

UNDOCUMENTED WORKERS

There are several ethical dilemmas that are faced by a Claimant's lawyer when they are representing an undocumented worker (illegal alien).

First is the lawyer allowed to divulge the fact that the worker is undocumented and is in the United States illegally?

It depends. This is information that would be considered confidential information under Rule 1.6(a) of the Virginia Rules of Professional Conduct, information "the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The lawyer could not voluntarily disclose this information without consent of the client or unless otherwise required or permitted to do so under Rule 1.6(b) and (c), Rule 3.3, and Rule 4.1. The lawyer cannot lie to a tribunal, present false evidence or information or otherwise in any way assist a client in perpetrating a fraud on a tribunal or to engage in any criminal or fraudulent conduct. See Rules 1.2(c) and (d), 1.6, 3.3, 4.1, 8.4.

If the lawyer (or the client) is asked directly about the client's status (e.g. in discovery, when being questioned in a hearing) or if there is a requirement to disclose in order to be able to pursue Workers Compensation benefits, then the lawyer and/or the client must answer or disclose truthfully. In such situations, to carry out her duty of communication to the client, (Rule 1.4(b)) the lawyer must advise and counsel the client that these disclosures must be made and what any possible consequences are or might be for doing so. See also Rule 1.1, Rule 1.2, Rule 1.3, and Rule 3.3. The lawyer should take whatever steps necessary or available to assist the client in mitigating any consequences that may result.

A situation could arise in which the lawyer is required to disclose information regarding the client's immigration status but, because disclosure could have detrimental consequences, the client tells the lawyer not to make the disclosure. If it is a situation in which false information has already been presented to a tribunal and the lawyer discovers it, the lawyer cannot follow the client's instruction. Rule 1.6(c) and Rule 3.3 require that the lawyer make the disclosure to correct any misrepresentation to the court. Generally it will follow that the lawyer must withdraw as counsel for the client. Id. See also Rule 1.16. If it is a situation in which no information has yet been provided but will have to be in response to some question or request, the lawyer also cannot follow the client's instruction to not fully disclose unless there is some legitimate legal alternative, like, for instance, invoking the Fifth Amendment. See Rule 1.2.

If discovery is propounded, can the worker take the Fifth Amendment? If the Fifth Amendment would be taken, would there be a negative inference against the worker that, indeed, the injured worker is illegally in the United States.

These are legal questions. There is nothing unethical about a client invoking the Fifth Amendment, however, in competently and diligently representing the client, the lawyer has a duty to adequately counsel the client whether and how to do so, if it is permitted, and then what, if any possible consequences may flow from doing so. See Rules 1.1, 1.2, 1.3. 1.4.

Question: Are there other instances in which a claimant's lawyer can be in an ethical dilemma in representing undocumented workers (discussion from the floor)?

SUPPLEMENT TO MEMORANDUM

As a practical note, that if claimant's counsel objects on the basis of the Fifth Amendment, the defense may well be able to dismiss the case based on the argument that the Fifth Amendment can be used as a shield but not as a sword. A more practical approach would be to object to Discovery inquiring of the claimant's eligibility for lawful employment on the basis that the claimant will not be asserting any rights, pursuant to §65.2-502 for partial incapacity. Therefore, on advice of counsel, the claimant objects to this Interrogatory on the basis that it is not relevant, nor reasonably calculated to lead to the Discovery of admissible evidence.

This suggested approach, usually avoids dismissal of a claim, based upon the Fifth Amendment. While the claimant may certainly assert a right under the Fifth Amendment, as a practical matter, the Commission will typically not allow a claimant to pursue a claim without responding to questions regarding eligibility for lawful employment because of the provisions of §65.2-502 (A), which disallow compensation for partial incapacity, for injured employees, not eligible for lawful employment.