ETHICAL ISSUES IN CASES INVOLVING UNDOCUMENTED WORKERS
Avoiding Ethical Dilemmas

- Attorneys for either party in claims involving undocumented workers require knowledge of:
  - State Workers’ Compensation Statutes
  - Rule of Ethics
  - Immigration Statutes
  - State and Federal Criminal Statutes
  - Labor regulations regarding hiring immigrant workers
Are Undocumented workers employees?

• General rule in most state systems undocumented workers are employees for purposes of coverage for work injuries

• Only two states exclude all benefits by statute, Wyoming and Idaho

• See article by Author David Torrey, WC Judge, for ABA Midwinter Seminar, April 9, 2011, written for the Panel: Equality for Immigrants and Undocumented Workers?
Arizona WC Statute

• An example of statutory language that includes undocumented workers as employees for purposes benefits follows:

• ARS 23-901(6)(b): Every person in the service of any employer subject to this chapter, including aliens and minors legally or illegally permitted to work for hire, ....

• But see concurring opinion in Gamez v. Industrial Comm’n, 213 Ariz. 314, 141 P.3d 794 (App.2006)
Representing the Undocumented Worker

- Ethical dilemma when counseling an undocumented worker whether to pursue a claim which may result in deportation, incarceration or prosecution
- Difficulties may arise as many undocumented workers have false papers or are working without papers with the employer’s knowledge
- Rules of Ethics which defines informed consent to require counseling the client regarding the consequences of pursuing the claim
Rule 1.0 of ABA Model Rules

• Definition of Informed Consent:

• (e) “Informed Consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct.

• Requires adequate communication to the client regarding potential pitfalls of filing a claim
Rule 1.4 Communication

• (5)(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
• Requires knowledge of the immigration consequences for the claimant and relating those to the client so a reasonable decision may be made regarding filing the claim.
• Requires communication to immigrant workers with temporary work visas who return to native country after a compensable injury and may face difficulties in obtaining a visa to return to the US for litigation.
Candor to the Court

• Ethical obligations for the lawyer representing a client who confides they are using a false Social Security Number or is working without legal documents

• Rule 3.3 (a)(1): A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement...
Potential Crimes for using false documents for employment

• Falsely documented worker: 8 USC 1325(a): Felony unlawful entry, 8 USC 1546(a): Felony false document use for employment, 8 USC 911: False claim of US Citizenship

• Attorney: 8 USC 1325: Felony aiding illegal alien, 8 USC 2: Felony aiding/abetting another in commission of a crime, 8 USC 4: Felony misprision of a felony.
Confidentiality when using Interpreters

• Cases involving undocumented workers often involve using interpreters for foreign speaking clients and may raise an issue as to whether confidentiality of conversations between lawyer and client are affected by presence of the interpreter

• ER 1.6 requires the lawyer not reveal information relating to the representation of a client and is generally unaffected by the presence of necessary interpreters. In addition, the attorney is wise to insure that the interpreter also understand the requirement of confidentiality extends to the interpreter.
Defense Counsel’s Potential Conflict

• Ethical issues with cases involving undocumented worker may develop for the defense attorney representing both the insurer and employer when the lawyer learns the employer is employing undocumented workers.

• Employer may not want the status of a documented worker exposed whereas the insurer may require the issue raised as a defense to the claim. Also, the attorney has a duty to counsel the employer against continuing to violate immigration law.

• ER 1.7 Conflict of Interest, when representing one client will be directly adverse to another client.
Consider Ethical issues in Cases Involving Undocumented Workers

- Rising numbers of foreign born persons in the US, authorized or unauthorized, make it important for Attorneys to understand all possible issues of ethics that may develop when representing either party in a claim involving undocumented workers.