

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

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A LAWYER WHO ASSISTS AN UNDOCUMENTED ALIEN IN OBTAINING WORKERS COMPENSATION BENEFITS MUST BALANCE HIS OBLIGATION TO PROTECT HIS CLIENT'S UNDOCUMENTED STATUS AGAINST HIS OBLIGATION OF CANDOR TO A TRIBUNAL.

QUESTIONS PRESENTED

- I. Whether an attorney's representation of an undocumented alien in a workers compensation case triggers the attorney's obligation under Rule 3-503.3(b) to take remedial measures, including disclosure of the client's undocumented status, to the tribunal.
- II. If the obligation to take remedial measures is mandatory, how is that obligation to be balanced against a client's right to seek limited workers compensation benefits and to be represented by counsel for that purpose?

FACTS

An attorney represents undocumented immigrants from time to time in the Nebraska Workers Compensation Court. In an effort to safeguard sensitive information of claimants, Rule 2(C)(1) of the Nebraska Workers Compensation Court sets forth a privacy policy to protect birth dates, Social Security numbers, and financial account numbers. Rule 2(C)(2) directs that this information be provided to the court in a separate filing (designated as "Addendum 3"). "The Addendum 3 document is mandatory with respect to the information identified in Rule 2(C)(1), but a party, attorney or the court may include in the Addendum 3 document additional personal or financial account information sought to be protected." Rule 2(C)(3).

Although submission of Addendum 3 is mandatory, in the case of an undocumented worker, completing and submitting Addendum 3 presents a problem for the claimant's attorney. If the attorney identifies the fraudulent Social Security number the claimant used to procure employment—assuming the employer required one—then the attorney has perpetuated the fraudulent use of the Social Security number. 8 U.S.C. 1324(c)(a)(2); 42 U.S.C. 408. If the attorney cannot provide a valid Social Security number for the claimant, the claimant's undocumented status will become obvious.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Rule § 3-501.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

Rule § 3-503.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

DISCUSSION

I. Whether an attorney's representation of an undocumented alien in a workers compensation case triggers the attorney's obligation under Rule 3-503.3(b) to take remedial measures, including disclosure of the client's undocumented status, to the tribunal.

The United States Supreme Court has determined undocumented immigrants are not entitled to back pay under the National Labor Relations Act (NLRA), because awards of this type are in conflict with federal immigration policy. *See Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002). In that case, the Court stated back pay benefits “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.” *Id.* at 151. The Nebraska Supreme Court has ruled that where an undocumented immigrant intends to remain in the United States, he is not entitled to vocational rehabilitation benefits because the purpose of these benefits is to restore an eligible injured employee to suitable gainful employment. *Ortiz v. Cement Products, Inc.*, 270 Neb. 787 (2005). Undocumented immigrants are not legally eligible to return to work. *Id.* at 790. *See also* 8 U.S.C. § 1324 (2000) (unlawful to hire unauthorized alien). *But see, Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202 (2009) (court upheld award of temporary total disability benefits to undocumented immigrant but did not reach question of entitlement to vocational rehabilitation absent evidence of maximum medical recovery and immigrant's intentions regarding future employment). Thus, at the outset, this committee recognizes the law in this area appears to be in a state of flux.

The Nebraska Rules of Professional Conduct state that confidentiality between attorneys and clients encompasses information “relating to the representation.” Rule § 3-501.6(a). “Confidentiality in the attorney-client relationship is of utmost importance.” Nebraska Ethics Advisory Opinion No. 93-4. The confidential relationship has been interpreted broadly and encompasses everything from the whereabouts of a multi-state fugitive to publicly accessible information. Nebraska Ethics Advisory Opinion No. 90-2; *In Re Anonymous*, 654 N.E.2d 1128, 1129 (Ind. 1995) (lawyer violated confidentiality by disclosing information available publicly), State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 2000-11(2000) (lawyers are required to maintain confidentiality even if a matter of public record); *contra In re Sellers*, 669 So.2d 1204, 1206 (La. 1996) (lawyer in violation for failing to disclose mortgage filed in public record); *In re Detention of Williams*, 22 P.3d 283, 286 (Wash. Ct.App. 2001) (social security records provided to lawyer by client were not confidential).

The Restatement (Third) of the Law Governing Lawyers § 68 (2000) identifies four elements for determining what is confidential information: 1) a communication; 2) made between privileged persons; 3) in confidence; 4) for the purpose of obtaining or providing legal assistance for the client. According to the facts presented to this committee, a client has communicated to an attorney his status as an undocumented immigrant in the course of pursuing workers compensation benefits. Bearing in mind the guidance offered by the Restatement and the fact that confidentiality is broadly applied, the committee is of the opinion that an undocumented immigrant's status is information “relating to representation” in a worker's compensation case. This imposes an ethical obligation upon an attorney to protect the information.

An attorney may disclose information protected by confidentiality when the client gives informed consent or the attorney is impliedly authorized to do so in order to carry out representation. Rule § 3-501.6. Here, the client has not consented to the disclosure of this information. Pursuant to Rule § 3-501.2(f), an attorney “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Thus, under the present facts even if the filing of a workers compensation claim is construed as impliedly authorizing the attorney to carry out acts in furtherance of that representation, an attorney cannot complete the Addendum 3 form without utilizing a fraudulent Social Security number, something the attorney must not do.

An attorney may also disclose confidential information if he or she reasonably believes it necessary to “prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm.” Rule § 3-501.6 (b)(1)-(4). The disclosure of an undocumented immigrant’s status is not necessary to prevent reasonably certain death or substantial bodily harm. “To prevent . . . a crime” indicates disclosure is allowed if the crime is ongoing or will be committed in the future. Because the facts at hand deal with workers compensation it implies the undocumented immigrant has already procured employment and the fraudulent Social Security number will not be used in the future to obtain this job. The use of a fraudulent Social Security number has been found to not be a continuing offense. *See United States v. Payne*, 978 F.2d 1177, 1180 (10th Cir. 1992); *United States v. Joseph*, 765 F.Supp. 326, 330 (E.D. La. 1991). Thus, the offense is completed when the fraudulent misrepresentation is made. *Id.* It is well settled ethically an attorney may not reveal completed crimes. ABA Formal Opinion 287; Nebraska Ethics Advisory Opinion No. 78-2. Hence, an attorney who has an ethical obligation to protect his client’s status as an undocumented immigrant may not disclose this information under any of the permissive exceptions to confidentiality.

Nevertheless, an attorney is in some instances mandated to disclose confidential information pursuant to Rule § 3-503.3. “A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct *related to the proceeding* shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Rule § 3-503.3(b) (emphasis supplied). As evidenced above a past use of a fraudulent Social Security number is not an ongoing crime, but once the attorney begins to represent the client in an adjudicatory proceeding even a crime committed in the past, if it is related to the proceeding, may require disclosure.

This determination hinges on relevance to the proceeding. “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.” *State v. Edwards*, 278 Neb. 55 (2009); Neb. Rev. Stat. § 27-401 (Reissue 2008). Although an undocumented immigrant’s status is not relevant to an employer’s liability for workers compensation benefits, it is relevant for purposes of determining damages. Many courts have limited recovery of certain types of workers compensation benefits based on an immigrant’s status as undocumented. *See, e.g. Hoffman Plastics Compound v. N.L.R.B.*, 535 U.S. 137 (no recovery of back pay); *Ortiz v. Cement Products, Inc.*, 270 Neb. 787 (no recovery of vocational rehabilitation benefits where undocumented worker intends to remain in United

States); Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99 (Pa. 2002) (total disability benefits may be stopped); Tarango v. State Indus. Ins. Sys., 25 P.3d 175 (Nev. 2001) (vocational rehabilitation benefits denied); Rivera v. United Masonry, Inc., 948 F.2d 774 (D.C.Cir. 1991) (total disability benefits not available); Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich.Ct.App. 2003) (weekly wage loss benefits not available). The limited benefits available to undocumented immigrants in workers compensation cases (solely because of their status) indicates that this information is material to the proceeding. *See* Maliqi v. 17 East 89th Street Tenants, Inc., 880 N.Y.S.2d 917 (NY 2009) (denial of motion in limine because immigration status is related to recovery). In other words, a client's status as an undocumented immigrant is relevant to a workers compensation proceeding because it defines the scope of available remedies.

Based upon the foregoing, the use of a fraudulent Social Security number is not an ongoing crime, but a completed one and as such an attorney is not ethically permitted to disclose this information. However, the representation of an undocumented immigrant in an adjudicatory proceeding where the client's undocumented status "relates to the proceeding" triggers the attorney's obligation under Rule 3-503.3(b) to take remedial measures, including disclosure to the tribunal, if necessary.

II. If the obligation to take remedial measures is mandatory, how is that obligation to be balanced against a client's right to seek limited workers compensation benefits and to be represented by counsel for that purpose?

Undocumented immigrants have a right to petition for workers compensation benefits in many jurisdictions, including Nebraska, although benefits may be limited. *See e.g.* Visoso v. Cargill Meat Solutions, 18 Neb. App. 202 (2009); Design Kitchen & Baths v. Lagos, 388 Md. 718, 882 A.2d 817 (2005); Safeharbor Employer Servs. I, Inc. v. Velazquez, 860 So.2d 984 (Fla. Dist. Ct. App. 2003); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003); Dowling v. Slotnik, 244 Conn. 781, 712 A.2d 396 (1998). Further, undocumented immigrants are guaranteed due process and equal protection under the fourteenth amendment. Plyler v. Doe, 457 U.S. 202, 210 (1982). Automatic or immediate disclosure of a client's status as an undocumented immigrant does not appear to be required under Rule § 3-503.3. This rule requires disclosure when all other remedial measures are unsuccessful.

Courts have recognized an undocumented immigrant's fear in pursuing a legal right where extreme prejudice may occur when immigration status is revealed. *See* River v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004); EEOC v. City of Joliet, 239 F.R.D. 490 (N.D. Ill. 2006); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005); Flores v. Amigon, 233 F.Supp.2d 462 (E.D.N.Y. 2002). Mandating disclosure may undermine a tenet of federal immigration policy aimed at "reduc[ing] the incentive for employers to hire illegal aliens." National Labor Relations Board v. A.P.R.A. Fuel Oil Buyers Group, Inc. 134 F.3d 50, 55 (2nd Cir. 1997). Employers may actually benefit economically from hiring undocumented workers if mandatory disclosure precludes or deters employees from obtaining workers compensation benefits.

Thus, while the right to workers compensation benefits has been limited for undocumented immigrants, those limited rights have clearly been recognized. The Nebraska Court of Appeals has specifically recognized an undocumented immigrant's right to certain benefits. It seems contrary to the recognition of these rights to require an attorney to adhere to a policy that deters immigrants from seeking such benefits. Nevertheless, the attorney must balance his obligations to his clients against his obligations to the court.

It is our conclusion that an attorney may complete Addendum 3 for the Nebraska Workers Compensation Court by noting in the space designated for a Social Security number the following: "Intentionally left blank." If after this submission the court requires the attorney to disclose the client's Social Security number, the attorney must either obtain the written consent of his client to disclose the past fraudulent use of a Social Security number, and hence his undocumented status, or must withdraw from the case.