S.C. §1395dd (2006).

137 See H.R. 3722, 108th Cong. (2004).

138 See, e.g., Alex Johnson & Glenn Counts, Crime-stopper Now Faces Deportation, MSNBC.COM, May 26, 2010, http://today.msnbc.msn.com/ id/37263917/ns/us_news-immigration_a_nation_divided/. In the cited news story, the immigrant reported a police officer who had attempted to inappropriately touch his girlfriend. The officer then wrongfully arrested the immigrant for resisting arrest. Id. Eventually, five additional women came forward with separate allegations and the officer was fired and faces eleven counts of sexual assault, extortion, and interfering with emergency communications. Id. The immigrant was placed in removal proceedings, although he recently received a six-month stay on removal. Id.

139 See Orde F. Kittrie, Federalism, Deportation, and Crime Victims Afraid to Call the Police, 91 Iowa L. Rev. 1449, 1452 (2006) (identifying government officials who have been caught threatening removal if the immigrants do not pay the bribes demanded); see also Nina Bernstein, Immigration Officer Pleads Guilty to Coercing Sex From a Green Card Applicant, N.Y. Times, Apr. 15, 2010, at A22 (reporting on the conviction of an immigration official for threatening an immigrant with adverse immigration consequences in exchange for sexual favors).

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140 Kittrie, supra note 139, at 1452.

141 Id. at 1454 (quoting New York City Mayor Michael Bloomberg). Mayor Bloomburg stated, "[W]e all suffer when an immigrant is afraid to tell the police .... [P]olice cannot stop a criminal when they are not aware of his crimes, which leaves him free to do it again to anyone he chooses." Id.

142 One news outlet reported a Las Vegas Police community outreach program where the officer suggested a hypothetical to the immigrants, that the officer, knowing of their unauthorized presence, demanded $200 per week for his silence. Id. at 1481 (citing Juliet V. Casey, Police Pilot Program: HART Discourages Silence, Las Vegas Rev. J., Sept. 30, 2001, available at http://www.reviewjournal.com/lvrj_home/2001/Sep-30-Sun-2001/news/17086070.html). When asked their response, half of the immigrants admitted they would pay the fee, and not one would have reported the act. Id.

143 Some cities and localities have attempted so-called "sanctuary" policies designed to protect immigrants in general. See, e.g., Takoma Park, Md. Mun. Code ch. 9.04 (2004). Other cities have passed such laws that specifically include those who report criminal activity. See, e.g., Office of the Mayor, City of N.Y., City-Wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services, Exec. Order No. 41 (2003). Generally, however, these measures have been strongly disfavored by the executive branch. See Huyen Pham, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. Cin. L. Rev. 1373, 1383-85 (2006) (noting federal government's response to the sanctuary movement by prosecuting certain individuals and passing the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)). Professor Kittrie has also proposed an amendment, which would essentially require any prosecutor who learned of an immigrant's unauthorized status as a result of that immigrant reporting a crime, to obtain an independent source of knowledge of that immigrant's status prior to removal. See Kittrie, supra note 139, at 1503.

144 See Margaret Raymond, The Professionalization of Ethics, 33 Fordham Urb. L.J. 153, 169 (2005).

145 See Wayne R. LaFave, Criminal Law §8.12 (3d ed. 2000).

146 N.Y. Penal Law §155.05(e) (2000).

147 Model Penal Code §223.4(7) (1962).

148 N.Y. Penal Law §155.05(e).

149 Though the language of the exculpatory clause often refers to itself as an affirmative defense, New York courts have struck the word "affirmative," since treating the phrase as an affirmative defense would impermissibly shift the burden of disproving an element to the defendant. See, e.g., People v. Chesler, 406 N.E.2d 455, 459 (N.Y. 1980).

150 N.Y. Penal Law §155.15(2).

151 Id.

152 Merriam-Webster Collegiate Dictionary 1187 (11th ed. 2003).

153 N.Y. Penal Law §155.15(2); see Dawkins v. Williams, 511 F. Supp. 2d 248, 258 (N.D.N.Y. 2007). Immigrants are not criminally liable for unauthorized presence alone. See Michael John Garcia, Criminalizing Unlawful Presence: Selected Issues, at CRS-2 (2006), http:// trac.syr.edu/immigration/library/P585.pdf ("[A]n alien found unlawfully present in the U.S. is typically subject only to removal."). In order for the unauthorized presence to be criminal, something more is needed, and the usual crimes charged are for entry without inspection, unauthorized entry after a removal order, and document fraud. Id. Were opposing counsel to threaten

criminal charges rather than removal, the affirmative defense could be applicable subject of course to the requirement of "sole purpose." N.Y. Penal Law §155.15(2).

154 Model Penal Code §223.4 (1962).

155 18 U.S.C. §873 (1994) (applying the law to any person who demands money or any "other valuable thing").

156 See, e.g., 8 U.S.C. §§1325(a), 1326 (2006).

157 See supra note 143 and accompanying text.

158 See Cimini, supra note 116, at 385-90 (identifying the tension between attorney-client confidentiality and required mandatory disclosures imposed on attorneys).

159 Model Rules of Prof'l Conduct R. 3.3(b) (2010).

160 Id. R. 4.1(b).

161 Generally, unlawful presence occurs when an individual "is present in the United States after the expiration of the period of stay authorized ... or is present in the United States without being admitted or paroled." 8 U.S.C. §1182(a)(9)(B)(ii).

162 Unauthorized or unlawful entry occurs when any individual "enters or attempts to enter the United States at any time or place other than as designated by immigration officers or ... eludes examination or inspection by immigration officers." Id. §1325(a).

163 See Cimini, supra note 116, at 401 (citing United States v. Rincon-Jimenez, 595 F.2d 1192, 1193-94 (9th Cir. 1979) (holding that the offense of unlawful entry is completed upon entry to the United States and therefore is not a continuing offense)).

164 See Harry J. Joe, Illegal Aliens in State Courts: To Be or Not to Be Reported to Immigration and Naturalization Service?, 63 Tex. B.J. 954, 957 (2000) (noting that unauthorized presence itself is not a criminal offense).

165 Cimini, supra note 116, at 404.

166 Professor Cimini notes, however, that there may be instances when the unauthorized immigrant's attorney desires to disclose the client's immigration status for strategic reasons, such as establishing credibility, reducing the opponent's negotiation leverage, or informing the tribunal of the direness of the client's situation. Id. at 408-14.

167 See, e.g., Knauff, supra note 19 (setting forth a primer to elicit immigration status in insurance defense).

168 Of note is the fact that the Model Rules of Professional Conduct no longer contain the requirement that attorneys be zealous advocates, except in the Preamble and comments. Model R. of Prof'l Conduct Preamble P2, R. 1.3 cmt. 1 (2010) (stating that a lawyer "must also act with ... zeal in advocacy upon the client's behalf."). The Comment notes however that a lawyer may need to exercise discretion in "determining the means by which a matter should be pursued." Id.

169 See, e.g., In re Florentino, No. 25966-4-II, 2002 Wash. App. LEXIS 1896, at *19 (Wash. Ct. App. Aug. 9, 2002) (holding that immigration status may be a relevant factor in the best interests analysis).

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170 See Cimini, supra note 116, at 404.

171 See infra Parts III.B.1.

172 Model Rules of Prof'l Conduct R. 4.4(a) (2010).

173 Id. R. 4.4(a) cmt. 1.

174 See, e.g., Fed. R. Civ. P. 26(b)(1); Fed. R. Evid. 401.

175 Texas, for example, has long kept information pertaining to immigration status away from the jury when not directly relevant. See, e.g., Basanez v. Union Bus Lines, 132 S.W.2d 432, 433 (Tex. App. 1939) (reversing a jury verdict based on inflammatory comments made by defense counsel). In Basanez, defense counsel closed his arguments in a personal injury action against a bus driver and line as follows:
I don't know about [the plaintiff]; he has been here for eighteen years and has not taken out any of his first papers yet. I don't know who he is, I don't know whether he waded that river or swam. But, I say, Gentlemen of the Jury, when you gentlemen bring in this verdict he will swim that river again, because, I say to you, I think he is all wet in this law suit.
Id. at 432-33.

176 Fed. R. Civ. P. 26(b)(1).
Unless otherwise limited by court order, ... [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense .... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.
Id. (emphasis added). The Rule 26(b)(1) standard is purposefully broad and allows discovery of inadmissible evidence provided that counsel reasonably believe that such discovery will lead to the discovery of other admissible evidence.

177 Fed. R. Evid. 401. "'Relevant evidence' means 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." Id. (emphasis added). The baseline for Rule 401 is that the evidence must be "of consequence to determin[ing] the action." Id. The emphasized language was selected from the California Evidence Code §210 to avoid any ambiguity that might arise from a materiality standard. 6 Cal. Law Revision Comm'n: Reports, Recommendations, and Studies 10-11 (1964). As the Notes of Advisory Committee on Rules comments, "[t]he fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a 'material' fact." Fed. R. Evid. 401 advisory committee's note.

178 Courts have determined relevancy by inquiring whether the evidence was "relevant to proving a material issue in the case." See, e.g., Poole v. State, 974 S.W.2d 892, 905 (Tex. App. 1998). In Texas, a court has stated the relevancy test is "whether the cross-examining party would be entitled to prove it as a part of his case." Bates v. States, 587 S.W. 2d 121, 133 (Tex. App. 1979).

179 Fed. R. Civ. P. 26(b)(1).

180 Fed. R. Evid. 403. The Advisory Committee commented on the jurisprudence that has been created which excludes evidence, even evidence of unquestioned relevance, when there are circumstances that suggest that such evidence may cause a decision to be formed "on a purely emotional basis." In those situations, judges are forced to balance the admission of relevant evidence against prejudicial harm that might occur because of its admission.Fed. R. Evid. 403 advisory committee's note (citing M.C. Slough, Relevancy Unraveled, 5 U. Kan. L. Rev. 1, 12-15 (1956); Herman L. Trautman, Logical or Legal Relevancy--A Conflict in Theory, 5 Vand. L. Rev. 385, 392 (1952)). In the State of Nebraska, there is also a privilege against responding to any question which could "tend to render the witness criminally liable or to expose him or her to public ignominy ...." Neb. Rev. Stat. §25-1210 (2008) (emphasis added). Ignominy is defined as "deep personal humiliation and disgrace," or "disgraceful or dishonorable conduct, quality, or action." Merriam-Webster Collegiate Dictionary 618 (11th ed. 2003); see also infra Part III.B.2.b, discussing the Fifth Amendment privilege of avoiding self-incrimination.

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181 See, e.g., Penate v. Berry, 348 S.W.2d 167, 168 (Tex. Civ. App. 1961) (striking as prejudicial defense counsel's argument in a personal injury suit that "in this country you can't come into court and reach your hands into the pockets of an American citizen and take his property from him--not for an alien--they may take away").

182 See, e.g., TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 241-42 (Tex. 2010).

183 Id. at 241.

184 Fed. R. Evid. 404(b) (noting that evidence of other crimes, wrongs or acts "is not admissible to prove the character of a person in order to show action in conformity therewith"); id. at 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence...."). The Rule 609 exception only applies to criminal convictions that are felonies or crimes involving an act of dishonesty or false statement, and was committed within the preceding ten years. Id. at 609(a), (b).

185 Fed. R. Evid. 404(b), 608(b).

186 See TXI Transp. Co., 306 S.W.3d at 241-42 (holding that an unauthorized immigrant's inconsistent statements regarding his immigration status and how he obtained a Texas driver's license was not properly admissible for impeachment purposes). The TXI court cited cases from multiple jurisdictions holding that a witness's immigration status is not admissible for impeachment purposes based on the witness's truthfulness or lack thereof. Id. at 242 n.7 (citing First Am. Bank v. W. DuPage Landscaping, Inc., No. 00 C 4026, 2005 WL 2284265, at *1 (N.D. Ill. 2009); Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207-08 (E.D.N.Y. 1996); Castro-Carvache v. INS, 911 F. Supp. 843, 852 (E.D. Pa. 1995); Figeroa v. I.N.S., 886 F.2d 76, 79 (4th Cir. 1989); Hernandez v. Paicius, 134 Cal. Rptr. 2d 756, 761-62 (Cal. Ct. App. 2003)).

187 TXI Transp. Co., 306 S.W.3d at 230.

188 Id.

189 See Brief of Appellees at 10-13, TXI Transp. Co. v. Hughes, 224 S.W.3d 870 (Tex. App. 2007) (No. 02-04-00242-CV).

190 TXI Transp. Co., 306 S.W.3d at 243. Plaintiff's counsel also questioned TXI's representatives as to whether they believed that "they owed a 'duty' to the public to prevent an 'illegal' from driving a TXI truck." Id. In questioning the TXI representative, plaintiff's counsel asked: "You know that he's got an invalid license, correct? ... [The Department of Public Safety] said it's valid because they don't know he's a liar ... does the DPS know that he's a liar? Have you told them that?" Brief of Petitioner-Appellant at 13, TXI Transp. Co. v. Hughes, 306 S.W.3d 230 (Tex. 2008) (No. 07-0541).

191 TXI Transp. Co., 306 S.W.3d at 243.

192 Id. at 243.

193 TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 897 (Tex. App. 2007).

194 TXI Transp. Co., 306 S.W.3d at 244 (Gardner, J., dissenting) (citing TXI Transp. Co., 224 S.W.3d at 931).

195 Id. at 245 (citing Tex. Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 864 (Tex. App. 1990)).

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196 Model Rules of Prof'l Conduct R. 3.1 (2010).

197 Id. Comment 2 provides that an argument or action is frivolous "if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Id. at cmt. 2.

198 See Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility 698 (2009) (stating that only when the pleading or argument lacks "'any reasonable basis and is designed merely to embarrass or [for] ... some other ill-conceived or improper motives"' would the attorney be subject to disciplinary action (quoting State v. Anonymous (1975-5), 326 A.2d 837, 838 (1974))).

199 Id. at 700 (quoting Model Rules of Prof'l Conduct R. 3.1 cmt. 2 (1983)).

200 Model Rules of Prof'l Conduct R. 3.4(d).

201 Rotunda & Dzienkowski, supra note 198, at 769.

202 See TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 233 (Tex. 2010).

203 Model Rules of Prof'l. Conduct R. 4.4(a).

204 Id. Additionally, if the attorney's actions are so egregious as to disrupt a tribunal, he or she would also be subject to sanctions for violation of R. 3.5(d). Model Rules of Prof'l. Conduct R. 3.5(d).

205 See Kligerman v. Statewide Grievance Comm., No. CV 95 055 46 20, 1996 Conn. Super. LEXIS 831, at *10 (Conn. Super. Ct. Mar. 21, 1996) (holding that "if there was clear and convincing evidence that there was a substantial legitimate purpose for using" the court orders compelling the attendance of a party or witness, "then the committee could not find that the plaintiff violated the rule") (emphasis added).

206 See Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1484-85 (D.C. Cir. 1995) ("[W]e can imagine a case in which an attorney's behavior is so harassing that it merits sanctioning, notwithstanding the existence of a substantial purpose.").

207 See Cimini, supra note 116 at 404-05.

208 The difficulty in determining a substantial purpose has been present since the rule's creation. In the February 1983 Midyear Meeting of the Commission on Evaluation of Professional Standards (the "Kutak Commission"), which was drafting the model rules, a proposal was put forward to eliminate the rule entirely on the grounds that "[it] calls for subjective standards ... [and] is vague, indefinite and without standards of measure." Ctr. for Prof'l Responsibility: Am. Bar Ass'n, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 554 (2006) [hereinafter A Legislative History]. The former Model Code of Professional Conduct was no clearer in its limitations. Model Code of Prof'l Conduct DR 7-106(C)(2) (1980) (allowing questions that are degrading if relevant to the case); DR 7-102(a)(1), 7-108(D) (prohibiting action or questions that are designed "merely to harass").

209 See, e.g., Kligerman, 1996 Conn. Super. Lexis, at *10. Contra Mass. Inst. of Tech. v. ImClone Systems, Inc., 490 F. Supp. 2d 119, 127 (D. Mass. 2007) (ruling on a protective order and imposition of sanctions for improprieties in the manner and purpose of questioning in a deposition).

210 ImClone, 490 F. Supp. 2d at 125 (citing In re Discipline of an Atty., 815 N.E.2d 1072, 1079 (Mass. 2004)). In ImClone, the

attorney was sanctioned for questions that were aimed at depriving MIT of an expert witness by having the witness's employer prevent or disrupt his cooperation with MIT by providing his testimony. See id. at 126.

211 Discipline of an Atty., 815 N.E.2d at 1076.

212 Id. at 1077.

213 Id. at 1080 (citing Sussman v. Commonwealth, 374 N.E.2d 1195, 1199 (Mass. 1978)).

214 See A Legislative History, supra note 208, at 555.

215 Kligerman v. Statewide Grievance Comm., No. CV 95 055 46 20, 1996 Conn. Super. Lexis 831, at * 9 (Conn. Super. Ct. Mar. 21, 1996).

216 In re Comfort, 159 P.3d 1011 (Kan. 2007). In Kansas, "substantial" is defined in the Kansas Rules of Professional Conduct as that which "denotes a material matter of clear and weighty importance." Kan. R. of Prof'l Conduct Terminology 1.0(m) (1988).

217 Comfort, 159 P.3d at 1019.

218 Id. at 1020 (citing In re Royer, 78 P.3d 449, 454 (Kan. 2003)); accord Att'y Grievance Comm'n of Md. v. Link, 844 A.2d 1197, 1212-13 (Md. 2004) (Raker, J., concurring) (noting that courts must look to the purpose of the alleged wrongdoer's actions, rather than the effect in a Rule 4.4 disciplinary action).

219 Comfort, 159 P.3d at 1020. Contra Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1483 (D.C. Cir. 1995) (noting that determining whether behavior is unprofessional under Rule 4.4 depends on the attorney's perspective).

220 Comfort, 159 P.3d at 1021.

221 Id.; see also Royer, 78 P.3d at 454 (holding that legitimate goals may not be pursued through means that serve no substantial purpose other than burdening the opposition). In Comfort, the reprimanded attorney disseminated a letter alleging a conflict of interest against opposing counsel to the city manager, city attorney, the city clerk and public information officer, and five city commissioners. 159 P.3d at 1015-16.

222 Royer, 78 P.3d at 454.

223 Id. (citing Kentucky Bar Ass'n v. Reeves, 62 S.W.3d 360, 365 (Ky. 2002)). Kentucky's Supreme Court further enhanced the strength of Rule 4.4 by requiring the respondent to "have had a solely legitimate 'substantial purpose.'" Id.

224 Id. at 456.

225 See, e.g., id.

226 See infra Parts IV.A. & B.

227 See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994) (noting that although the Model Rules do not

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expressly prohibit threatening disciplinary charges to gain an advantage in a civil proceeding, the ABA Ethics Committee concluded that such action would be a disciplinary violation of Rule 4.4 and possible 8.4(d)).

228 Id. However, as with determining the definition of "substantial purpose" it is not clear what standard (objective or subjective) would be used to determine if an advantage was being sought.

229 See Fed. R. Evid. 401.

230 See Shepherd v. Am. Broad. Co., Inc., 62 F.3d 1469, 1483-84 (D.C. Cir. 1995); Royer, 78 P.3d at 454.

231 Lawyers, as "officer[s] of the legal system and ... public citizen [s] having special responsibility for the quality of justice" should not be allowed to utilize the court system or the threat of litigation as a tool for inciting prejudice. Model Rules of Prof'l. Conduct Preamble para. 1 (2010).

232 Id. para. 5. The concepts of respect for the legal system, improving access to the legal system, the administration of justice, and the public's understanding of and confidence in the judicial system permeate the preamble of the Rules of Professional Conduct as well as the rules themselves. Id. at paras.5-8, 13.

233 TXI Transp. Co. v. Hughes, 224 S.W.3d 870 (Tex. App. 2007); Hughes v. TXI Transp. Co., No. 03-05-379, 2004 WL 5174740 (Tex. Dist. Ct. Sept. 20, 2004).

234 See case cited supra note 79.

235 See case cited supra note 79.

236 Model Rules of Prof'l. Conduct R. 8.4(d) (2010).

237 Id.

238 Id. R. 8.4(d) cmt. 3.

239 See, e.g., Lawrence v Texas, 539 U.S. 558, 594 (2003) (striking down a law outlawing sodomy due to its failure of a rational-basis test); cf. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973) (holding that a school financing system based on inherently inequitable property tax distribution was not subject to strict scrutiny even though the result was substantially different educational experiences for students depending on whether they resided and attended schools in more or less affluent neighborhoods); Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008) (applying intermediate scrutiny to a case involving the armed forces' policy of Don't Ask, Don't Tell).

240 See Rotunda & Dzienkowski, supra note 198, at 1222-25.

241 Id. at 1224; Model Rules of Prof'l. Conduct Rule 8.4(d) cmt. 3.

242 A Legislative History, supra note 208, at 812-18. The Young Lawyers Division in 1994 submitted the first proposal which would have explicitly prohibited harassing and discriminatory conduct in any legal proceeding, whether in a court room or not. Id. The amendment was withdrawn prior to a vote. Id.

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243 See A Legislative History, supra note 208, at 813.

244 Id. Like the former proposal, this one was also withdrawn prior to any vote. Id. at 814-16. As neither the Young Lawyers Division proposal nor the Standing Committee proposal were voted on, the Standing Committee adopted a policy statement, drafted by the Young Lawyers Section, at the February 1995 Midyear Meeting which provided in part that the ABA condemns any action, words, or conduct by lawyers which are biased or prejudicial against anyone involved in the judicial process. Id.

245 See A Legislative History, supra note 208, at 814 (emphasis added).

246 Id.

247 Id. at 817. At the time this rule was adopted, there was much discussion and concern over the use of bias and prejudice in jury selection. Id. The comment was to emphasize that a trial judge's determination in a Batson challenge was not determinative, and the allegedly-offending lawyer would not be subject to discipline until the relevant state disciplinary body found a violation of Rule 8.4. Id. A "Batson challenge" occurs when counsel objects to a juror's exclusion because of perceived improper and/or unconstitutional grounds such as race or sex. Batson v. Kentucky, 476 U.S. 79, 97-98 (1986) (holding that prosecutors may not peremptorily challenge potential jurors solely on account of their race as such conduct is prohibited by the Equal Protection Clause).

248 See, e.g., In re Thomsen, 837 N.E.2d 1011, 1012 (Ind. 2005) (disciplining attorney for repeated references to a "black man" and "black guy" in a marital dissolution action). This 2005 case was a case of first impression for the court as it pertained to Indiana Professional Conduct Rule 8.4(g), Indiana's rule which prohibits lawyers from engaging in any race-based conduct that is biased or prejudicial. Id. at 1011-12.

249 Id. at 1012.

250 Id.

251 Id.

252 United States v. Kouri-Perez, 8 F. Supp. 2d 133, 139 (D.P.R. 1998) (sanctioning attorneys for unnecessary intrusion into and publication of the ancestry of an Assistant U.S. Attorney).

253 In re Comfort, 159 P.3d 1011, 1023 (Kan. 2007).

254 Prunty v. Consol. Fuel & Light Co., 108 P. 802, 803 (Kan. 1910) (citing Webster's Universal Dictionary).

255 See Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988) (noting that although hypothetical situations testing the vagueness of a rule of professional conduct, in this case Rule 1.02, could be imagined, such a rule should not be struck down when it has many valid uses); Comfort, 159 P.3d at 1024 (citing In re Anderson, 795 P.2d 64, 67 (Kan. 1990)); Att'y Grievance Comm. of Md. v. Alison, 565 A.2d 660, 667 (Md. 1989) (noting the "regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'" (quoting In re Snyder, 472 U.S. 634, 645 (1985)); In re Williams, 414 N.W.2d 394, 397 n.8 (Minn. 1987). Contra John F. Sutton, Jr., How Vulnerable is the Code of Professional Responsibility?, 57 N.C. L. Rev. 497, 517 (1979) (arguing for a standard that would be "realistic and susceptible of uniform, regular enforcement"). Dean Sutton was the Reporter for the ABA Special Committee on Evaluation of Ethical Standards which drafted the Model Code.

256 See, e.g., Howell, 843 F.2d at 208.

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257 See infra Part IV.A. regarding techniques to be used prior to and during civil proceedings to protect against status coercion.

258 In re Abbott, 925 A.2d 482, 489 (Del. 2007).

259 Model Code of Prof'l. Conduct DR 7-105(A) (1980).

260 The omission was deliberate. See Geoffrey C. Hazard, Jr. et al., The Law of Lawyering 40-8 (3d ed. Supp. 2008) (noting the prohibition was considered redundant of other rules).

261 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992).
It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.
Id. Other states retained the Model Code approach. See, e.g., Tex. Disciplinary Rules of Prof'l Conduct R. 404(b)(1) (1989) (prohibiting a lawyer from threatening criminal or disciplinary charges to gain advantage in a civil matter).

262 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363.
While the Model Rules contain no provision expressly requiring that the criminal offense be related to the civil action, it is only in this circumstance that a lawyer can defend against charges of compounding a crime ... A relatedness requirement avoids exposure to the charge of compounding, which would violate Rule 8.4(b)'s prohibition against "criminal act[s] that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." 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. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.
Id.

263 Id.

264 Id.

265 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2273 (2002) (codified as amended at 6 U.S.C. §§521, 522 (2002)).

266 See Ting v. United States, 149 U.S. 698, 730 (1893) (stating the deportation "proceeding ... is in no proper sense a trial and sentence for a crime or offence.... It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions" upon which his residency depends); see also, Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913). Contra Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases, 113 Harv. L. Rev. 1890 passim (2000). The primary effect of ruling that deportation (removal) is not punishment is that the criminal procedure provisions of the Constitution are therefore inapplicable in immigration proceedings. See Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Provisions Must Apply, 52 Admin. L. Rev. 305, 309-10 (2000) (noting that by determining that immigration cases are not punishment, the rights of trial by jury, assistance of counsel, the exclusionary principle from the freedom from unreasonable search and seizure, the prohibition against cruel and unusual punishment, etc. do not apply).

267 The ABA Commission on Ethics and Professional Responsibility has also promulgated an opinion on the threatened use of disciplinary proceedings to gain advantage in a civil matter. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-383 (1994). The Opinion stated that, like the prohibition on threatening criminal proceedings:
Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness or fitness as a lawyer.... Such a threat would also be improper if the professional misconduct is

unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.
Id.

268 Id. While Formal Opinion 94-383 noted that there may be limited circumstances under which Model Rule 8.3(c) may allow a lawyer representing a victim of legal malpractice to settle the malpractice case with the offending lawyer conditioned upon nondisclosure of the malpractice (which implicitly threatens disclosure), any lawyer considering such course of action should make sure that the proposed threat complies with both the Model Rules and criminal law. Id. It appears that the primary reason for allowing this type of threat is that the harmed party is made whole through valid restitution or compensation from the offending party in those limited circumstances when neither the elements of coercion are present and there is no required reporting of ethical misconduct.

269 Model Rules of Prof'l Conduct R. 8.4(b) (2010).

270 Id. R. 8.4(b) cmt. 2.

271 See supra Part II.A.

272 Section 5.11 of the ABA Standards for Imposing Lawyer Sanctions corresponds to a violation of Rule 8.4(b), and provides "disbarment is generally appropriate when (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft ...." ABA Standards for Imposing Lawyer Sanctions §5.11(a) (1986, as amended 1992) (emphasis added); see also Bd. of Prof'l Responsibility v. Meenan, 85 P.3d 409 (Wy. 2004) (disbarring attorney for conduct including extortion). In other jurisdictions, the crime may be defined as "blackmail." See, e.g., S.C. Code Ann. §16-17-640 (1992) (defining blackmail as the extortion of money or anything of value by threatening individuals with certain prohibited types of intimidation, such as provided in New York's extortion statute).

273 Model Rules of Prof'l Conduct R. 4.4(a); see Cimini, supra note 116,at 407.

274 Model Rules of Prof'l Conduct R. 8.4.

275 See John Freemen, Blackmail and You, S.C. Law., July 17, 2005.

276 Model Rules of Prof'l Conduct R. 8.4(a). While the North Carolina ethic's opinion on point did not specifically address the issue, Rule 8.4(a) clearly states that it is also misconduct for an attorney to "knowingly assist or induce another" to violate the rules or to "do so through the acts of another." Id.

277 Id. R. 4.2.

278 See Rotunda & Dzienkowski, supra note 198, at 1234-35 (citing The Legislative History of the Model Rules of Professional Conduct 148 (ABA 1987)).

279 See supra Parts II.B. and II.C (noting the relevancy of immigration status in an action for lost wages or unlawful failure to hire, as well as in some family court proceedings). In regards to the family court proceedings, some commentators have argued that immigration status should not be used in any context. See, e.g., Julie Linares-Fierro, Comment, A Mother Removed - A Child Left Behind: A Battered Immigrant's Need for a Modified Best Interest Standard, 1 Scholar 253, 319-21 (1999).

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280 See supra notes 54-57and accompanying text.

281 Fed. R. Evid. 403.

282 Model Rules of Prof'l Conduct R. 4.4(a), 8.4(d) (2010).

283 See Shepherd v. Am. Broad. Co., 62 F.3d 1469, 1483-84 (D.C. Cir. 1995); In re Royer, 78 P.3d 449, 454 (Kan. 2003).

284 Royer, 78 P.3d at 454.

285 See, e.g., In re Abbott, 925 A.2d 482, 485 (Del. 2007) (noting that sarcastic and inflammatory use of language is disruptive to the judicial process and prejudicial to the administration of justice).

286 See Statewide Grievance Comm. v. Paige, No. CV030198335S, 2004 Conn. Super. LEXIS 1922, at *12-19 (Conn. Super. Ct. July 14, 2004).

287 In addition, courts have held that an employer's reporting of immigrants to the immigration authorities (and perhaps even just the threat of reporting) in retaliation for any workplace complaint may be violations of anti-retaliation statutes. See Orrin Baird, Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond, 19 Lab. Law. 153, 161 (2003) (noting that such behavior violates the NLRA).

288 See Cimini, supra note 116, at 407-08.

289 Id.; see also Cunningham-Parmeter, supra note 4, at 76 (2008) (noting that admitting immigration status may also constitute "direct evidence of criminal liability and deportability").

290 Cunningham-Parmeter, supra note 4, at 76.

291 See id. at 62 (proposing counseling the use of the Fifth Amendment in immigrant-initiated employment litigation and detailing policy grounds for extending the privilege to immigrants in civil litigation).

292 Many unauthorized immigrants would be able to avail themselves of the benefits of the Fifth Amendment because they will have committed some immigration-related crime such as entry without inspection, failing to register, reentry after removal, or some type of document fraud. See id. at 56.

293 See Cunningham-Parmeter, supra note 4, at 73-74; Eric Schnapper, Righting Wrongs Against Immigrant Workers, Trial, Mar. 2003, at 46, 54. Case law has generally treated defendants that invoke the Fifth Amendment differently than plaintiffs, as they have been loath to penalize individuals involved in a lawsuit that was not of their own choosing. Cunningham-Parmeter, supra note 4, at 73.

294 Id., at 74 (noting that the practice of dismissing suites by plaintiffs who invoke the Fifth Amendment privilege has not "'carried the day"' (quoting McMullen v. Bay Ship Mgmt., 335 F.3d 215, 218 (3d Cir. 2003))).

295 Since Baxter v. Palmigiano, the Supreme Court has allowed courts to draw "adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." 425 U.S. 308, 318 (1976). Some jurisdictions have passed laws that specifically prohibit judges from drawing any adverse inferences. See Cunningham-Parmeter, supra note 4, at 66.

296 In Rico v. Rodriguez, custody was awarded to the father, at least in part, on incorrect evidence that such an award would enhance the child's immigration petition. See Rico v. Rodriguez, 120 P.3d 812, 816-17 (Nev. 2005).

297 See Thronson, Of Borders and Best Interests, supra note 70, at 54 (noting judicial statements of open bias such as "I have a problem with your immigration situation" (citing In re M.M., 587 S.E.2d 825, 831 (Ga. Ct. App. 2003))); see also People v. Phuong, 679 N.E.2d 425, 428 (Ill. App. Ct. 1997) (chastising trial judge for discriminatory comments such as "'[n]othing like a bench trial with a Chinese interpreter"').

298 Model Code of Judicial Conduct R. 1.2 (2008).

299 Id. R. 2.2.

300 Id. R. 2.3.

301 Id. R. 2.6.

302 Tex. Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 866 (Tex. Ct. App. 1990); Model Code of Judicial Conduct R. 2.3(C). The Guerrero court emphasized the necessary role of trial judges in suppressing improper arguments. Id. at 868 (noting that the trial judge must not have "fully underst[oo]d the language of counsel, or he would not have permitted it,--would have rebuked it, and ought to have punished its author" (quoting Moss v. Sanger, 12 S.W. 619, 620 (Tex. 1889))).

303 "An independent, fair and impartial judiciary is indispensable to our system of justice." Model Code of Judicial Conduct Preamble para. 1. Judges must "strive to maintain and enhance confidence in the legal system." Id. "Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety." Id. R.1.2 cmt. 1. Indeed, not all bias from reported decisions is anti-immigrant, and some judges have been found to have acted with perceived bias even though it is clear that no racial animosity existed, and the judge's conduct was probably pro-immigrant. See Mejia v. United States, 916 A.2d 900, 903 (D.C. Cir. 2007) (reversing a conviction on the grounds that a judge's musings, though potentially well-intentioned, created a perception of bias).

304 Associated Press, Judge Accused of Abusing Power by Reporting Immigrant Children, Miami Herald, Jan. 19, 2004, at 8B. However the judge also acknowledged that he does not report every individual he suspects of being present without authorization. A Judge Goes Too Far, Palm Beach Post, Jan. 26, 2004, available at http://findarticles.com/p/articles/mi_8163/is_20040126/ai_n51824682/. In fact, the judge does not have a duty to report the illegal activity. See Fla. Ethics Advisory Comm., Op. 78-4 (1978). Other commentators have also reported on instances in which judges have contacted immigration authorities. See, e.g., Leslye E. Orloff et al., Ensuring the Battered Immigrants Who Seek Help from the Justice System Are Not Reported to the INS, in Leslye E. Orloff & Rachel Little, Somewhere To Turn: Making Domestic Violence Services Accessible to Battered Immigrant Women, A "How To" Manual for Battered Women's Advocates and Service Providers 278, 278-88 (1999).

305 A Judge Goes too Far, supra note 304.

306 Every judicial ethics advisory committee that has examined and reported on the issue has concluded that no affirmative obligation to report exists. Cynthia Gray, A Judge's Obligation to Report Criminal Activity, Jud. Conduct Rep., Fall 1996, at 3; see, e.g., N.Y. Advisory Comm. on Judicial Ethics, Op. 05-84 (2005) (noting that while a judge must report misconduct by another judge or attorney who has violated the Code of Judicial Conduct or Rules of Professional Responsibility, no rule has been adopted regarding litigants or witnesses); see also Ala. Judicial Inquiry Comm'n, Op. 86-281 (1986) (no duty to report criminal offense discovered during course of trial); Ariz. Judicial Ethics Advisory Comm., Op. 92-15 (1992) (no duty to report "illegal activity"); Fla. Ethics Advisory Comm., Op. 78-4 (no duty to report illegal activity); Ill. Judicial Ethics Comm., Op. 02-01 (2002) (no duty to report illegal activity, though reporting is not prohibited); Me. Ethics Advisory Comm., Op. 01-1 (2001) (no duty to report illegal activity); Utah Ethics Advisory Comm., Op. 00-3 (2000) (no duty to report illegal activity); and Wash. Ethics Advisory Comm., Op. 02-9 (2002) (no duty to report illegal activity).

307 N.Y. Advisory Comm. on Judicial Ethics, Op. 03-110 (2004). In Illinois, the courts have enumerated the factors to include:
(1) [T]he nature and seriousness of the offense; (2) conclusiveness of the information before the judge that a crime has been committed; (3) the recent, remote, or ongoing nature of the crime; (4) whether the crime has a victim and if so whether the victim is operating under a disability that would interfere [with][sic] the victim's ability to report the crime; (5) whether a danger to the community exists or the public trust is involved; and (6) whether the state's attorney or an assistant state's attorney was present when the information concerning the criminal activity was disclosed.
Ill. Judicial Ethics Comm., Op. 02-01.

308 N.Y. Advisory Comm. on Judicial Ethics, Op. 03-110.

309 N.Y. Advisory Comm. on Judicial Ethics, Op. 05-30 (2005).

310 See, e.g., In re Goodfarb, 880 P.2d 620, 623 (Ariz. 1994) (sanctioning a judge for using racially inflammatory language in court); see also In re Schiff, 635 N.E.2d 286, 287-88 (N.Y. 1994) (disciplining judges for purposefully disparaging Puerto Ricans in the presence of an Hispanic attorney).

311 Model Code of Judicial Conduct R. 1.2 (2008).

312 As the old saw goes, ignorance of the law is no defense. See id. R. 1.1 (duty to comply with the law); see also In re Harshbarger, 450 S.E.2d 667, 670 (W. Va. 1994) (noting that by accepting the position of judge, he had accepted the responsibility of becoming "learned in the law").

313 Model Code of Judicial Conduct R. 2.2.

314 Id. R. 2.3(C).

315 Id. R. 2.3(D).

316 Id. R. 2.3(D).

317 Id. R. 2.6(B).

318 Any attorney should be extremely cautious in reporting an opposing party to immigration authorities, as such conduct may likely violate the applicable Rules of Professional Conduct. See supra Part III.B.1. Further, opposing counsel should refrain from counseling their clients to engage in such conduct as that behavior would also likely violate the Rules of Professional Conduct. See supra Part III.B.1.g.

319 See supra Part III.B.1.b-d.

320 See, e.g., Fed. R. Civ. P. 26(c)(1). Rule 26(c) provides that any person contesting discovery of an issue may move for a protective order after attempting to resolve the dispute with the other party. Courts, in their discretion and for good cause, may issue an order to protect a party from harassment, embarrassment, annoyance, etc. The protective order may "forbid [] inquiry into certain matters, or limit[] the scope of disclosure or discovery to certain matters." Id. at 26(c)(1)(D).

321 See, e.g., Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128, 139 (W.D.N.Y. 2003) (granting a preliminary injunction prohibiting, on penalty of civil or criminal contempt, an employer from contacting immigration or other law enforcement authorities).

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322 Centeno-Bernuy, 302 F. Supp. 2d at 135.

323 In re Meredith, 201 P.3d 1056, 1062-63 (Wash. Ct. App. 2009) (reversing a no contact protective order on First Amendment grounds noting that a "citizen does not lose the right to petition the government merely because his communication to the government contains some harassing or libelous statements").

324 Centeno-Bernuy, 302 F. Supp. 2d. at 139.

325 Rivera v. Nibco, Inc., 364 F.3d 1057, 1064-65 (9th Cir. 2004).

326 Id. at 1066.

327 Flores v. Albertsons, Inc., No. CV0100515, 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002); see also Flores v. Amignon, 233 F. Supp. 2d 462, 464-65 (E.D.N.Y. 2002) (granting protective order against discover of immigration status information on the grounds that, even if relevant, the information is far more prejudicial than probative).

328 See Frank Goldsmith, North Carolina Advocates for Justice Seminar, The Ethical Implications of Discovery and Disclosure of Immigration Status, 10 (Feb. 20, 2009); see also Recinos-Recinos v. Express Forestry, Inc., No. CV A 05-1355, 2006 WL 197030, at *14 (E.D. La. Jan. 24, 2006) (granting protective order prohibiting discovery of irrelevant immigration status). Contra Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (holding where "plaintiff's immigration status is relevant to prove a material aspect of the defense, a protective order [is] not ... appropriate.").

329 A motion in limine is a pretrial request that certain inadmissible evidence not be referred to or offered at trial. Black's Law Dictionary 804 (8th ed. 2004).

330 See Rodriguez v. Texan, Inc., No. 01 C 1478, 2002 WL 31061237, at *2-3 (N.D. Ill. Sept. 16, 2002) (granting plaintiff's motion in limine to exclude mention of plaintiff's immigration status); see also EEOC v. First Wireless Group, Inc., 225 F.R.D. 404, 406 (E.D.N.Y. 2004) (upholding magistrate's protective order and denial of defendant's motion in limine to introduce immigration-related evidence on the grounds that failure to do so "would significantly discourage employees from bringing actions against their employers who engage in discriminatory employment practices"). In Gonzalez v. City of Franklin, the Wisconsin Supreme Court upheld the granting of a motion in limine excluding evidence of immigration status due to the prejudicial effect it could have. 403 N.W.2d 747, 760-61 (Wis. 1987).

331 See First Wireless, 225 F.R.D. at 406-07;Rodriguez, 2002 WL 31061237, at *3.

332 See Agosto & Ostrom, supra note 32, at 402.

333 In re Meredith, 201 P.3d 1056 (Wash. Ct. App. 2009).

334 See, e.g., Ohio Rev. Code Ann. §3113.31(E)(1)(h) (2009) (providing that judge may grant any relief that the court considers equitable and fair); see also Ronald B. Adrine & Alexandria M. Ruden, Ohio Domestic Violence Law §18:20 (2009) (stating that, among other things, a judge may validly order that an individual not withdraw an application for permanent residency filed on behalf of the immigrant, that the individual may be ordered to "take all necessary action" in assisting the immigrat with the application, and finally, that an individual "may be enjoined from communication with any government agency including ICE or the Department of Homeland Security or a particular Embassy or Consulate about the [immigrant]").

335 Meredith, 201 P.3d at 1064 (remanding the case for a more narrowly tailored ruling).

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336 Id.

337 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148-49 (2002).

338 See supra notes 106-108 and accompanying text.

339 See Fed. R. Evid. 401; see also Hoffman 535 U.S. 137.

340 See Goldsmith, supra note 328, at 8 (noting additionally that in the cases where unlawfully terminated immigrants were able to find substitute employment fairly quickly, any claim for lost wages would likely be minimal and therefore minimally harmful to the client if omitted).

341 See Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-13 (1995) (noting that such agreements may be ethically entered into, but that the client must be advised that "the entire settlement could be held void as contrary to public policy, even if the settlement is not in itself illegal"); see also 6A Arthur Linton Corbin, Corbin on Contracts §1421 (1962). The North Carolina State Bar's ethics opinion contains no proviso regarding any potential unenforceability of this type of agreement. N.C. State Bar, Formal Ethics Op. 15 (2009). The ABA Standing Committee on Ethics and Professional Responsibility only noted that such an agreement may be unenforceable if there were a mandatory obligation to report or testify such as a subpoena or other court order. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992).

342 The crime of compounding typically requires knowledge by one party that another has committed an offense, and attempts to seek more than is due as fair restitution or indemnification in exchange for not reporting the crime. ABA Comm. on Prof'l Ethics, Formal Op. 92-363 (1992); see also N.Y. Penal Law §215.45 (2000).

343 See N.C. State Bar, Formal Ethics Op. 15 (2009).

344 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363.

345 New York is of obvious concern given the fact that their ethics opinion notes the issue of potential unenforceability must be disclosed to the client. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-13 (1995).

346 See supra notes 333-336 and accompanying text.

347 See, e.g., Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 264 (S.D.N.Y. 2008); Melendres v. Soales, 306 N.W. 2d 399, 402 (Mich. Ct. App. 1981); see also Mariel Martinez, Comment, The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a Wider Lens, 7 U. Pa. J. Lab. & Emp. L. 661, 690-91 (2005) (suggesting that bifurcation may help refocus finders of fact on the issue of liability rather than ancillary questions of immigration status).

348 Lewis v. City of N.Y., 689 F. Supp. 2d 417, 429 (E.D.N.Y. 2010). In Lewis, however, it is likely that the "undue sympathy," if any, was a result of extensive medical injuries, not immigration status. Id.

349 Salas v. Hi-Tech Erectors, 177 P.3d 769, 774 (Wash. Ct. App. 2008), rev'd, 230 P.3d 583 (Wash. 2010). The court noted that, although plaintiff had in fact moved in limine to exclude evidence of immigration status, he should have further moved to limit discussion of immigration status to lost wages. Id.

350 Salas, 230 P.3d at 587 (holding that the trial court decision in denying the motion in limine and allowing evidence of immigration status was "based on untenable reasons ... [and] an abuse of discretion.").

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351 Motions for summary judgment are granted only when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

352 See, e.g., Contreras v. Corenthian Vigor Ins. Brokerage, Inc., 103 F. Supp. 2d 1180, 1182, 1186 (N.D. Cal. 2000) (granting summary judgment to the immigrant for FLSA and other wage claims after former employer reported her to immigration authorities the next business day after the first pre-hearing conference regarding the wage claims).

353 Id. at 1186.

354 See Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 504-05 (M.D. Pa. 2007) (allowing anonymous filing to protect immigration status information). Some jurisdictions have specific rules governing filing via a pseudonym. See James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993) (establishing factors upon which a court should decide whether or not to allow anonymous filing).

355 See Serrano v. Underground Utils. Corp., 970 A.2d 1054, 1058-59 (N.J. Super. App. Div. 2009) (alleging that employer failed to pay employees for two to three hours of work per day while requiring six day workweeks, and also alleging that the employer failed to pay the prevailing wage); see also Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 749 (D. Md. 2008) (stating "[e]ven if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery [on immigration status] ... there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights." (quoting Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 193 (2002))).

356 See Agosto & Ostrom, supra note 32, at 402.

357 The motion to continue will be of little use to the unauthorized immigrant if he or she is detained. In the case of detention, the unauthorized immigrant will need to seek conditional parole. See infra Part IV.B.3 and accompanying text.

358 Office of the Chief Immigration Judge, Immigration Court Practice Manual 96 (2008), available at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

359 Id.

360 8 C.F.R. §1003.29 (2010).

361 See id. §274a.12(c)(14) (defining deferred action as "an act of administrative convenience to the government which gives some cases lower priority"); see also Anna Marie Gallagher & Maria Baldini-Potermin, Immigration Trial Handbook §2:11 (2009).

362 Counsel for the unauthorized immigrant may seek deferred action at any time in the proceeding, however once immigration proceedings have commenced, ICE must move to dismiss the action in court as by that time jurisdiction of the case has vested with the immigration judge. 8 C.F.R. §239.2. Until jurisdiction of the case has vested with the immigration judge, ICE may unilaterally cancel the notice to appear, but ICE may not act unilaterally after it has issued the notice to appear. Id. This situation presents immigrants with the conundrum that they may not be able to obtain deferred action as the best time to request it is prior to the notice to appear being issued; however, if the notice to appear has not been issued, the immigrants may be loath to call ICE attention to themselves on the slim chance of receiving this benefit.

363 See Siverts v. Craig, 602 F. Supp. 50, 53 (D. Haw. 1985) (defining deferred action as "an informal administrative stay of deportation").

364 See 6 Charles Gordon et al., Immigration Law and Procedure §72.03 [2][h] (2010).

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365 INS Operations Instruction 242.1(a)(22) was removed in 1997. Gallagher & Baldini-Potermin, supra note 361, at §2:12.

366 See Memorandum from Doris Meissner, Comm'r, INS, to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents, & Reg'l & Dist. Counsel 7-9 (Nov. 17, 2000); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, to All OPLA Chief Counsel 3-6 (Oct. 24, 2005). The memoranda are nonbinding on DHS.

367 See sources cited supra note 366.

368 8 U.S.C. §1226(a)(2)(B) (2006). In some cases, particularly for aggravated felons, detention is mandatory while removal proceedings are pending. §1226(c). Additionally, parole under §236 is limited to aliens who are "lawfully admitted," and further, only if DHS is satisfied that that immigrant "would not likely pose a danger to property or persons and ... is likely to appear for any future proceedings." 8 C.F.R. §236(c)(8) (2010).

369 8 C.F.R. §236(c)(9).

370 8 U.S.C. §1182(d)(5).

371 See 8 U.S.C. §1225(b).

372 8 C.F.R. §212.5(d)(1)-(3).

373 8 C.F.R. §212.5(b)(5).

374 Id. While the Code of Federal Regulations repeats the phrases "urgent humanitarian reasons" and "significant public benefit" in addition to adding the security risk and risk of absconding language, 8 C.F.R. §212.5(b), it also provides simply that DHS may parole the immigrant "in accordance with section 212(d)(5)(A) ... as he or she may deem appropriate." 8 C.F.R. §212.5(c).

375 Id. §212.5(e)(2).

376 See 8 U.S.C. §1231(c)(2)(A)(ii).

377 See id. §1182(d)(5)(A); 8 C.F.R. §241.6(a) (citing as factors for consideration §241(c) of the INA and 8 C.F.R. §212.5- Parole of aliens into the United States).

378 See supra Part III.B.1.e.

379 See supra Part III.B.

380 See supra Part III.B.1.c. & d.

381 See supra note 54 and accompanying text.

382 See supra Part III.

383 N.Y. Penal Law §155.15(2) (2010).

384 See supra Part IV.

385 Model Rules of Prof'l Conduct R. 8.3 (2010) (requiring attorneys to report other lawyers' or judges' violations of the Rules of Professional Conduct).

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