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# Embracing Paradox: Three Problems the NLRB Must Confront to Resist Further Erosion of Labor Rights in the Expanding Immigrant Workplace

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# EMBRACING PARADOX: THREE PROBLEMS THE NLRB MUST CONFRONT TO RESIST FURTHER EROSION OF LABOR RIGHTS IN THE EXPANDING IMMIGRANT WORKPLACE

Michael C. Duff*

## INTRODUCTION

The much-discussed *Hoffman Plastic Compounds* opinion,[1] decided by the Supreme Court in 2002, was as indefensible for most labor lawyers as it was predictable for many immigration lawyers.[2] The opinion held "that allowing the [National Labor Relations] Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in the [Immigration Reform and Control Act].[3] It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[4] As Catherine Fisk and Michael Wishnie observed, before *Hoffman* many labor lawyers instinctively presumed that a worker's immigration status was immaterial to labor law coverage.[5] Labor law attorneys' reflexive presumption of broad labor law coverage derives from the tradition of "labor law's embrace of collective action and private rights enforcement to achieve public deterrence [of labor law violations]."[6] In other words, for a "traditional" labor lawyer the status

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[1] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).

[2] *See* Bruce A. Hake, *Radical Bill Would Criminalize All Aid To Undocumented Persons* at http://www.bibdaily.com/pdfs/Hake%20editorial3%203-2-06.pdf (last visited January 9, 2008) (discussing, among other things, the increasingly draconian nature of immigration law in connection with the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which passed in the House of Representatives but failed to pass the Senate).

[3] Throughout this article the term "IRCA" will mean the Immigration Control and Reform Act of 1986, 8 U.S.C. § 1324a et seq.

[4] Hoffman Plastic Compounds, 535 U.S. at 151.

[5] Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies*, *in* LABOR LAW STORIES 399-400 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

[6] *Id.*

of an individual discriminatee[7] was irrelevant to the question of coverage provided the employee did not fall into a classification expressly excluded from coverage by the National Labor Relations Act.[8] To view the matter differently would ignore the public function of labor law. A central tradition of American labor lawyers, and of the NLRA world within which they practice, is that of "solidarity," or assertion of collective rights in furtherance of individual rights.[9] That notion emphasizes individual rights as they impact the collective centrality of labor law.

The Supreme Court in *Hoffman* did not look through such a subtle prism. For a majority of the Court, unauthorized workers,[10] though covered as "employees" under the NLRA, were *not* entitled to backpay[11] if not lawfully present in the United States.[12] The Court thought this true because "awarding backpay to illegal aliens runs counter to policies underlying the IRCA, policies the Board has no authority to enforce or administer. Therefore . . . the award lies beyond the bounds of the Board's remedial discretion."[13] The Court essentially concluded that the policies of the IRCA - such as the Court found them to be[14] - were more important than the

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[7] "Discriminatee" is a specialized administrative law term referring to an individual who has been discriminated against for exercising rights under the National Labor Relations Act.

[8] 29 U.S.C. §§ 151-169. Unless otherwise indicated, "NLRA" is used in this article to refer to the National Labor Relations (Wagner) Act of 1935 and its major amendments, the Labor Management Relations (Taft-Hartley) Act of 1947, and the Labor- Management Reporting & Disclosure (Landrum-Griffin) Act of 1959.

[9] *See* Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law*, 53 Buffalo L. Rev. 883, 922-24 (2005-2006).

[10] Discussion of immigration issues invariably presents semantic difficulties, *see* Beth Lyon, *When More Security Equals Less Workplace Safety: Reconsidering U.S. Laws That Disadvantage Unauthorized Workers,* 6 U. Pa. J. Lab. & Emp. L. 571, 573-82 (2003-2004). Following Professor Lyon, the term "unauthorized worker" is used in this article to refer to anyone whom immigration laws forbid to work, and "undocumented immigrant" to refer to any individual whose *presence* in the United States is *unauthorized*. Not all undocumented immigrants work or seek to do so.

[11] The standard remedies for a discharge violating the NLRA are reinstatement to employment, backpay subject to mitigation, and a cease and desist order. 29 U.S.C. § 160(c).

[12] Hoffman Plastic Compounds, 535 U.S. at 151.

[13] *Id*. at 149.

[14] Although the Court spoke earnestly respecting the seriousness of the Congressional intent to eliminate unauthorized immigration, as manifested by the IRCA, *see* Hoffman Plastic Compounds, 535 U.S. at 147-149, a pragmatic assessment of that claim of seriousness has been offered by Judge Posner:

> "If all Americans were required to carry biometric identification, if any clandestine entry into the United States were punished as a serious crime, and if the employment of an illegal alien were made a federal felony with a mandatory minimum punishment of 10 years in prison, the problem of illegal immigration would be solved more or less overnight, and the millions of illegal immigrants would be on their way back to Mexico and Central America (and in lesser numbers to China and other poor countries that supply us with many illegal immigrants). This exodus--this de facto

policies underlying the NLRA, notwithstanding that the only legislative history of the IRCA showed that Congress had no intention of impacting NLRA remedies.[15]

The purpose of this article, however, is *not* to engage in another extended critique of *Hoffman*.[16] Rather, the article addresses percolating

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> deportation of the illegal immigrant population--would disrupt the economies both of the United States and of Mexico."

Richard Posner, "The Illegal-Immigration Quandary," The Beckner-Posner Blog, May 21, 2006, *available at* http://www.becker-posner blog.com/archives/2006/05/the_illegalimmi.html (last visited July 20, 2008).

[15] *See* Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 Den. U. L. Rev. 93, 147-48 (2007).

[16] That type of criticism is abundant, and rightly so, as the Court appeared to be drawing on a rarified notion of pristine citizenship far in excess of anything the IRCA actually expressed. So inconsistent with reality was the Court's view of the IRCA that it seemed to stray into the realm of "folklore," as Thurman Arnold once employed the term in his still provocative work, THE FOLKLORE OF CAPITALISM, (Beard Books 2000) (1938). Arnold observed that the punditry of the legal and economic establishment was prone to overlooking or ignoring obvious changes in social reality, preferring to cling to a system of outmoded beliefs that he termed, "folklore." In a seminal passage Arnold stated,

> It may be asserted as a principle of human organization that when new types of social organization are required, respectable, well-thought-of, and conservative people are unable to take part in them. Their moral and economic prejudices, their desire for approval of other members of the group, compel them to oppose any form of organization which does not fit into the picture of society as they have known it in the past. This principle is on the one hand the balance wheel of social organization and on the other hand its greatest element of rigidity. *Id.* at 3.

In *Hoffman*, a majority of the Court abandoned the text and legislative history of the IRCA for an imagined and activist conjuring up of statutory conflict with the NLRA and, in doing so, "oppose[d] any form of organization which does not fit into the picture of society as they have known it in the past." *See id.* The immigration reality as it presently exists in American society *is* a massive de facto *organization* of employers, unauthorized workers, and nod-and-wink consumers. The *Hoffman* folklore prefers to deny this reality and to blithely assert that unauthorized immigrant workers are simply "illegal," *see, e.g.*, the majority's repetitive use of the term "illegal workers," 535 U.S. at 142, n.2, ignoring the high likelihood of the permanent presence of unauthorized immigration in the national economy and the implications of the presence for industrial stability, the raison d'etre of the NLRA. *See* Knowledge @ Wharton, Law and Public Policy, "The Immigration Debate: Its Impact on Workers, Wages and Employers," http://knowledge.wharton.upenn.edu/article.cfm?articleid=1482&CFID=61005198&CFTOKEN=86413370&jsess (last visited July 24, 2008) (unauthorized workers comprise 24% of all workers in farming, 17% in cleaning, 14% in construction, 12% in food preparation, 36% of all insulation workers, 29% of all roofers and drywall installers, and 27% of all butchers and other food-processing workers). The presence of these unauthorized workers could not possibly have been accomplished without the pervasive complicity of entire sectors of the facially legitimate economy. Much has been written about this chimera, and little need be added here to the broader discussion about *Hoffman* that is not impeccably captured by analogy in Professor Arnold's cited passage, and specifically critiqued in Justice Breyer's brilliant *Hoffman* dissent, *supra*, 535 U.S. at 153, and in the work of able commentators. *See, e.g.,* Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman*

practical issues left in the wake of *Hoffman*'s theoretical conundrums. While litigation involving unauthorized workers predated *Hoffman*, the case removed any lingering doubts that unauthorized workers were statutory employees, even while it divested them of a remedy.[17] In light of the Supreme Court's refusal to find that the IRCA impliedly stripped unauthorized workers of NLRA employee status, it became unmistakably clear that the phenomenon of NLRA coverage was likely to be long term.

The organization responsible for day-to-day administration of labor law is the National Labor Relations Board,[18] which has for roughly the past seven years been left the untidy job of interpreting this Zen-like state of affairs. The global tension between the labor law coverage of unauthorized workers and the absence of a remedy for those workers when employers discriminate against them under labor law manifests itself in a series of paradoxes at the level of statutory enforcement. This article delineates and explores the contours of those paradoxes for NLRB prosecutors,[19] the foot soldiers engaged in the vindication of the collective[20] labor law rights and remedies now remaining to unauthorized workers.[21]

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*Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. Rev. 1 (2003-2004); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc. *Produce Disposable Workers*?, 14 Berkeley La Raza LJ. 103 (2003); and Katherine E. Seitz, *Enter at Your Own Risk: The Impact of* Hoffman Plastic Compounds v. National Labor Relations Board *on the Undocumented Worker*, 82 N.C. L. Rev. 366 (2003-2004).

[17] "The principle that legal rights must have remedies is fundamental to democratic government." Donald H. Ziegler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 Hastings L. J. 665 (1986-1987). The Romans expressed the maxim as *ubi jus ibi remedium*. The *Hoffman* Court found that a cease and desist order rendered against an employer, coupled with the posting of a conspicuous "Notice to Employees" containing promises to comply with the law, supported by the threat of court sanction for non-compliance, was an adequate remedy for the NLRA violations found by the NLRB, which the Court did not disturb. Hoffman Plastic Compounds v. NLRB, 535 U.S. at 152. As a practical matter, that order ran to the union's *future* attempts to organize employees at Hoffman, and to *future* individual victims of discrimination. Only scholastic reasoning could conclude that this remedied the violation of the Section 7 rights of *the unauthorized worker who was the actual victim of the unlawful discharge*.

[18] Hereinafter the "NLRB," the administrative agency established by Congress to administer the NLRA. *See* 29 U.S.C. § 153 (2007).

[19] The prosecutorial arm of the NLRB is the Office of the General Counsel. The adjudicative branch of the NLRB is referred to as "the Board." In this article the term "NLRB attorneys" refers to regional office attorneys who investigate and prosecute cases under the direction of the General Counsel.

[20] If *any* rights under the NLRA can be conceived as "individual" - given the paucity of backpay awards and the dubious benefit of employee reinstatement to a hostile employer - no such rights remain to particular unauthorized workers who are the individual victims of discrimination for engaging in NLRA protected conduct. *See supra* note 17 and accompanying text.

[21] Labor law's remedial scheme is incremental. On the one hand, it is unlikely that any "bad actor" could be deterred from engaging in unlawful conduct – particularly discharges - by the weak, typically isolated remedies that are the hallmark of the NLRA. *See* Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*,

There are three such paradoxes. First, NLRB attorneys must advance the claims of unauthorized workers under one statutory regime, the NLRA, who may simultaneously, but secretively, be violating another statutory regime, the IRCA. As will be developed, violations of the IRCA are arguably subject to disclosure by NLRB attorneys under professional responsibility rules. However, the disclosure of the violations could jeopardize NLRB prosecutions. Second, NLRB attorneys must prosecute cases in which witness credibility is essential, but which revolve around witnesses who very likely have made serious misrepresentations in connection with their immigration status. Third, because, under *Hoffman,* unauthorized workers may be summarily discharged by employers, with only limited remedial consequence, any attempt by the NLRB to protect these workers' collective bargaining rights may be extremely short lived. Employers can apparently simply fire unauthorized workers until any collective bargaining rights established under law on their behalf have been extinguished.

The NLRB's first reaction to *Hoffman* was somewhat counterintuitive, for the agency took the position that it would not investigate immigration particulars, even those touching on the paradoxes raised in this article, and claimed that in many respects *Hoffman* had not changed anything.[22] The rationale behind the NLRB's deliberate avoidance of the potentially complicated details surrounding unlawful immigration is in some respects understandable. The NLRB has little expertise in immigration law and would have to devote resources to acquire it.

Additionally, there is the real danger that NLRA-related immigration investigations might deter unauthorized workers from reporting and pursuing violations of the NLRA. As Keith Cunningham-Parmeter has argued, in the context of employment litigation, status-based discovery can, and often does, cause unauthorized workers to opt out of[23] or abandon

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96 Harv. L. Rev. 1769, 1788-1789 (1983) (arguing that "...the traditional remedies for discriminatory discharge - backpay and reinstatement - simply are not effective deterrents to employers who are tempted to trample on their employees' rights."). Repeated unlawful conduct, on the other hand, may lead to court-enforced administrative orders the violation of which could lead to court-imposed contempt sanction. The adequacy of the scheme is a matter of legitimate and perpetual debate. *See, for example,* Michael Wiener, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction*, 52 UCLA L. Rev. 1579 (2005). One may accordingly question what of value was actually lost in *Hoffman*. The fact remains that NLRA litigation involving unauthorized workers continues, and that unions are increasing efforts to organize unauthorized workers. See, e.g., James Parks, "Immigrant Workers Freedom Ride," AFL-CIO Webpage (discussing organized labor's commitment to organize unauthorized immigrants and upcoming "freedom ride" to publicize the commitment) *available at* http://www.aflcio.org/aboutus/thisistheaflcio/publications/magazine/0903_iwfr.cfm (last visited August 17, 2008).

[22] *See infra* at Part I.

[23] Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth*

employment claims.[24] But, unlike the situation in civil employment litigation, where the risk of claim abandonment and the problem of under-deterrence it represents is essentially "private," NLRA policy is explicitly "collective," and operates under the premise that workers' freedom of association is essential to improving workplace conditions for all workers.[25] Thus, the NLRB's mandate to protect the collective bargaining rights of all workers argues for balancing the risk of claim opt out or abandonment by individual workers in employment law against an arguably larger collective risk of statutory under-enforcement flowing from not confronting the immigration dimensions and complexities of NLRA cases.

Without development of immigration-conscious investigative procedures, NLRA regional directors may be more inclined to dismiss cases whenever lurking, but inchoate, immigration issues take them beyond their prosecutorial comfort zone.[26] To contend with this ill defined exoticism, the NLRB, contrary to its present practice,[27] should explicitly analyze and evaluate immigration issues and consciously develop strategies reflecting an appropriate balance of risks, rather than simply fleeing from the risks of overinvestment in immigration expertise and the potential for claim opt-out or abandonment. The agency need not become expert in immigration law - it need only identify obvious issues. While the NLRB may believe that avoidance of immigration particulars is, in effect, striking a balance of risks, this article contends that studious detachment from the operative facts of cases - facts reflecting the industrial realities that are presumably the stock in trade of the NLRB - is unwarranted and pernicious. The NLRB's failure to devise administrative procedures and a litigation strategy that embraces paradoxes aggravated by *Hoffman* creates a serious risk of the incremental, de facto deregulation of unauthorized workers - a large and rapidly growing segment of the labor market[28] - a prospect utterly inimical to the industrial

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*Amendment*, 41 Cornell Int'l L. J. 27, 43-44 (2008).

[24] *Id.*

[25] *See* 29 U.S.C. § 157 (defining Federal labor policy in terms of the collective bargaining rights and freedom of association of all workers). Admittedly, this view concedes a cramped view of antidiscrimination law, such as Title VII, that, in its original design at least, sought to protect broad classes of workers. *See* Karl Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 Md. L. Rev. 731, 761-62 (1985). The observation is made in the context of what antidiscrimination law has become.

[26] Regional directors have extremely broad prosecutorial discretion not to pursue cases, even those that are meritorious. *See* NLRB Casehandling Manual (Part One) §10122.14. In fiscal year 2003, for example, NLRB regional directors "merit dismissed" allegations in 104 cases. NLRB INSPECTION REPORT No. OIG-INS-30-04-01, REVIEW OF MERIT DISMISSAL PROCEDURES (2003), *available at* http://www.nlrb.gov/nlrb/about/ig/reports/insp_ins-30-04-01.html.

[27] *See infra* at Part I.

[28] Just how rapid growth in the segment will be is difficult to determine with precision. However, the overall growth in the immigrant population may provide some clues. If current trends continue, the population of the United States will rise to 438 million in 2050,

peace that is the cornerstone of the NLRA.

In Part I, the article discusses the NLRB's initial attempts to grapple with various post-*Hoffman* issues.[29] Part II assesses professional responsibility issues arising when NLRB attorneys seek to vindicate the rights of workers who may be engaged in continuing violations of Federal immigration law. Part III considers inherent credibility problems for NLRB attorneys relying on the testimony of unauthorized workers to establish facts sufficient to make out violations of the NLRA. Lastly, Part IV evaluates whether the stability of NLRA rights conferred on unions representing unauthorized workers justifies expenditure of NLRB resources to gain those rights.

## I. THE GENERAL COUNSEL'S 2002 HOFFMAN MEMORANDUM

The NLRB's prosecuting division, composed as it primarily is of labor lawyers,[30] predictably reacted to *Hoffman* in the manner described by Fisk and Wishnie.[31] While acknowledging, as it was bound to do, that *Hoffman* was the state of the law, it subtly, perhaps unconsciously, resisted. A 2002 memorandum[32] from the NLRB's General Counsel[33] (the Hoffman Memorandum) instructed NLRB regional offices *not* to alter their investigative procedures in light of *Hoffman*.

The Hoffman Memorandum acknowledged that, "the Court clearly held that backpay is unavailable to remedy the discharge of individuals for the period of time they were legally unavailable to work in this country."[34]

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from 296 million in 2005, and 82% of the increase will be due to immigrants arriving from 2005 to 2050 and their U.S.-born descendants. *U.S. Population Projections: 2005-2050*, PEW HISPANIC CENTER, REPORTS AND FACTSHEETS, February 11, 2008, available at http://pewhispanic.org/reports/report.php?ReportID=85 (last visited July 14, 2008).

[29] Problems and tensions at the confluence of labor law and the economic reality of unauthorized workers predated *Hoffman,* which merely formalized and reified the tensions by deciding that unauthorized workers were *both* statutory employees *and* not entitled to remedies under the statute. *Compare* Sure Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (holding that unauthorized workers were statutory employees but denying remedies in the circumstances of the case).

[30] The NLRB employs eight hundred labor lawyers. http://www.nlrb.gov/about_us/careers/job_descriptions_and_listings/index.aspx. (last visited July 24, 2008). The Office of the General Counsel is based in Washington D.C. *See* http://www.nlrb.gov/About_Us/Overview/fact_sheet.aspx. (last visited July 24, 2008).

[31] *See supra* note 5 and accompanying text.

[32] Memorandum from Arthur F. Rosenfeld, Gen. Counsel, NLRB to All Reg'l Directors, Officers-in-Charge, and Resident Officers, NLRB, regarding *Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After Hoffman Plastic Compounds*, Inc., GC 02-06, July 19, 2002. [hereinafter "Hoffman Memorandum"].

[33] The General Counsel is the NLRB's chief prosecutorial official and is responsible for development of the agency's litigation strategies and policies. *See* 29 U.S.C. § 153(d).

[34] Hoffman Memorandum at 2, § C.

Accordingly, the Memorandum instructed, "Regions should not seek a backpay remedy once evidence establishes that a discriminatee was not authorized to work during the backpay period."[35] However, striking a somewhat strident tone, the Memorandum also asserted, "Regions have *no* obligation to investigate an employee's immigration status *unless a respondent affirmatively establishes the existence of a substantial immigration issue* . . . [and] . . . should begin their analysis with the presumption that employees and employers alike have conformed to the law. . . "[36] The Memorandum further took the position that:

> [t]he *Hoffman* decision does *not shift the burden onto the Board to conduct an immigration investigation in the first instance*. In fact, this issue arose in *Hoffman* not pursuant to an investigation, but because the discriminatee admitted on the witness stand during a compliance hearing that he was undocumented throughout the backpay period.[37]

These instructions amount to an advisement for NLRB investigators and trial attorneys to plunge into cases often obviously rich in immigration subtext with blinders on.[38] According to the Hoffman Memorandum, unless an employer should happen to come forward with evidence that a discriminatee is unauthorized, thereby opening itself to the potential for IRCA liability,[39] the immigration status of a discriminatee will simply not be considered during the course of pre-trial investigation, in settlement negotiations, or during the merits phase of a trial.[40] Any immigration issues

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[35] *Id.*
[36] Hoffman Memorandum at 4, § E (emphasis supplied).
[37] *Id.* (emphasis supplied).
[38] Shahid Haque, Comment, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 Chicago Kent L. Rev. 1357, 1376-1378 (2004) (arguing that by refusing to inquire into the status of undocumented workers the NLRB has created several problems which Congress should correct by compelling the agency to actively investigate the immigration status of claimants "where it may be reasonably brought forward in the course of conduct").
[39] *See generally* Collins Food International v. INS, 948 F.2d 549 (9th Cir. 1991) (observing that courts authorized to find employer had constructive knowledge of worker's unauthorized status). An employer is accordingly at risk attempting to prove to immigration authorities that it had no knowledge of a worker's immigration status before the onset of NLRB litigation. The risk may be sufficient to discourage employers from raising immigration issues in NLRB proceedings, particularly during the investigative stages of a case before liabilities or remedies are at stake.
[40] Hoffman Memorandum at 4, § E. One problem with proceeding in this fashion is that it may create settlement problems. The NLRB informally settles a high percentage of its "merit" cases. Employer claims of discriminatee unauthorized status raised before trial in the context of settlement negotiations would have to be resolved in order to settle the case. The Hoffman Memorandum instructs regions that cases of that sort should be submitted to

that may exist are to be deferred until the compliance phase of a proceeding.[41] Of course, if a discriminatee is unauthorized, no backpay or reinstatement will be available as a remedy.[42] Imagine any plaintiff in any other forum going through the time and expense of trial preparation and formal litigation, while actively avoiding issues that could, given the right facts, result in the nullification of *any* substantial remedy during the damages phase of the proceeding.

Immigration issues could nevertheless emerge in any number of ways during pre-trial investigation, in settlement negotiations, [43] or later during trial, despite the considerable energy expended by the NLRB trying to avoid them. At trial, for example, employer counsel could simply ask a discriminatee, on cross-examination, about the discriminatee's immigration status, notwithstanding Orrin Baird's sensible speculation that an employer facing immigration law liability would be unlikely to do so.[44] As any labor relations specialist would be compelled to concede, labor relations parties do not always act in ways that are entirely sensible, and the unlikely can

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the Division of Advice ("Advice") in Washington, D.C. *Id.* It is unclear what the practice is thereafter because the details of settlement are usually confidential.

[41] Hoffman Memorandum at 1, § B.2. *citing* Intersweet, Inc.*,* 321 NLRB 1, 1, n.2 (1996), *enfd.* 125 F.3d 1064 (7th Cir. 1997) (agreeing with NLRB's view that employer's contention that discriminatees not entitled to backpay or reinstatement because they were unauthorized workers appropriately left to compliance stage of proceeding). NLRB proceedings are divided into a merits and a liability, or "compliance," stage. The compliance stage does not proceed until a charged party has decided not to appeal an adverse NLRB merit determination to a Federal circuit court or until the charged party loses on appeal and is ordered by the court to comply with the NLRB's order. Accordingly, a strongly held position on immigration could be resolved in a circuit court.

[42] Hoffman Plastic Compounds, 535 U.S. at 151.

[43] *See supra* note 40.

[44] Orrin Baird, *Undocumented Workers and the NLRA:* Hoffman Plastic Compounds *and Beyond*, 19 Lab. Law 153, 165 (2003-2004). How realistic a concern is immigration law liability for employers? In Concrete Form Walls, 346 NLRB No. 80 (2006), the employer repeatedly argued that it was not in violation of the NLRB because the discriminatees were "undocumented." The NLRB offered evidence that the employer maintained a separate payroll of "Hispanic" employees whose social security numbers it had not attempted to verify, in obvious violation of Federal immigration law. *Id.,* slip op. at 19. The employer did not object to the introduction of this evidence, which it presumably would have done if it feared immigration liability. The employer in *Intersweet*, *see supra* note 41, repeatedly raised the argument that the discriminatees in that case were unauthorized workers, which it presumably would not have done if it feared liability. Although immigration enforcement actions against employers have been increasing - *see* U.S. Immigration and Customs Enforcement, *FY07 Accomplishments, Strengthening Worksite Enforcement*, available at http://www.ice.gov/doclib/pi/news/factsheets/fy07accmplshmntsweb.pdf (last visited July 26, 2008) - there are startling instances of non-enforcement. In a recent immigration raid, the largest in U.S. history, resulting in more than 400 arrests of workers, not a single employer official had been arrested as of this writing. CBSNews.com, *No Employers Charged In Immigration Bust: Almost 400 Illegal Immigrant Workers Arrested, But still No Managers Facing Charges*, http://www.cbsnews.com/stories/2008/06/02/national/main4143701.shtml (last visited July 24, 2008).

occur.[45] Even if an NLRB trial attorney objects at trial to a question touching on immigration status on the grounds that *Hoffman* has rendered the question irrelevant, as implicitly instructed in the Hoffman Memorandum,[46] employer counsel will probably be able to make an administrative law judge[47] aware of the issue simply by making an offer of proof.[48] An even more likely way for immigration issues to intrude on the course of trial is for a *witness or discriminatee* to divulge, without solicitation, his or her unauthorized status, and perhaps facts showing unlawful conduct connected to that status, to an NLRB attorney *before* trial, an eventuality that the Hoffman Memorandum does not appear to contemplate.[49] Such a revelation, to either an NLRB attorney or to employer counsel[50] during either trial or pre-trial investigation, could have a

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[45] *See generally* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, *in* 15 Legal Studies Forum 327, 331 (1991) (observing that parties in labor relationships influenced in decision making by a number of factors including "crazy intense commitment that makes some people willing to do things that the other party regards as irrational") *available at* http://www.duncankennedy.net/documents/The%20Stakes%20of%20Law%20or%20Hale%20and%20Foucault%20_%20J%20Leg%20Stud.pdf (last visited July 30, 2008).

[46] Hoffman Memorandum at 5, § E**.**

[47] NLRB unfair labor practice cases are tried without jury to an administrative law judge in the manner of a formal adjudication governed by § 554 of the Administrative Procedure Act. *See* 29 U.S.C. §§ 160(b) & (c).

[48] *See* National Labor Relations Board Division of Judges Bench Book, Chapter 13, Section 113. In the underlying proceeding in *Hoffman* itself, the immigration evidence that became the focus of subsequent litigation was elicited in an atypical offer of proof in which the employer's counsel was permitted to cross-examine the discriminatee in the compliance phase of the proceeding. Hoffman Plastic Compounds, 326 NLRB 1060, 1062, fn. 9 (1998). The administrative law judge sustained the NLRB attorney's objections to the line of immigration questioning, which resulted in a series of admissions by the discriminatee, but nevertheless made findings based on the admissions. Remarkably, no exception appears to have been taken by the NLRB attorney to this strange trial sequence. *Id.*

[49] The role of an investigating NLRB agent is explained in the NLRB's Unfair Labor Practice Casehandling Manual, Section 10050:

> As impartial investigators, Board agents should identify themselves as agents of the Board to all witnesses and parties, should explain the purpose of the investigation and should avoid conveying a prosecutorial image. Although Board agents should not provide advice to the parties and must remain neutral throughout the investigation, Board agents should freely identify and discuss the theories underlying the charge with both parties. This is particularly true with respect to individual charging parties who do not typically have any expertise in Agency law and procedures. Throughout the investigation, Board agents should assertively seek out all material evidence in the spirit of providing the Regional Director with a complete picture of the events so as to permit an informed decision on the case.

Experienced NLRB attorneys may sense the demarcation between not "conveying a prosecutorial image" and "freely identify[ing] and discuss[ing] theories underlying the charge..." The same may not be true for "charging parties who do not typically have any expertise in Agency law and procedures." *Id.* Free exchanges of case theories and ideas could result in unsophisticated witnesses "blurting" facts regarding immigration status under the reasonable misapprehension that such facts are relevant to the case.

[50] *See* Johnnie's Poultry Co., 146 NLRB 770, 775 (1964), *enforcement denied* on other

significant impact on the NLRB attorney's case, even before it arrives at the compliance phase, for a variety of reasons.

Adding to the potential for the NLRB's overall litigation risk is the underlying nature of NLRB pre-trial procedures. In short, there *is no* discovery process in NLRB litigation.[51] Consequently, even apart from the additional limitations imposed by the Hoffman Memorandum, under typical procedures an NLRB attorney would have no way of knowing about immigration irregularities, or an employer's possible awareness of those irregularities, unless a witness or discriminatee revealed them. While trial by ambush is part and parcel of NLRB litigation in the absence of discovery processes, unexpected immigration developments can add considerably to litigation uncertainties. The Hoffman Memorandum exacerbates an inherently hostile litigation environment by pretending that all can be business as usual until the compliance phase. This article makes the modest proposal that this posture is unwise and should be modified.[52]

## II. ETHICAL PARADOX

### A. SCOPE OF THE PROBLEM

Professional responsibility issues comprise the first of the three paradoxical problems to be addressed in this article. The issues arise in NLRB cases because when NLRB attorneys seek to vindicate the rights of workers engaged in continuing violations of Federal immigration law, a vindication unambiguously authorized by *Hoffman*, it might be argued that

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grounds at 344 F.2d 617 (8th Cir. 1965) (establishing that an employer's attorney may contact and question an employee in advance of trial if the attorney takes detailed precautionary measures to ensure that the employee is not coerced by the questioning) A pre-trial interview of a witness by an employer's counsel could probably elicit facts concerning immigration status while following established precautionary measures.

[51] *See* Starr v. Commissioner of Internal Revenue, 226 F.2d 721, 722 (7th Cir. 1955), *cert. denied* 350 U.S. 993 (1956) (holding that parties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of constitutional right); see also Frilette v. Kimberlin, 508 F.2d 205, 208 (3d Cir. en banc 1974), cert. denied 421 U.S. 980 (1975) (holding that Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings); *see* NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (2d Cir. 1970), *cert. denied* 402 U.S. 915 (1971); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951) (affirming that NLRA does not specifically authorize or require the NLRB to adopt discovery procedures).

[52] The Hoffman Memorandum takes the position that novel immigration issues be submitted to the Division of Advice. *See* Hoffman Memorandum at 5, § E. While this approach may seem soothing in connection with problems encountered at the beginning phases of a case, it would not appear helpful at trial, after the NLRB has already invested significant resources. Furthermore, unless Division of Advice analyses of submitted cases are explained carefully following the Division's decision, regional offices may not gain expertise. Regional office personnel may view decision of submitted immigration issues as ad hoc determinations lacking transparent unifying principles.

the existence of known or easily ascertainable immigration violations must be disclosed by NLRB attorneys under norms of professional responsibility. Disclosure of such violations, however, may weaken an NLRB case in two ways. It may provide employers with defenses to conduct otherwise unlawful under the NLRA. It may also provide employers with an opening to argue that unauthorized workers are not credible witnesses, a prospect that would be problematic if important witnesses are unauthorized. The Hoffman Memorandum makes no mention of these issues.

On a broader level, professional responsibility issues may come into play because the public-at-large may view actions by government agencies, lawyers, or courts in furtherance of the rights of unauthorized workers as complicity in law breaking. *Hoffman's* validation of the NLRB's prosecution on behalf of unauthorized workers means that this kind of litigation will continue, aggravating those in the body politic who challenge the idea that unauthorized workers have "rights."[53] For those observers, the legitimacy of the NLRB as the enforcer of the labor rights of "illegal" workers appears indefensible,[54] and certainly not in the public interest.[55] The ethics of NLRB attorneys may be called into question by such observers or by parties appearing before the agency who seek tactical advantage under formal rules and canons of professional responsibility applicable to attorneys. Broadly speaking, it seems fair to say that blind involvement by NLRB attorneys in the enforcement of the rights of unauthorized workers seems ethically counterintuitive.[56]

The state professional responsibility rules applicable to private sector attorneys do not completely clarify whether an attorney acts within norms

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[53] *See, e.g.,* Walter Olson, "A Wink Too Far: Back pay to illegal immigrants comes to an end, despite administration efforts," The National Review, April 3, 2002, *available at* http://www.nationalreview.com/comment/comment-olson040302.asp (last visited June 13, 2008)**;** *see also* George F. Will, "Out of What 'Shadows'", Newsweek, Newsweek Web Exclusive, *available at* http://www.newsweek.com/id/34331 (last visited July 20, 2008).

[54] Michael R. Brown, *Hoffman Plastic Compounds v. NLRB: The First Step*, 19 Lab. Law 169, 184 (2003-2004) (questioning how NLRB could "logically allow an illegal alien to vote or to be awarded damages if demoted unlawfully, if the alien is not authorized to work lawfully in the first instance").

[55] *See, e.g.,* Heather MacDonald, "Seeing Today's Immigrants Straight: Advocates of 'comprehensive immigration reform' let ideology blind them to the dispiriting facts on the ground," City Journal (Summer 2006), *available at* http://www.city-journal.org/printable.php?id=2039 (last visited July 20, 2008).

[56] Although not cast in terms of professional responsibility, this was implicitly the argument made by a charged employer in A.P.R.A. Fuel Oil Buyers Group, Inc., 312 NLRB 471, 474 n.2 (1993) (detailing employer's argument that the NLRB's response to a Freedom of Information revealed that two of the NLRB's witnesses were using false and fraudulent names and that the NLRB's concealment of the information may have affected the credibility of witnesses and tainted the hearing proceedings). The controversy apparently arose at trial but might have taken shape at any stage of a proceeding. One approach to managing such risks is to actively ignore these kinds of facts, but this article argues that is the wrong approach.

of state professional responsibility when representing unauthorized workers in employment litigation.[57] Christine Cimini has argued that in most cases such representation would pass ethical muster under the Model Rules.[58] Her analysis, however, amply demonstrates that the matter is not free from doubt, particularly due to the complexity of the myriad disclosure obligations existing under professional responsibility rules and canons.[59] Thus, in private practice settings an attorney must assess the omnipresent tension between professional responsibility rules requiring disclosure of fraud and criminality - to tribunals or others - and those requiring protection of a client's confidential information.[60]

Two analytical difficulties complicate the identification of professional responsibility obligations of attorneys employed by the Federal Government. First, it is frequently unclear whether the legal ethics of Federal attorneys are controlled by the rules of the states to which they have been admitted,[61] by some other body of rules, such as the rules of courts or administrative agencies, or even by a more generalized duty to the "public interest."[62] Second, even if the professional responsibility duties of Federal attorneys are located solely within the rules and canons of their states of Bar admission, it might be argued that those rules are preempted by the polices being pursued by the attorneys' Federal employers.[63] Before exploring these difficulties, the article will consider the factual circumstances that could

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[57] *See* Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 Stan. L. Rev. (Forthcoming, 2008).

[58] *Id.* at 5. Following Cimini, this Article discusses state law ethics issues in terms of the "Model Rules," the American Bar Association's Model Rules of Professional Conduct, in considering state-law ethical questions. Though not binding in themselves, most states have adopted the Model Rules with few or no variations. *See* Alphabetical List of States Adopting Model Rules, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited June 21, 2008). The Model Rules have effectively become the dominant model of American Legal Ethics Codes. WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 7 (1998).

[59] Cimini, *Ask Don't Tell*, at 3-5.

[60] Expressed in terms of the Model Rules, the conflict is between the client confidentiality requirements of Rule 1.6 and other rules containing disclosure requirements, most notably Rule 3.3's requirement that attorneys act with candor when dealing with a tribunal.

[61] State-law choice of law problems may also be presented if the state ethics rule of the attorney's place of employment differs from the ethics rule of the attorney's state of admission. *See* Carla C. Ward, *The Law of Choice: Implementation of ABA Model Rule 8.5*, 30 J. Legal Prof. 173 (2005-2006).

[62] *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should and Will Government Lawyers Serve the Public Interest?*, 41 Boston College L. Rev. 755, 789 (2000); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 Harv. L. Rev. 1170, 1171-72 (2001-2002).

[63] *See infra* note 78 and accompanying text. *See also* 17 CFR Sec. 205.6 (c) (Security and Exchange Commission regulations) (asserting that an attorney complying in good faith with SEC regulations shall not be subject to discipline under inconsistent state standards where the attorney is admitted or practices). The General Counsel of the Securities and Exchange Commission has asserted that the regulation preempts state rules of professional conduct. See Ward, Law of Choice, 185; John T. Bostelman, THE SARBANES OXLEY DESKBOOK, Sec. 18:10.2 (2003).

bring professional responsibility questions into play.

B. SOME SCENARIOS

Assuming that the NLRB, faithful to the Hoffman Memorandum, does *not* actively investigate the immigration status of a discriminatee or witness, an NLRB investigating[64] or trial attorney may nevertheless come to know of it, or of some other unlawful immigration conduct, perhaps because of a "blurting" incident during pre-trial investigation, or because unexpected testimony surfaces at trial.[65] If an NLRB attorney should learn during pre-trial investigation that a discriminatee or witness is an unauthorized worker, certain professional responsibility issues centering on disclosure arguably come into play.[66] Similarly, an NLRB attorney might learn that a discriminatee, in addition to being an unauthorized worker, has made a false representation of identity to the NLRB during the pre-trial investigation, perhaps out of fear that the revelation of the worker's actual identity could lead to deportation or criminal charges.[67] An NLRB attorney might also learn that a discriminatee or witness made a false claim of citizenship to obtain employment,[68] or that fraudulent documents were tendered[69] to the employer to obtain employment.[70]

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[64] Although non-attorney "field examiners" also conduct NLRB investigations, the NLRB applies attorneys' professional responsibility rules to non-attorney investigators as a matter of policy. *See* National Labor Relations Board Casehandling Manual (Section One) §10058.

[65] The Hoffman Memorandum suggests that NLRB trial attorneys "object" at trial if immigration status is raised by an employer's counsel**,** Hoffman Memorandum at 5, § E. That tactic, however, seems an insufficient solution to the problem. In *Hoffman* itself, the NLRB attorney *did* object to such questioning advanced during the compliance stage of the proceeding, which deals exclusively with questions of remedy. While such a question would now be relevant at the compliance stage, in light of *Hoffman's* subsequent holding, the relevancy was not clear at the time, and the testimony was nevertheless received in evidence in the form of an offer of proof. The lesson for litigators is that it may be practically difficult to exclude immigration evidence.

[66] *See infra* at Part II.D.

[67] The NLRB has occasionally relied on abuse of its processes through fraudulent misrepresentations to deprive a discriminatee of the protection of the NLRA. Precoat Metals, 341 NLRB 1137, 1139 (2004). In the present context, the issue would be whether fraudulent immigration misrepresentations could rise to the level of a willful false representation in violation of 18 U.S.C. § 1001 (proscribing broadly, on pain of criminal penalty, falsification and concealment of material facts in any matter or proceeding within the jurisdiction of the U.S. Government). If they could, the NLRB attorney might be faced with professional responsibility issues for non-disclosure of the criminalized misrepresentations, in addition to having to contend with whatever the NLRB might require be done under its rules.

[68] A criminal offense pursuant to 18 U.S.C. § 911.

[69] A criminal offense pursuant to 8 U.S.C. § 1324c.

[70] Although these scenarios would be interesting even if purely theoretical, they almost all, in fact, transpired in the course of a single case in which I was personally involved when formerly employed as a trial attorney with the NLRB.

None of these scenarios would result necessarily in the NLRB's refusal to find a violation of the NLRA. For example, if an employer was unaware of the facts surrounding a discriminatee's misrepresentation or criminal conduct at the time it violated the NLRA then the facts may fall into the category of after-acquired evidence. Such evidence is that upon which the employer could not factually have relied in taking unlawful action against a discriminatee, but which is sufficiently serious to deprive the employee of a remedy, despite the finding of a statutory violation.[71] In practical operation, the intertwining of unlawful immigration conduct with the operative facts of NLRA cases was assured once the Supreme Court agreed that unauthorized workers were covered by the NLRA.[72] But leaving the issue of statutory coverage to one side, the common scenarios in these cases are likely to either reveal or very strongly suggest the existence of unlawful immigration conduct that a disinterested attorney might conclude must be disclosed under ethical codes of conduct or professional responsibility.

### C. WHICH CANON OF PROFESSIONAL RESPONSIBILITY?

After *Hoffman*, an NLRB attorney has a greater likelihood of becoming involved in cases in which the attorney knows, or very strongly suspects, that discriminatees or witnesses are unauthorized workers, or in which other unlawful immigration conduct is present. The question is whether these facts must be disclosed, and to whom. Disclosure obligations governing such a situation are a function of the canon of professional responsibility to which the involved attorney is bound. The question of which ethical "code" serves as a point of reference for an attorney engaged in Federal administrative practice is not easy to answer. From the point of view of the attorney, the most immediate point of reference is the ethical code of the attorney's state of Bar admission. A second point of reference is any ethical code implemented by the attorney's employer.

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[71] *See* John Cuneo, Inc., 298 NLRB 856 (1990) (holding that if employer proves employee misconduct upon which it did not rely in taking unlawful employment action, but for which it would have discharged any employee notwithstanding employee participation in protected conduct, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct). Subsequent discovery of employee misconduct does not undermine a finding of statutory violation, and the NLRB has found an employer's discharge of unauthorized workers engaged in NLRA protected activity, in claimed compliance with immigration law, to be evidence of pretext, if the employer knew about, and failed to act upon, unlawful employee immigration status existing before the protected activity. Concrete Form Walls, 346 NLRB 831 (2006).

[72] Hoffman Plastic Compounds, 535 U.S. at 144-145. While the Court discussed the issue of the employee status of unauthorized workers somewhat abstractly under its prior holdings, any discussion of remedies for individuals the Court believed not to be statutory employees would have been superfluous; *but see* Agri Processors, 514 F.3d 1, 13 (D.C. Cir. 2008) (Kavnaugh, CJ, dissenting) (concluding that *Hoffman* majority did not explicitly hold unauthorized workers to be statutory employees).

From the point of view of the administrative agency, however, the situation is unclear. The NLRB, like most Federal agencies, does not require its attorneys to be admitted to practice in any particular jurisdiction.[73] Thus, the NLRB would first have to decide whether to require its attorneys to comply with the code of the attorney's state of admission, the state of the attorney's practice, typically an NLRB regional office, or with some other code applicable only to NLRB attorneys. If the NLRB accepted the position that a state code should apply, it would face the prospect of ascertaining and applying the professional responsibility codes of the states in which its regional offices are located, and also of the states of admission of every attorney in its employ, in connection with the precise professional responsibility question presented.

This is precisely the route that the NLRB has taken in connection with the only professional responsibility issue to which it has paid significant attention[74] involving former supervisors of presently-charged employers coming forward to offer evidence adverse to their former employers in a current case. The question arising is whether the counsel of the charged employer may, consistent with norms of professional responsibility, be passed over or "skipped" in an interview of the former supervisor conducted by an NLRB attorney.[75] In this situation the NLRB might simply have devised a bright line agency rule authorizing such interviews. Instead, the NLRB opted in this situation, and now by virtue of agency policy has opted in all situations, to comply with the professional responsibility rules of an NLRB attorney's state of Bar admission, and the rules of the state in which a regional office sits.[76]

The NLRB's decision to follow state professional responsibility rules rather than enacting its own Federal ethics rule is consistent with at least one professional responsibility development in the Federal sector. The courts have rejected[77] the idea that Department of Justice prosecutors may

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[73] *See* NLRB Webpage, Careers, at http://www.nlrb.gov/nlrb/careers/pdf/attorney.pdf.

[74] In conducting research for this article, no agency guidance memorandum dedicated to a professional responsibility subject other than the skip counsel issue was uncovered.

[75] The skip counsel issue s a variant of the general "anti-contact rule." The Model Rules of Professional Conduct provide one articulation of the rule: "[i]n representing a client, a lawyer shall not communicate with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES OF PROFESSIONAL CONDUCT, R. 4.2. The precise problem for the NLRB is whether a *former* supervisor of a represented employer is "a person the [NLRB] lawyer knows to be represented by another lawyer in the matter..." The answer varies between jurisdictions, hence the problem.

[76] NLRB Casehandling Manual (Part One), § 10058 (instructing that NLRB attorneys comply with the ethics codes adopted by their licensing State "and/or" the codes adopted by the state in which a contact with a witness occurs, and with the ethics codes adopted by the Federal courts before which they appear).

[77] Nina Marino and Richard Kaplan, *The McDade Amendment: Moving Towards A Meaningful Limitation On Wrongful Prosecutorial Contact With Represented Parties,* The

be exempted by Federal regulation from compliance with state "no contact" rules in Federal litigation through a doctrine of implied preemption, a theory forcefully articulated in 1989 in a document that has become known as the "Thornburgh Memorandum."[78] This theory was roundly defeated through Congressional enactment of the McDade Amendment and its interpretive regulations.[79]

The NLRB's effective adoption of state professional responsibility codes, while rationally reactive to the Thornburgh fiasco, is not compulsory. The McDade rules, requiring that certain Federal attorneys follow state ethics codes, do not by their terms apply to Federal agency attorneys practicing outside of the Department of Justice.[80] In theory, therefore, the NLRB could promulgate professional responsibility rules that conflicted with state rules without violating Federal law. So, for example, the agency might simply promulgate a rule authorizing its attorneys not to disclose violations of immigration law that are discovered.

Nevertheless, in attempting to follow state codes, which in turn are

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Richmond Journal of Law and the Public Interest, Section C, Vol IV., No. 1 (1999);http://law.richmond.edu/rjolpi/Issues_Archived/1999_Fall_Criminal_Issue/Kaplan_&_Marino_2.htm.

[78] The Memorandum, subsequently codified as then-Department of Justice Regulation, 28 C.F.R. Section 77.10(a), provided:

> A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A 'controlling individual' is a current high-level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

The regulation provided government prosecutors with access to represented persons in a manner that violated several state legal ethics codes. *See, e.g.,* U.S. *ex rel.* O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252 (1998) (holding that regulation permitting government contact with employee of represented organization if employee was not "controlling individual" not authorized by statute and in conflict with Missouri ethics rules). *See also* William Glaberson, "Thornburgh Policy Leads to a Sharp Ethics Battle," New York Times, Mar. 1, 1991, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D0CE2D7173AF932A35750C0A967958260 (last visited June 21, 2008).

[79] 28 U.S.C. § 530B (attorney for Federal Government subject to state laws and rules, and local Federal court rules, governing attorneys in each state where attorney engages in duties, to same extent and in same manner as other attorneys in state); *see also* interpretive regulations at 28 CFR 77 et seq.

[80] 28 CFR 77.2(a) (defining "attorney" as Attorney General; Deputy Attorney General; Solicitor General; attorneys employed in Justice Department divisions; attorneys employed by the DEA; attorneys employed by the ATF; attorneys employed by FBI or Office of General Counsel of FBI; attorneys employed in any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; and various "Special Attorneys" and Independent Counsel).

largely the state-adopted Model Rules,[81] the NLRB encounters a paradigm primarily contemplating private adversarial regimes. While it is the agency's prerogative to adopt this paradigm, state rules may not and probably will not address the precise question of an attorney's obligation to disclose violations of immigration law discovered in Federal agency litigation, or for that matter of many other professional responsibility questions unique to Federal practice. Many states have little to say about public sector practice beyond adopting the Model Rule applicable to criminal prosecutors.[82]

Indeed, returning to the example of the skip counsel problem, the NLRB rejected the approach of the Model Rules, which would actually have permitted NLRB attorneys to contact and interview the former supervisor of a charged employer without the assent or presence of the employer's counsel. Apparently, the agency preferred a more cautious approach in which attorneys were required to receive authorization from their superiors before interviewing former supervisors, prompting some observers to wonder aloud at the departure from the Model Rules. As Attorney Michael Posner noted:

> When the Skip Counsel Guidelines of the Office of the General Counsel were issued on February 15, 2002, the Regions were mandated to contact Special Litigation prior to interviewing former supervisors or agents of a represented party in the absence of consent of the parties counsel due to the existence of different rules of professional conduct among the various states. [However,] Model Rule 4.2, Comment 7, provides that "consent of the organization's lawyer is not required for communication with a former constituent".[83]

The NLRB probably took the more cautious approach of state-by-state canvassing of ethics rules in lieu of reliance on an unadopted Model Rule because complaining parties might otherwise resort to challenges under state-specific professional responsibility rules to exert pressure on the agency for either political reasons or for use as leverage during litigation.

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[81] Forty-eight states and the Virgin Islands have adopted the Model Rules of Professional Conduct. *See* AMERICAN BAR ASSOCIATION, CENTER FOR PROFESSIONAL RESPONSIBILITY, *Model Rules of Professional Conduct Dates of Adoption, available at* http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited August 1, 2008).

[82] *See generally* Model Rule of Professional Conduct 3.8, "Special Responsibilities Of A Prosecutor."

[83] Michael Posner, "A Union Perspective of the Skip Counsel Rules," at 3, *available at* http://www.bnabooks.com/ababna/ethics/2003/posner.doc (last visited July 22, 2008).

The Skip Counsel Guidelines state, however, that the primary purpose of relying on state-specific ethical rules is "to safeguard Board attorneys from ethics violations..."[84] State variations on adoption of the Model Rules prompted the agency to canvass each state to ensure broad compliance with their professional responsibility schemes.

Why the NLRB's general caution in matters of professional responsibility? Professional responsibility violations are not, after all, self-enforcing.[85] The essential reason centers on the enduring background of the contentious relations between labor and management.[86] The structure of the NLRA "is focused on enforcement, with concentration on administrative agency models and on traditional legal processes to implement policy,"[87] creating "a propensity to litigate at the administrative agency level."[88] In this litigious environment, labor and management, who are repeat players on this stage, could utilize professional responsibility complaints for tactical advantage in litigation.[89] For example, an employer might argue that any testimony elicited from a former supervisor during an investigation outside of the presence of its counsel could not properly have been relied upon as a basis for initiating formal litigation.

In labor litigation transpiring in the midst of the hyper-politicized immigration debate, it is easy to imagine professional responsibility challenges coming from any number of interests.[90] Accordingly, no less

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[84] Memorandum from Richard A. Siegel, Assoc. Gen. Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB, regarding Guidelines Concerning Appropriate Contacts with Represented Persons, Mem. 02-36 (Feb. 15, 2002) *available at* http://www.nlrb.gov/shared_files/OM%20Memo/2002/om02-36.html.

[85] The NLRB's Office of the Inspector General occasionally investigates allegations of attorney misconduct and refer them to state Boards of Bar Overseers if it deems them arguably meritorious. *See for example*, Semiannual Report to Congress, April 1, 2001 through September 30, 2001, Investigations Program, OIG-I-272, (concluding that former Board Member's improper release of information relating to Board's deliberations and votes was in violation of the Agency's rules pertaining to the release of information and was prejudicial to the administration of justice and forwarding matter to Board Member's Bar association for review, which determined that the conduct was not in violation of its Rules of Professional Responsibility) *available at* http://www.nlrb.gov/nlrb/about/ig/reports/sar_9-30-01.html#5.

[86] *See* Rafael Gely, *Tale of Three Statutes . . . (and One Industry): A Case Study on the Competitive Effects of Regulation*, 80 Or. L. Rev. 947, 976 (2001) *citing* Dennis A. Arouca & Henry H. Perritt, Jr., *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?*, 3 Lab. L.J. 145, 149-50 (1985).

[87] *Id*.

[88] *Id*. at 977.

[89] *See, e.g., supra* note 56.

[90] A group favoring restrictive immigration could, for example, allege that NLRB attorneys advancing claims in the interests of unauthorized workers breached professional responsibility duties. Boards of Bar overseers often investigate *any* facial allegation of attorney misconduct. The Maine Board of Bar Overseers, for example, asserts that "[e]ach written complaint is reviewed by the office of Bar Counsel and investigated if it involves alleged misconduct by a Maine attorney." Maine Board of Bar Overseers website *available at* http://www.mebaroverseers.org/Attorney%20Complaints/attorney_complaints.htm

caution should be employed in navigating the murky professional responsibility waters of immigration disclosure than has been employed in the agency's state-by-state canvassing of professional responsibility "no-contact" rules.[91] Nevertheless, at the state level general professional responsibility rules have seldom been applied in a coherent manner in immigration-specific contexts,[92] so it appears likely that the NLRB's essential analysis of these problems must rely upon the Model Rules in the abstract.

## D. DISCLOSURE ANALYSIS UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

The central professional responsibility issue raised by the *Hoffman* decision, and its authorization of NLRB advocacy on behalf of the interests of unauthorized workers, is the obligation to disclose unlawful conduct. The factual scenarios discussed in this article[93] call into question whether an NLRB attorney would be required to disclose evidence of immigration law violations. One point of departure for a rule-based analysis of disclosure obligations is the Model Rules of Professional Conduct, and Model Rules 3.3, 3.4, 4.1 and 8.4 would appear most germane to such an analysis.[94]

### 1. Model Rule of Professional Conduct 3.3

Model Rule of Professional Conduct 3.3 generally requires that an attorney observe candor in dealing with a tribunal by disclosing "false" evidence of which the attorney is aware.[95] Subsection (b) of the rule

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[91] *But see* Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 Fordham Urban L. J. 969, 972 (discussing the borrowing of state norms of professional conduct as federal law as "imported disuniformity").

[92] Hilary Sheard, *Ethical Issues in Immigration Proceedings*, 9 Geo. Imm. L. J. 719, 741 (discussing "the lack of uniformity among the ethical rules in the several states" as a "current cause for concern" in the context of Federal immigration practice).

[93] *See supra* note 64-72 and accompanying text.

[94] Model Rule of Professional Conduct 3.8 does not appear to apply to NLRB attorneys functioning in an administrative context, even when it is adversarial, because that provision by its terms applies only to criminal prosecutors.

[95] MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.3 (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

requires that an attorney "who represents a client in an adjudicative proceeding" take "reasonable remedial measures" with the tribunal,[96] if the lawyer knows that "a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding."[97] Assuming that an NLRB attorney is, within the meaning of the rule, representing a client[98] in an adjudicative proceeding,[99] the rule appears to additionally require that the attorney take "remedial measures" *if* an admission of a present violation of immigration law is tantamount to "criminal or fraudulent conduct related to the proceeding."[100] Courts have also found that an attorney may have an affirmative duty to investigate evidence the attorney intends to offer.[101]

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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.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[96] Model Rule of Professional Conduct, Rule 1.0(m) defines a tribunal in relevant part as an "administrative agency or other body acting in an adjudicative capacity." NLRB adversarial administrative trials fit comfortably within this definition, though there is a legitimate question as to whether a matter could be "remedied" by disclosure to prosecutorial officials. The General Counsel and administrative law judges are in effect bifurcated sectors of the same administrative unit. It might therefore be argued that disclosure of immigration violations to prosecutorial officials is tantamount to disclosure to the tribunal, thereby satisfying the attorney's duty under Rule 3.3.

[97] *See supra* note 95.

[98] Model Rule of Professional Conduct 1.13(a) states, "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Opinions differ as to whether an attorney engaged in Government practice represents the entire Government or the particular administrative agency for which the attorney is immediately employed. *See* MODEL RULES OF PROFESSIONAL CONDUCT FOR FEDERAL LAWYERS, R. 1.13 cmt. (Federal Bar Association 1990). The Federal Bar Association's Model Rules flatly conclude that the Federal attorney's client is the administrative agency. MODEL RULES FOR FEDERAL LAWYERS, *supra*, R. 1.13(a). These rules are strictly advisory, however.

[99] *See supra* note 95. NLRB proceedings would appear to fit the definition of adjudicative proceeding. Model Rule 3.9, Cmt. 1, states that the rule applies to lawyers practicing before "...legislatures, municipal councils, and executive and administrative agencies acting in a *rule-making* or *policy-making capacity*..." (emphasis added).

[100] MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.3(b).

[101] Patricia F. Reilly, *Ethics: Balancing Ethical Disclosure Requirements with Statutory Regulations for Lawyers Practicing Before Regulatory Agencies*, 46 Okla. L. Rev. 325,

The Hoffman Memorandum instructs that a discriminatee's immigration status not be affirmatively investigated by an NLRB attorney unless a charged employer comes forward with evidence establishing that a discriminatee is "undocumented."[102] While it is true that regions are instructed not to seek back pay in the event that the undocumented status of an employee is established, the additional suggestion in the Memorandum is that the burden of establishing immigration status be placed exclusively on the employer. Thus, an NLRB attorney could reasonably conclude that the instruction not to investigate the issue of immigration status amounted to a directive to ignore even the most transparent immigration violations.

A complete analysis under the rule would depend on the precise facts that became known to the NLRB attorney. If, for example, the attorney learned only in the most general terms that a discriminatee was unauthorized, the attorney may have no knowledge of a crime. Under current immigration law the mere presence of an unauthorized immigrant within the United States is a civil but not a criminal violation; the immigrant would be subject to deportation but not to criminal sanction.[103]

On the other hand, the mere presence of an unauthorized worker could be considered fraudulent conduct when assessed from the perspective of an employer. If the employer had previously inquired of the discriminatee about immigration status, which in itself would be an unlawfully inadequate investigation of a worker's status on the part of the employer under the current I-9 regime,[104] and the NLRB attorney became aware that the worker falsely told the employer that he or she was authorized, a professional responsibility issue may arise. In that instance, the attorney will arguably have come under a disclosure duty pursuant to the rule in light of discovered fraudulent conduct.[105]

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337-38 (1993) *citing* Wyle v. R.J. Reynolds Industries, 709 F.2d 585, 590 (9th Cir. 1983) (holding law firm's failure to investigate client's denials of unlawful conduct, despite client's prior false averments on similar matter, tantamount to knowledge of the client's false representations).

[102] Hoffman Memorandum at 4, § E.

[103] *See* Keith Cunningham-Parmeter, *Fear of Discovery,* 63-64 (observing that, while mere unauthorized presence not criminal, entering country without inspection, reentering country following deportation, and fraudulent presenting of documents to satisfy employment-related immigration verification requirements are felonies); *see also* Cimini, *Ask, Don't Tell* at 3. Indeed, one of the provisions of the failed Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2005 (HR 4437) would have criminalized the mere presence in the country of an unauthorized immigrant.

[104] *See* 8 U.S.C. § 1324(a)(B) (2000).

[105] It is reasonable to doubt that admissions of this type would be made to NLRB attorneys, though practitioners know them to be common. NLRB attorneys operate in a litigation environment lacking discovery rules and must as a matter of basic trial tactics encourage witnesses to provide potentially damaging information not uncovered in the pre-trial investigation that could be placed in issue at trial. An open-ended question posed to a witness during trial preparation could produce immigration information the attorney had not sought.

Even if the NLRB attorney does not obtain actual knowledge of the commission of either a crime or fraud through a witness' admission, or through documents, the circumstances suggesting immigration violations could become sufficiently obvious[106] that a court would conclude the attorney had a duty to investigate further, contrary to the directives of the Hoffman Memorandum. For example, regional offices routinely require discriminatees to provide social security numbers during pre-trial investigation, so that earnings information may be obtained from the social security administration and reasonably accurate backpay calculations performed to facilitate the possibility of pre-trial settlement.[107] If discriminatees decline to provide social security numbers, provide numbers that the social security administration can not match to any individual, or provide numbers producing identities or other information that is inconsistent with the NLRB regional office's records, the attorney assigned to such a case may arguably have come under a duty to investigate the surrounding circumstances more fully.

Whether the immigration violations of which the NLRB attorney becomes aware is classified as a crime or a fraud, it might in either event be argued that the conduct did not occur in connection with "the proceeding," within the meaning of Rule 3.3(b), because it preceded the operative events in the NLRB case. The counterargument to this position might be that immigration violations are ongoing until a worker's immigration status is regularized. Another response to this argument might be that because immigration status *is* material to questions of remedy, misrepresentations in connection with the status have an adequate nexus to "the proceeding" to trigger the rule. In any event, the language of 3.3(a)(1) and (a)(3) are suggestive of disclosure obligations extending beyond a discrete proceeding.[108]

There are situations beyond the mere unlawful presence of a worker that may more forcefully communicate the existence of underlying criminal, as opposed to unlawful civil, conduct. Under the strict I-9 regime, for example, tender of fraudulent documents to obtain employment is an independent criminal violation,[109] as are false representations of citizenship to an employer.[110] Awareness by an NLRB attorney of these crimes could squarely present a Rule 3.3 issue.[111]

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[106] *See infra* note 121 and accompanying text.
[107] National Labor Relations Board Casehandling Manual (Part Three), § 10504.4.
[108] *See supra* note 95. Unlike Model Rule 3.3(b), there is no explicit limitation of the disclosure obligation to a discrete proceeding under these provisions.
[109] 8 CFR 274a.2(3).
[110] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 215.
[111] *Compare* D.C. Legal Ethics Opinion 336 (2006) (finding that attorney had affirmative professional responsibility obligation to correct misrepresentations of identity and social

If an NLRB attorney should become aware that a discriminatee made a false representation of identity to the NLRB during a pre-trial investigation, Rule 3.3(a)(1), which prohibits an attorney from making a false statement of fact or law to a tribunal, or from failing to correct a false statement of material fact or law previously made to a tribunal by an attorney, may also come into play.[112] In that event, even though the misrepresentation would not have occurred during trial,[113] pleadings would necessarily communicate its substance to an NLRB administrative law judge because NLRB complaints are required to plead the identity of discriminatees with particularity.[114] In that circumstance, the NLRB attorney may have an obligation under the rule to correct the false statement contained in the pleading to the extent that the identity of a discriminatee is material to the underlying case.

An additional problem potentially arises under Rule 3.3(a)(3), which forbids an attorney from offering evidence that the attorney knows to be false.[115] The most obvious application of this rule would involve a witness' substantively false testimony. Suppose, however, that an NLRB attorney comes to learn that the identity of an unauthorized worker is not as it was represented during the pre-trial investigation. Such a development could make it difficult for the attorney even to call the witness to testify without informing the tribunal of the misrepresentation. A variation of this application could arise if a discriminatee or witness misrepresented identity or immigration status in a pre-trial affidavit, and the affidavit formally comes into evidence.[116] In that situation, the NLRB attorney would

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security number made by incapacitated immigrant fiduciary in benefits applications and that failure to disclose the misrepresentations would constitute a fraud on the tribunal within the meaning of D.C. Rule of Professional Conduct 3.3, Comment 2). D.C. Legal Ethics Opinion 336 (2006), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion336.cfm (last visited July 19, 2008).

[112] *See supra* note 95.

[113] *Compare* U.S. v. Shafer Equipment Co., 11 F.3d 450 (4th Cir. 1993) (upholding District Court's pre-trial censure of Department of Justice attorneys for failing to disclose that expert witness lied about academic credentials and qualifications and for continuing litigation and filing court papers based on administrative record developed in part by witness in violation of West Virginia's version of Rule 3.3 and the broader general duty of candor required to protect the integrity of the judicial process).

[114] National Labor Relations Board Casehandling Manual (Part One), § 10264.2. The drafter of the complaint retrieves the identity of alleged discriminatees from the regional investigative file. *Id*. § 10262. If the investigative file is inaccurate, the complaint is likely to be inaccurate.

[115] *See supra* at note 95.

[116] Although pre-trial affidavits are available to a charged party at trial for purposes of impeaching the witness who provided the affidavit during cross-examination, it is not introduced into the record in its entirety as substantive evidence. *See* National Labor Relations Board Division of Judges Bench Book, § 13-207. If, however, a dispute arises over the contents of the affidavit, the NLRB trial attorney may offer it in its complete form, and an administrative law judge would commit error by refusing to admit it. *See id.* §13-

arguably have an obligation to remedy any statement contained in the affidavit that is known by the attorney to be false.[117]

The comments to Rule 3.3 are generally helpful in each of these contexts.[118] Most significantly, the comments make clear that the prohibition against offering false evidence applies only if an attorney *knows* the evidence to be false. The NLRB attorney may present evidence to the ALJ if the attorney merely has a reasonable belief of its falsity.[119] Accordingly, absent an unequivocal admission from the discriminatee that immigration law has been violated, or the possession by the attorney of documents clearly showing that unlawful conduct has transpired, the NLRB attorney would not have an obligation under the Model Rules to take remedial measures with the NLRB tribunal, however defined.[120] Nevertheless, the comments importantly refine this general rule by observing that an attorney's knowledge that evidence is false can be inferred from the circumstances and that the attorney cannot ignore an "obvious falsehood."[121]

Even in the absence of a prohibition from offering evidence only "reasonably believed" to be false, the comments to Rule 3.3 additionally provide that an NLRB attorney would be permitted, in theory, to refuse to offer such evidence because "[o]ffering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate."[122] A difficulty is presented if there is a difference of opinion between the NLRB and one of its attorneys as to whether evidence should be offered. For example, the attorney and the agency may have different views as to whether a set of facts creates only a reasonable belief as to the falsity of evidence, or as to the significance of the falsity even if it is clearly present.

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813 *citing* J.G. Braun Co., 126 NLRB 368, 369, n.3 (1960).

[117] The duty to disclose fraudulent evidence proffered to a tribunal at any stage of a proceeding presents a difficult issue because of the inherent conflict of that duty with an attorney's additional duty to protect a client's confidences. *See, e.g.*, Digest of Rhode Island Ethics Advisory Panel, Opinion #91-76, Request #201, December 4, 1991 *available at* http://www.courts.state.ri.us/supreme/ethics/pdfadvisoryopinions/91-76.pdf (last visited July 19, 2008) (advising attorney who came to know that employee of client offered false testimony in deposition, to encourage client to persuade employee to correct error and, failing correction, to inform court).

[118] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT, Comments to Rule 3.3, *available at* http://www.abanet.org/cpr/mrpc/rule_3_3_comm.html.

[119] MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.3, Cmt. 8.

[120] *Id.*

[121] *Id.* For the rule to have any real possibility of application, the "knowledge" requirement must possess flexibility, for as one commentator has noted, "If 'actual knowledge' were limited to matters of personal perception, we would be left . . . with an empty rule, since it must be a true rarity when a client's lawyer was present at her client's crime and is still called on to defend him." Edward L. Kimball, *When Does a Lawyer Know Her Client Will Commit Perjury?*, 2 Geo. J. Legal Ethics, 579, 580 (1988-1989).

[122] MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.3, Cmt. 9.

The NLRB may take the position that, because immigration status is irrelevant to the question of whether the NLRA has been violated - because *Hoffman* has established definitively that unauthorized workers are statutory employees - evidence of immigration violations is simply "irrelevant" to the proceeding. But that position ignores the complexity of Rule 3.3, and would presume that false representations of immigration status, rendered irrelevant to the question of statutory coverage after *Hoffman*, is identical to false representations of *material fact*, within the meaning of Model Rule 3.3. That conclusion seems dubious.[123]

Model Rule 3.3, Comment 7, may provide both the NLRB and the involved attorney with some cover. It states that while the "duties of 3.3(a) and (b) apply to all lawyers, including defense counsel in criminal cases[,] . . . [i]n some jurisdictions . . . courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false."[124] It might therefore be argued that the NLRB could formally direct the NLRB attorney to offer, without disclosure, evidence the attorney knows or strongly believes to be false, and that the agency's direction would provide the attorney with an escape from censure under the rule.

2. Model Rule of Professional Conduct 3.4

Cases involving unauthorized workers seem intuitively likely to generate situations in which witnesses fail to provide their true identity out of fear that the information will somehow be conveyed to immigration authorities. Model Rule of Professional Conduct 3.4[125] generally requires

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[123] Some commentators do not see this as a problem. In their view, Government attorneys owe no ethical duty to a broader public interest. Moreover, they argue that attempts by an attorney to impose such a duty on an agency, assuming it could be identified, would create separation of powers issues by exalting privately held ethical opinions over the opinions of agency heads, who, unlike career attorneys, are accountable to the democratically elected executive. Jonathan R. Macey & Geoffrey P. Miller, *Reflection on Professional Responsibility in a Regulatory State*, 63 Geo. Wash. L. Rev. 1105, 1116 (1994-1995). This reasonable position offers little aid to the ensnared litigator attempting only to predict the position of the attorney's licensing state Bar.

[124] MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.3, Cmt. 7.

[125] MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.4 (Fairness To Opposing Party And Counsel):
A lawyer shall not:
(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably

that an attorney be "fair" to an adversary.[126] One specific refinement of the broad rule is subsection (b)'s prohibition of an attorney from "assisting" a witness in testifying falsely. If a witness or a discriminatee was known by an NLRB attorney to have misrepresented identity in the course of an NLRB proceeding, the attorney would find it difficult to call the individual to testify at trial without suborning perjury. This would be particularly true if the individual had used a false identity within the body of a pre-trial affidavit, or in a manner that resulted in the false identity appearing in formal pleadings. In that eventuality, if the attorney called the witness, and failed to disclose the misrepresented identity, an adversary would have a persuasive argument that the attorney had rendered assistance in the furtherance of false testimony.[127]

3. Model Rule of Professional Conduct 4.1

The *Hoffman* case did not end the relevancy of immigration status in NLRA cases because that status goes directly to the question of remedy, an issue that will often arise in pre-trial settlement negotiations. Model Rule of Professional Conduct 4.1[128] addresses an attorney's "truthfulness in statements to others."[129] Subsection (b) of the rule applies to disclosure of facts necessary to avoid assistance of a *client* in perpetrating a criminal or fraudulent act, and is therefore probably inapplicable to the kinds of factual circumstances that have been under discussion because unauthorized workers are not the clients of NLRB attorneys.[130] Subsection (a), however

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diligent effort to comply with a legally proper discovery request by an opposing party;
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[126] *See id.*

[127] *See* The Florida Bar v. Burkich-Burrell, 659 So.2d 1082 (Fla. 1995) (applying Florida's version of Rule 3.4, the court upheld Bar authorities' censure of an attorney for failing to check, review or correct interrogatory responses, the underlying facts of which the attorney had personal knowledge, and was therefore in a position to correct, because the attorney had a duty to review sworn answers to interrogatories for correctness even if the attorney took no part in preparing them).

[128] Rule 4.1 states, "In the course of representing a client a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

[129] *See id.*

[130] *But cf.* Bruce Hake, *Dual Representation in Immigration Practice: The Simple Solution*

applies to attorney conduct outside the attorney-client relationship.[131] An attorney is broadly prohibited from making a false statement of material fact to a third person. The question that an NLRB attorney could encounter under this provision is whether the failure of the attorney to disclose a discriminatee's known immigration violations to a charged, unrepresented employer during pre-trial investigation or settlement negotiations, could represent a "false statement of material fact or law."[132] The materiality of immigration status in this posture results from the likely reduction of the employer's backpay liability, which could weigh heavily in any decision to settle a case.[133]

The comments to Model Rule 4.1 state, "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[134] A significant factual omission appears adequate to trigger the rule.[135] If a discriminatee informed an investigating NLRB attorney that the discriminatee was unauthorized, it would be an arguable violation of Rule 4.1 for the attorney to attempt settlement without informing the charged, unrepresented employer about

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*is the Wrong Solution*, 5 Geo. Immigr. LJ. 581, 597 (1991) (arguing in relevant part that lawyer-client relationships may be formed impliedly despite statements of counsel to the contrary).

[131] *See supra* note 128.

[132] Some jurisdictions apply their versions of Rule Model Rule 4.1, rather than Model Rule 3.3, to require disclosures of fraud to tribunals made during the prehearing phases of a claim. *See* Philadelphia Bar Association Ethics Opinion, Opinion 88-7 (1988) available at http://www.philadelphiabar.org/page/EthicsOpinion88-7?appNum=2&wosid=c7VRdjQ3xYra5WSSgEu7tM (advising attorney to withdraw representation from client who made fraudulent claims to social security administration if attorney refused to disclose fraud and client refused to recant it).

[133] In fiscal year 2006, the NLRB settled 96.7% of the cases in which its investigations found violations of the NLRA. Regional offices negotiated those settlements. *See* General Counsel's Summary of Operations FY 2006 *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2007/GC%2007-03%20Summary%20of%20Operations%20FY%200. This means that most backpay calculations are made in regional offices. Backpay issues involving immigration status must be submitted to the General Counsel's Division of Advice in Washington, D.C. Hoffman Memorandum at 3, § C. But those issues must be identified by regional offices before they can be submitted to the Division of Advice. Given the time and resource pressures that are a fact of regional office life, *see generally* Fred Feinstein, *The Challenge of Being General Counsel*, 16 Labor Lawyer 19, 37 (2000-2001) *available at* http://www.bna.com/bnabooks/ababna/laborlawyer/16.1.pdf, it is entirely possible that immigration facts relevant to backpay could simply be missed or glossed over.

[134] MODEL RULES OF PROFESSIONAL CONDUCT, R. 4.1, Cmt. 1.

[135] *See* Rhode Island Supreme Court Ethics Advisory Panel, Opinion No. 97-01, Request No. 702, Issued January 9, 1997 *available at* http://www.courts.state.ri.us/supreme/ethics/pdfadvisoryopinions/97-01.pdf (opining that attorney representing plaintiff-decedent's beneficiary would violate Rules 3.3 and 4.1 by failing to disclose to defendant the fact of plaintiff's death prior to accepting defendant's offer of settlement). By analogy, it might be argued that an NLRB attorney has an obligation to disclose a discriminatee's unauthorized worker status prior to entering into an NLRA settlement, particularly because the NLRB attorney's countervailing duty of client confidentiality is ambiguous.

the full details underlying the settlement.[136] Presumably, however, the attorney could not breach the rule by proposing a settlement that did not include backpay for an unauthorized discriminatee.[137]

4. Model Rule of Professional Conduct 8.4

Model Rule 8.4[138] addresses general attorney misconduct and broadly proscribes it. The issue kept alive by *Hoffman* is whether an attorney's failure to disclose immigration violations amounts to general misconduct or dishonesty. The states interpret their adopted versions of Rule 8.4 derivatively: it is automatically violated if there is a contemporaneous violation of any other rule of professional conduct. The language of the rule compels this conclusion because it states, in subsection (a), that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . ."[139] Aside from this derivative violation of the rule, there are two potential independent violations worthy of mention.

First, under subsection (c), it is professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[140] The language is very broad and could easily extend to the types of immigration disclosure issues that have been under discussion. Second, under subsection (d) it is professional misconduct for an attorney to "engage in conduct that is prejudicial to the administration of justice."[141] Although Comment 4 to the rule observes that a finding of significant interference with the administration of justice has historically been assumed to require a crime of "moral turpitude,"[142] Comment 5 cautions that

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[136] *See supra* note 135 and accompanying text.
[137] Given a rudimentary understanding of backpay, it should be obvious to an employer when the backpay of a discriminatee has not been included in a settlement.
[138] Model Rule of Professional Conduct 8.4 (Misconduct) -

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
[139] *See supra* note 138 for rule; *see, e.g.,* L.S. v. Mississippi Bar, 649 So.2d 810, 814 (1994) (noting that there is always a violation of Rule 8.4 if there is a violation of any other rule).
[140] *See supra* note 138.
[141] *Id.*
[142] *See* MODEL RULES OF PROFESSIONAL CONDUCT, R. 8.4, Cmt., *available at*

"[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."[143] That language has expansive and uncertain connotations.[144]

This foray into the Model Rules reveals a wide variety of arguments available to adversaries of whatever stripe seeking to stir the professional responsibility pot. In the present atmosphere of immigration controversy, the NLRB would do well to remove the pot from the fire.

While the notion of the attorney's moral "trilemma" of being required to "know everything, to keep it in confidence, and to reveal it to the court"[145] is not new, it is less susceptible of sympathetic treatment in these circumstances. Why should state ethics boards agree that NLRB attorneys admitted in their jurisdictions, regardless the identity of their legal employer, are entitled to fail to disclose evidence of crimes or wrongdoing to a tribunal? The proposition seems even more troublesome when it is considered that, while one arm of the organizational client of the attorney, the NLRB prosecutorial division, demands confidentiality in connection with the collection of evidence arguably subject to disclosure, the other arm of the client, the NLRB adjudicative arm, is denied the disclosure. Caught in the middle are litigants. It is easy to imagine state ethics boards penetrating this veil by treating the attorney-client relationship between the NLRB attorney and the NLRB prosecutorial arm as a fiction, and requiring absolute disclosure of immigration violations to the NLRB adjudicative arm.

## E. TWO POSSIBILITIES FOR AMELIORATION

Clearly, the Hoffman Memorandum creates vulnerabilities for NLRB attorneys by failing to take on the professional responsibility issues generated by *Hoffman*. One possibility for dealing with conflicting professional responsibility norms, or for dealing with the absence of any

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http://www.abanet.org/cpr/mrpc/rule_8_4_comm.html.

[143] *Id. See also* State Bar of Michigan, Opinion # RI-166 (June 3, 1993) *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ri-166.htm?CFID=2525549&CFTOKEN=84086261 (last visited July 19, 2008) (opining that attorney member of administrative board had duty to disclose new material discovered in file by attorney after board had heard the case and that failure to do so would violate Michigan's version of Rule 8.4).

[144] *See, e.g.,* Attorney Grievance Commission v. Floyd, 929 A.2d 61 (2007) (holding that attorney's concealment from federal employer that employment recommendation was written by husband violated Maryland's version of Rule 8.4).

[145] Taryn L. Hook, Comment, *Ethical Problems in Representing Aliens Applying for Visas Based on Marriages to United States Citizens*, 28 Santa Clara L. Rev. 709, 724 (1988) citing Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121, 123 (1985).

norm directly applicable to immigration-related disclosures, is for the NLRB to take a very hard look at Model Rule 8.5.[146] The various theories for attorney discipline under the Model Rules discussed in the previous section are vexing because the rules do not appear to apply to attorneys employed by and engaged in practice before Federal administrative agencies. These agencies collectively represent a de facto jurisdiction. Application of state ethics codes to a Federal jurisdiction in effect thrusts Federal attorneys into a species of multi-jurisdictional practice containing tensions that are in reality the residue of federalism.

The American Bar Association has taken note that multi-jurisdictional practice is becoming much more common.[147] In many practice areas the nationwide and international practice of law has created potential in an analogous fashion for professional responsibility conflict between jurisdictions.[148]

In recognition of this evolving reality of legal practice, the ABA promulgated, in 2002, Model Rule of Professional Conduct 8.5.[149] While

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[146] Rule 8.5 states:
(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

[147] AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE, 3-5, 10 (August 2002) *available at* http://www.abanet.org/cpr/mjp/intro-cover.pdf (last visited August 2, 2008).

[148] *Id*. at 3.

[149] MODEL RULES OF PROFESSIONAL CONDUCT, R. 8.5 (Maintaining The Integrity Of The Profession):
(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to

the full history of the rule is beyond the scope of this article, one feature of it has direct application to an NLRB attorney facing the prospect of competing ethical norms. Subsection (b)(1) of the rule states that "[i]n any exercise of the disciplinary authority of this jurisdiction . . . for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits [applies], unless the rules of the tribunal provide otherwise."[150] The language suggests that NLRB attorneys could adhere to NLRB created ethics rules when both the attorney's state of admission and the state in which the attorney's regional office is located have adopted Model Rule 8.5.[151] Following an agency rule in the case of conflicting or nonexistent professional responsibility norms, as allowed by Rule 8.5, would be consistent with the NLRB's policy of following state ethical provisions once it had enacted a rule addressing the situation.[152]

More audaciously, the NLRB could simply apply Model Rule 8.5 to *all* situations of professional responsibility rules conflict as a consensus ABA opinion on how to solve multijurisdictional problems.[153] An ABA-deferential approach would be less objectionable to state Bar authorities than resort to an agency created rule and would have the virtue of avoiding federalism critiques. To further fend off criticisms of heavy-handedness in the area of immigration disclosures, the NLRB could apply disclosure rules used by a majority of jurisdictions, where they can be identified, as its preferred rules when sitting as a "tribunal" within the meaning of Rule 8.5.

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discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

[150] *See supra* note 146.

[151] As of January 24, 2008, thirty-six states had adopted a rule identical or similar to Model Rule 8.5, *see* AMERICAN BAR ASSOCIATION, STATE IMPLEMENTATION OF ABA MODEL RULE 8.5, *available at* http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf. Several regional offices sitting in high-immigration areas would be in a position to apply the rule as the governing norm in their geographic area. The 2000 Census reflected that, as of the year 2000, California, New York, Texas, Florida, Illinois and New Jersey accounted for more than two-thirds of the foreign-born resident count. *See* U.S. Census Bureau, Census 2000 Summary File 3, PCT19. Place of Birth for the Foreign-Born Population *available at* http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=dataset&id=DEC_2000_SF3_U&_lang=en. Although the Census does not break down the "undocumented immigration" population by state, the Pew Hispanic Center estimates that 30 percent of the foreign-born population is undocumented. Pew Hispanic Center, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S.* (Washington, D.C., March 7, 2006), p. 4. California, New Jersey and Florida have enacted rules similar or identical to Rule 8.5; New York and Florida have recommendations pending to enact a rule identical to 8.5. *See supra*, State Implementation of Rule 8.5.

[152] National Labor Relations Board Casehandling Manual (Part One), § 10058. *See supra* note 76 and accompanying text.

[153] *See* Report 201C , American Bar Association on Multijurisdictional Practice Report to the House of Delegates (August 2002), *available at* http://www.abanet.org/cpr/mjp/201c.pdf. (describing Rule 8.5(b)(1) as minimizing conflicts between and clarifying applicability of rules to provide protection from discipline for attorneys who act reasonably in the face of uncertainty).

The ethics rule imposed through Model Rule 8.5 could simply hold that an NLRB attorney's exclusive ethical obligation upon learning of immigration violations is to report them to agency superiors.[154] The attorney's compliance with such a rule would simultaneously satisfy the NLRB's institutional requirements and the professional responsibility objectives of the NLRB attorney.

Alternatively, the NLRB could travel the same path that it has traveled in the context of the no contact rule. It could simply direct its Office of Special Litigation to conduct a state-by-state canvassing of whatever professional rules may be applicable to immigration disclosures and broadly disseminate the results of that canvassing. In the event that problematic disclosure rules are uncovered, the Office could seek an advisory ethics opinion from the Bar counsel of the state in question on particular points of law. Attorneys admitted in states requiring disclosure in common immigration scenarios could be sequestered from this class of cases. The essential problem with choosing a state-by-state approach is that state professional responsibility law is likely to be inchoate, partly because of the paucity of state doctrine dealing with these issues, and partly because of the failure of either the Model Rules or of the canons of particular states to define with any clarity the professional responsibility duties of Government attorneys outside of the criminal context.

Whichever option the NLRB might choose to pursue will put its investigating and trial attorneys in a superior position than the one in which they currently find themselves. Ultimately, NLRB attorneys are vulnerable to allegations of failing to disclose illegal conduct as required by ethical canons because there is no immediately apparent countervailing interest of client confidentiality that would forbid such a disclosure. Even if such a countervailing interest exists, because the Government-at-large or the NLRB is the NLRB attorney's client, the overall perception would probably be that the agency's reliance on that interest was an attempt to ignore immigration illegality, aided by its attorneys. Professional responsibility

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[154] The procedure employed could approximate Model Rule of Professional Conduct 1.13(b):

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

ambiguity, if left unchecked, may provide an opening for opponents of labor law coverage of unauthorized workers to interfere with appropriate prosecution of these important emerging cases at the intersection of labor and immigration law. The NLRB should act to prevent the interference.

## III. CREDIBILITY PARADOX

### A. CREDIBILITY IN NLRB PROCEEDINGS GENERALLY

*Hoffman's* reaffirmation of the NLRA employee status of unauthorized workers means that the testimony of these workers, who are indispensable, immediate witnesses of employers' NLRA violations, will be taken and relied upon by the NLRB to prosecute those violations. This is the second of the paradoxical problems that *Hoffman* has unleashed. Unauthorized workers, who unlawfully attain entry or maintain residence in the country through a series of misrepresentations, must be found credible by judges, who are arguably predisposed to view the workers' actions as a categorical stain on credibility. The NLRB must find a way to prevent the presumptive discrediting of witnesses based on their status as unauthorized workers.

Even in ordinary NLRB trials, the credibility of witnesses is extremely important; pre-trial investigations are conducted by affidavit[155] and the assertions of charging party witnesses are accepted as true for purposes of the investigation unless disproved by objective evidence.[156] In the case of a discharge alleged to have violated the NLRA, for example, evidence of an employer's anti-union motive - a necessary element of the NLRB's prima facie case[157] - may consist exclusively of an employee's account of the statements of an employer's agent. The same is true of employee accounts of threats and coercive statements that, standing alone, would violate the NLRA. In a typical case, these witness statements must be substantially credited, both by the administrative law judge hearing the case and, ultimately, by the NLRB in order to make out a violation.[158] Courts take seriously the right of employers to impeach the credibility of witnesses testifying about these kinds of statements, which are of independent legal significance. As the Fourth Circuit has remarked, "[i]mpeachment evidence

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[155] National Labor Relations Board Casehandling Manual (Part One), § 10060.
[156] National Labor Relations Board Casehandling Manual (Part One), § 10064.
[157] *See* Wright Line, 251 NLRB 1083, 1083-1084 (1980); NLRB v. Transportation Management, 462 U.S. 393 (1983).
[158] The ancient and still viable NLRB case addressing witness credibility is Standard Dry Wall Products, Inc., 91 NLRB 544 (1950) (holding that it is the policy of the NLRB to attach great weight to a fact finder's credibility findings based on demeanor, and that those findings will not be overruled except where the clear preponderance of all the relevant evidence convinces the NLRB that the fact finder's findings were incorrect). Technically, the NLRB possesses the right to visit all trial level findings de novo. 5 U.S.C. § 557(b).

is crucial in [NLRB] proceedings, since the ALJ sits as judge and jury."[159]

More generally, the Supreme Court has emphasized that the determination of "the weight and credibility of the evidence is the special province of the trier of fact."[160] Furthermore, "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."[161] An NLRB trial attorney has good reason to be concerned about the practical finality of credibility determinations given the deference afforded administrative law judges by both the NLRB and the circuit courts in making those determinations.[162]

## B. TRIAL ATTORNEY'S DILEMMA

In this credibility-rich environment, an NLRB attorney would ordinarily confront a dilemma in the situation created, or exacerbated, by *Hoffman*. On the one hand, immigration facts could be ignored on the theory that they are not germane to the question of whether a discriminatee is a statutory employee. On the other hand, immigration facts could be assessed and explored on the theory that an adversary could use the facts to impeach the credibility of a discriminatee, or of any other witness who is an unauthorized worker. Impeachment could take several forms. The NLRB's witnesses might be confronted with facts concerning immigration status, false claims of citizenship, misrepresentation of identity, or forged or unlawfully obtained documents.

In one sense, the NLRB has solved the trial attorney's dilemma by fiat, for it has taken position that immigration matters are "irrelevant" to the question of NLRA violation because the discriminatee or witness is a statutory employee.[163] In other words, the NLRB as an institution presumes that immigration questions necessarily go to employee status. However, if the purpose of such questioning is to impeach credibility, the fact that the evidence does not undermine the employee status of a discriminatee is itself irrelevant. Assuming the purpose of counsel is to impeach the overall credibility of an unauthorized worker-witness, it is possible, indeed likely, that a judge would permit questioning on immigration matters within

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[159] Halstead Metal Products v. NLRB, 940 F.2d 66, 73 (4th Cir. 1991).
[160] Inwood Labs, Inc. v. Ives Labs, Inc., 456 U.S. 844, 856 (1982).
[161] Anderson v. City of Bessemer City, N.C. 470 U.S. 564, 574-575 (1985).
[162] *See, e.g.,* NLRB v. Gordon, 792 F.2d 29, 32 (2nd Cir. 1986) (holding that NLRB's findings based on ALJ's assessment of witness credibility not overturned by circuit unless hopelessly incredible or in contradiction of either the law of nature or undisputed documentary testimony).
[163] *See* Hoffman Memorandum at 2-3, § B.

standard evidentiary parameters.[164] Assuming the NLRB trial attorney called the witness to present testimony that was important, the impeachment of the witness' credibility by exploration of immigration circumstances is extremely problematic. Indeed, given the fetters placed on the pre-trial investigation, the attorney would be completely unprepared if adverse immigration evidence should surface.

C. DOUBLE D

Credibility complexities in the context of NLRB cases containing immigration issues are well reflected in the case of *In re Double D. Construction Group, Inc.*[165] In *Double D*, a somewhat standard labor law case in strict factual terms, Iron Workers Local 272 sought to represent a unit of workers employed by Double D, a construction company engaged in the work of reinforcing concrete buildings and structures throughout southern Florida. The precise employees the union wanted to represent were ironworkers who placed reinforcing steel bars, commonly known as "rebar," in concrete structures.[166] A representation election[167] was initially scheduled for October 19, 2001.[168] The union filed objections to the election[169] because of coercive conduct it claimed the employer had committed, and the union and employer agreed to a second election without additional litigation, which was ultimately held on December 7, 2001.[170] The union lost that election,[171] but filed objections to the conduct of the

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[164] *See* Federal Rule of Evidence 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. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness." However, because Federal administrative law judges are generally not required to follow the rule, *see infra* note 235 and accompanying text, there is increased likelihood of witness examination on arguably collateral issues.

[165] 2002 WL 31046012 (NLRB Div. of Judges 2002) *rev'd* 339 NLRB 303 (2003) *on remand* 2003 WL 21748671 NLRB Div. of Judges 2003).

[166] Double D. Construction Group, Inc., 339 NLRB 303, 322 (2003).

[167] Among the NLRB's statutory duties is the conducting of representation elections when 30% of an employer's employees in a unit appropriate for collective bargaining demonstrate an interest in representation by a bargaining representative. *See* 29 U.S.C. § 159(e).

[168] Double D at 322.

[169] *See* National Labor Relations Board Casehandling Manual (Part Two), §§11390-11397.

[170] Double D at 320.

[171] *Id*. The final tally was four votes for union representation, ten against union representation, and two disputed ballots that were not considered because resolution of the

second election, which were consolidated for hearing with an unfair labor practice allegation.[172]

At trial, the administrative law judge found the employer had committed a number of unfair labor practices and also found that the employer had interfered with the conduct of the second election.[173] For purposes of this discussion, the judge's finding with respect to a discharged employee, Tomas Sanchez, is most salient. Sanchez testified that on November 13, 2001, he accompanied the union president to a Federal building, where the NLRB offices were located, to facilitate the discussion of a voluntarily rerun second election.[174] An important credibility dispute arose as to whether the employer's principal, Lock, saw Sanchez in the building.[175] This was important because in order for the NLRB to establish that Sanchez was discharged for engaging in protected activity, as it had alleged, it first had to establish that the employer had knowledge[176] that Sanchez was engaged in protected activity.[177] Sanchez unequivocally asserted that Lock saw him in the building.[178] The union official could not remember if he saw Lock in the building, but only "believed" he did.[179] Lock could not recall if he had seen Sanchez in the building.[180] Thus, Sanchez' testimony was the reed upon which the NLRB's prima facie case was perched. A mere three days after the second election, Sanchez reported to work and, according to

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underlying disputes would not have altered the result of the election. *Id*. at 321.

[172] Unfair labor practices are detailed in 29 U.S.C. § 158. Those practices are, in their essence, conduct violating 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...").

[173] Double D at 318-19.

[174] *Id*. at 324.

[175] *Id*. at 324-25. More precisely, Sanchez alleged that Lock saw him in a coffee shop in the lobby of the Federal building.

[176] The employer almost certainly had knowledge that *someone* was involved in union activity, and it might be argued that this should be enough to satisfy the NLRB's burden on this element of proving that the discharge was unlawful. In recent years, however, the NLRB has, squeamishly it might be said, insisted on particularized evidence of knowledge. *See* Sacramento Recycling, 345 NLRB 564 (2005). In other words, the NLRB insists that it be proven that the employer knew that *an individual* discriminatee was involved in protected activity to make out a prima facie case of discrimination with respect to *that* discriminatee, even in a small workplace in which a realistic understanding of workplace dynamics should easily support an inference of knowledge in connection with *any* employee discharged during an organizing drive in suspicious circumstances.

[177] *See* Benjamin Franklin Plumbing, 352 NLRB No. 71 (2008). (under *Wright Line* standard NLRB meets its initial burden by showing that the employee was engaged in protected activity; that the employer was aware of the activity; and that the activity was a substantial or motivating reason for the employer's action).

[178] Double D at 324.

[179] *Id*. at 325.

[180] *Id*.

his testimony, Lock discharged him.[181] According to Lock's testimony, Sanchez simply abandoned his job following the election.[182] The administrative law judge refused to credit Sanchez' testimony on either issue:

> . . . [T]here are reasons to doubt Sanchez' testimony . . .[H]e . . . admitted that when he applied for work with [the employer] he used a false social security number. Although asked, he did not say where he obtained this number, but only admitted that it was false. There are certain similarities between using a false social security number and giving untrue testimony. Both obviously involve the element of falsehood, but more than that, they both entail a substantial legal risk. The punishment for using a false social security number is quite significant, and so is the penalty for perjury. Sanchez used a false social security number to obtain employment. To obtain work, he was willing to risk the legal penalty. The complaint names Sanchez as a discriminatee, and the Government seeks an order requiring Respondent to reinstate him with backpay. A job is at stake once more. If Sanchez demonstrated a willingness to use a false Government document to obtain work, notwithstanding the risk, he may also be willing to offer false testimony to obtain reinstatement, notwithstanding the risk. To the extent that Sanchez' testimony conflicts with that of Lock, I credit Lock.[183]

Thus, the administrative law judge dismissed the complaint allegation that the discharge of Sanchez violated the NLRA.[184] The General Counsel filed exceptions, and a two-member plurality of a three-member NLRB panel remanded the administrative law judge's discharge finding to "reevaluate the conflicting testimony of Sanchez and Lock, basing his choice between their accounts on appropriate considerations in determining credibility."[185] For the plurality, comprised of Board member Liebman and then Board member Acosta:

> [T]he judge effectively disqualified Sanchez as a witness, as

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[181] *Id.*
[182] *Id.* The distinction is critical because an "adverse action" must be proven as part of the NLRB's prima facie case. *See* United Rentals, Inc., 350 NLRB No. 76, slip op. at 1 (2007).
[183] Double D at 325.
[184] *Id.*
[185] *Id.* at 306.

> opposed to making a true credibility determination, which considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.[186]

The plurality did not suggest that the administrative law judge was prevented from taking cognizance of the false representation made on the I-9 form.[187] However, it thought that the judge impermissibly discredited Sanchez's testimony at trial *solely* because of the false representation.

Dissenting Board Member Schaumber had a very different view of the matter:

> I believe the rule the majority adopts, while well intentioned, threatens to lower the bar on the degree of truth and honesty to be expected in Board proceedings. After all, why should the rule be limited to the falsification of an Immigration and Naturalization Service Form I-9 and not be applied to additional documentation provided during the course of employment? Why should the majority's decision be limited to undocumented aliens that are the focus of its decision and not be expanded to others who have compelling personal reasons to lie to get a job?[188]

On remand the same administrative law judge again discredited Sanchez' testimony, albeit on expanded grounds.[189] However, with respect to the general propriety of utilizing the fact of a falsified immigration document as part of an assessment of credibility, the judge was undeterred:

> Sanchez damaged his credibility not by failing to obtain a valid social security number but *by lying about it* on a government form. The difference in these two acts is as stark as the contrast between malum prohibitum and malum in se. Neither the Ten Commandments nor the Code of Hammurabi nor the Confucian Analects condemns working without a valid social security number and, in any event, doing so says nothing about propensity to answer questions

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[186] *Id*. at 305.
[187] *Id.*
[188] *Id*. at 309.
[189] 342 NLRB 910, 912-16 (2004).

> truthfully. On the other hand, lying is lying, and has been since the dawn of human civilization.[190]

Under *Standard Dry Wall*, the judge's credibility finding should probably have been upheld because the *clear* preponderance of all the relevant evidence should not have convinced a plurality of the NLRB that the judge's decision was incorrect.[191] As the administrative law judge demonstrated in his decision on remand, there were alternative bases in the record evidence to discredit Sanchez.[192] The plurality obviously knew *Standard Dry Wall* well and yet failed in reality to apply it in the case.

## D. THE ASYLUM LAW ANALOGY: *THE HEART OF THE CLAIM*

The essential credibility paradox arising from *Hoffman's* approval of NLRA employee status for unauthorized workers has a parallel in asylum law. Whether an immigrant has left his or her native country to escape political violence and persecution or to escape severe economic hardship by obtaining a better job, or any job at all, litigation in both the asylum and labor contexts may jeopardize that escape. It is hard to imagine that the facts surrounding such an escape would not be desperate. Desperate people have been known to do desperate things, including misrepresenting facts relating to immigration and to citizenship status.[193] The development of credibility law in asylum contexts provides useful lessons for the NLRB.

Asylum law, like labor law, is steeped in difficult fact questions turning on credibility. An asylum applicant begins with a formal application to the Attorney General for protection.[194] The applicant must demonstrate in an interview with an asylum officer that the applicant is a refugee, has been persecuted in the country of the applicant's nationality, and has a well founded fear of future persecution on account of race, religion, nationality,

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[190] *Id*. at 916.
[191] *See supra* note 158.
[192] 342 NLRB at 912-16.
[193] Indeed, in Double D the NLRB cited Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000), a case standing for the proposition that an unauthorized worker falsifying immigration documents was not guilty of a crime of "moral turpitude" within the meaning of immigration regulations. 339 NLRB 330, n.17. The citation was curious because, as noted by the dissent, *id*. 317-18, and the administrative law judge on remand, 342 NLRB at 916-17, the case had no apparent application to Double D. The judge may have suspected that the case was cited to chide that unauthorized workers were not "immoral."
[194] Sheilah C. O'Grady, *Dangerous Side Effects May Occur: The Real ID Act's Prescription for Changing Standards of Credibility and Corroboration in Asylum Law*, citing CHARLES GORDAN, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW & PROCEDURE, § 34.02 [1] (Matthew Bender 2006).

membership in a particular social group, or political opinion.[195] At the completion of the administrative process, an immigration judge hears the applicant's case and assesses the credibility of the applicant's testimony, taking into account any corroborating evidence.[196] Before rendering a decision, the judge must make an explicit credibility finding.[197] If the judge makes an adverse credibility determination, or finds a lack of corroborating evidence, the asylum petition is denied.[198] The applicant may appeal the denial of a petition to the Board of Immigration Appeals, and ultimately to the Federal appellate courts.[199] Credibility determinations are obviously central to these procedures.

Asylum cases present similar problems of how to evaluate testimonial credibility in the context of immigration. In *Turcios v. INS*, for example, an immigrant, Hugo Turcios applied for asylum and attempted to avoid deportation.[200] At hearing, Turcios testified that he had been arrested, detained, and beaten by armed officers of the El Salvadoran National Police, apparently because of his political affiliations.[201] After two months of near-lethal capture, Turcios was released at the Guatemalan border, possibly because his detention had become public knowledge and was so obviously unlawful under Salvadoran law.[202] Following his release, Turcios reentered El Salvador at a different border location that he believed to be safe.[203] After remaining in El Salvador for roughly six months, he again left the country because he feared imprisonment and death.[204]

On cross-examination at the immigration hearing, Turcios stated that he had received a passport and an El Salvadoran identification card shortly before he fled El Salvador.[205] He traveled through Guatemala and Mexico and entered the United States without inspection.[206] Thereafter, Turcios worked in the United States as a bus boy, gardener, painter, and construction worker.[207] While engaged in that work, Immigration and Naturalization Service officials arrested him three times, and he falsely told them that he was Mexican so that he could avoid being sent back to El

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[195] *Id.* citing IMMIGRATION LAW & PROCEDURE, § 33.05 [3][b][i].
[196] *Id*. *citing* IMMIGRATION LAW & PROCEDURE, §1.03[5][d].
[197] *Id*. *citing* IMMIGRATION LAW & PROCEDURE, § 34.02 [9][b].
[198] *Id*. *citing* IMMIGRATION LAW & PROCEDURE, § 34.02 [9][b].
[199] O'Grady, *Dangerous Side Effects*, *citing* IMMIGRATION LAW & PROCEDURE, § 34.02 [12][g].
[200] 821 F.2d. 1396 (9th Cir. 1987).
[201] *Id* at 1399.
[202] *Id*.
[203] *Id*. at 1400.
[204] *Id*.
[205] 821 F.2d. at 1400.
[206] *Id.*
[207] *Id*.

Salvador.[208] When asked why he never sought a legal visa to enter the United States, Turcios stated it had not occurred to him.[209] The immigration judge found that Turcios "did not establish his credibility due to his evasiveness in answering questions."[210] The judge additionally based an adverse credibility on Turcios's admission that he lied about his citizenship to United States authorities and on Turcios's "repeated violations of the Immigration Laws."[211]

The Ninth Circuit reversed the judge's credibility finding, while also disagreeing with the judge on conclusions to be drawn assuming the testimony to have been incredible. On the issue of credibility, the court, in partial reliance on an opinion of the United Nations High Commissioner for Refugees,[212] stated:

> Untrue statements by themselves are not reason for refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case . . . Turcios's misrepresentations are wholly consistent with his testimony and application for asylum: he did so because he feared deportation to El Salvador. In this context, Turcios's statement to the INS does not detract from but supports his claim of fear of persecution. It does not support a negative credibility finding.[213]

The Ninth Circuit further elucidated this nuanced view of credibility in *Ceballos-Castillo v. INS*,[214] even as it rejected its application to the facts of that case. In responding to the argument that an evaluation of credibility by an immigration judge had been inadequate, the court said, "We understand but reject the argument. Unlike *Turcios,* the misstatements here were not incidental. They involved the *heart of the asylum claim*."[215]

The Federal circuits generally came to accept the proposition that adverse credibility determinations should not be based on "minor inconsistencies that do not go to the 'heart of the asylum claim.'"[216] This assertion seems similar to an argument that credibility determinations may

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[208] *Id*.
[209] *Id*.
[210] 821 F.2d. at 1400.
[211] *Id*.
[212] *Id*. *citing* United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 199, at 46 (Geneva 1979) (*Handbook*) *available at* http://www.hrea.org/erc/Library/hrdocs/refugees/unhcr-handbook.pdf.
[213] *Id*. at 1400-01.
[214] 904 F.2d 519 (9th Cir. 1990).
[215] *Id*. at 520 (emphasis mine).
[216] Camara v. Attorney General, 2008 WL 1823342, slip op. at 1 (3rd Cir. 2008) citing Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir.2002).

not be based on *irrelevant* testimony, a proposition that appears to sweep too broadly. The fact of being a serial liar outside of court - assuming it could be established - would bear *some* relationship to the truth of testimony offered in court even if those lies were unrelated to the controversy under consideration.[217]

In 2005, Congress passed the Real ID Act, which has since been codified.[218] The Act, among other things, revised the standard for credibility determinations[219] in asylum cases, explicitly in reaction to Ninth Circuit jurisprudence.[220] The legislation expressly authorizes immigration judges to discredit witnesses based on testimonial inconsistencies that are arguably relevant but do *not* go to the "heart of the claim."[221]

## E. THE RULE 608(b) PRISM

*Double D* and *Turcios* can be read as disagreements between trial judges and appellate bodies about the degree of inconsistency that must be present before testimony, as a matter of law, may be deemed not credible. This resolves to the question of *how much* falsity must be uttered before *all* confidence in a witness's testimony has been lost. However, the cases can also be read as profound disagreements between judges and appellate bodies about the nature of falsity. Federal Rule of Evidence 608(b),[222] the

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[217] Adverse credibility determinations in asylum and labor cases may be driven by the relative lack of witness sophistication or even, paradoxically, by honesty because much of the "prior bad act" evidence comes by way of admission during cross examination. *See* Hoffman Plastic Compounds, 314 NLRB 683, 685 (1994) and Turcios, *supra,* 821 F.2d at 1400. If witnesses in these cases were simply to deny meandering allegations of immigration misrepresentations, it is likely that these impeachment facts could not be proven extrinsically. Federal Rule of Evidence 608(b), *see infra* note 222 for text of rule.

[218] The asylum legislation applicable to the present discussion is now codified at 8 U.S.C. § 1158.

[219] 8 U.S.C. § 1158 (b)(B)(iii) (authorizing trier of fact to base credibility determinations on all relevant factors and on falsehoods in witness statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the claim).

[220] *See, e.g.,* 151 Cong. Rec. H453 (daily ed. Feb. 9, 2005) (statement of Rep. Hart).

[221] *See supra* note 215 and accompanying text.

[222] Federal Rule of Evidence 608(b) states:

> 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. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified...The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness."

vehicle through which testimony "probative of truthfulness or untruthfulness" should properly be before a Federal judge,[223] suggests an analytical referent for this disagreement. The rule allows that specific instances of conduct can be used to attack a witness' "character for truthfulness" at the discretion of the court *if* "probative of truthfulness or untruthfulness."[224] In essence the rule states that specific instances of conduct can be "inquired into" to attack credibility if they are probative of credibility. The formula begs the question: what *is* probative of credibility?

Returning to *Double D*, it is clear that the plurality did not think that the misrepresentation on the immigration form that was at issue in the case was, standing alone, probative of credibility:

> With respect to the incentives for truth-telling, filling out a government immigration form in the workplace - even one that recites the criminal penalties for false statements in the event the signer's false statement is detected and leads to a conviction- is not the same as testifying under oath in a legal proceeding. *This may be particularly true with respect to immigrants who face compelling pressure to find work and earn a livelihood*.[225]

Although the plurality insisted that it assigned the misrepresentation some probative value, it is more realistic to read the case as an instance in which the plurality believed (i) that the judge had assigned the immigration misrepresentation dispositive weight and (ii) rejected that the misrepresentation was *qualitatively* probative of credibility. The answer of dissenting Board member Schaumber reveals his fundamental disagreement:

> Considerations to be taken into account in determining the credibility of a witness do not turn on the employee's status as an illegal alien, any more than the employee's nationality, country of origin or sex. The rules of evidence call on triers of fact, whether judge or jury, to weigh and consider many factors in determining a witness's credibility. No one class of employees, or employers for that matter, ha[s] a necessary monopoly on any of them. Compelling pressure to find work and earn a living *can be* a mitigating factor for an employee

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[223] *See supra* note 222.
[224] *See id.*
[225] Double D, 339 NLRB at 305 (emphasis mine).

> whose testimony is impeached because he or she lied in order to get a job; it is not a factor reserved for the illegal alien community.[226]

Although couched in terms of immigration misrepresentation being one among many factors that a judge might consider in making a credibility determination, the argument is in reality an answer to the plurality's tacit assumption that the judge had discredited employee Sanchez *solely* because of such a misrepresentation.[227]

## F. TWO WAYS OUT: PRESUMPTION OF CREDIBILITY AND THE FIFTH AMENDMENT

Rather than helplessly accepting the risk of adverse credibility determinations that eviscerate the prosecutions involving unauthorized workers that *Hoffman* authorized, policy makers could employ approaches less threatening to administrative law judges[228] than the puzzling disregard of *Standard Dry Wall* credibility determinations.[229] An evidentiary rule could be developed creating a rebuttable presumption that an employee admitting to unauthorized worker status in an NLRB proceeding is probably telling the truth. This counterintuitive notion is based on recognition of the stark reality of the situation. An unauthorized discriminatee is not eligible for backpay or reinstatement and is exposed to the risk of disclosure to immigration authorities[230] with resulting criminal liability or deportation. A witness in this situation has no apparent incentive to lie. The NLRB, steeped in industrial reality, has understood this kind of witness vulnerability in other circumstances and has established what is in practical operation a credibility presumption in favor of employees testifying against the interests of their present employers during NLRB proceedings.[231]

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[226] *Id*. at 315. (emphasis in original).

[227] The *sub silentio* argumentation throughout the case is underscored by the complete absence of record evidence that Sanchez was actually an unauthorized worker. Everyone simply assumed that he was. *Id*. at 318, n.3.

[228] The Roman maxim "Falsus in Uno, Falsus in Omnibus" refers to the discretion of a judge to reject the entirety of a witness' testimony based upon a single misrepresentation. It generally still is held that a judge has the prerogative to discredit a witness in this manner, though the rule, now as always, is not free from doubt. *See* 98 C.J.S. Sec. 570.

[229] In order for policy makers to effectively consider alternative approaches, the NLRB must painstakingly develop a factual record of the industrial circumstances of a variety of immigration-impacted workplaces in a manner that its Hoffman Memorandum procedures would not allow.

[230] Whether the risk is real or imaginary seems unimportant.

[231] Flexsteel Industries, 316 NLRB 745 (1995) (holding testimony of current employees contradicting statements of supervisors likely to be particularly reliable because adverse to the employees' pecuniary interests), *accord* Gold Standard Enterprises, 234 NLRB 618, 619 (1978); Georgia Rug Mill, 131 NLRB 1304, n.2 (1961). Unauthorized workers always

A second policy approach would be to permit discriminatees and witnesses to invoke their Fifth Amendment privilege against self-incrimination without risking the drawing of an adverse inference from a judge in response to the invocation.[232] Such a rule would apparently be at odds with the present NLRB rule permitting the drawing of an adverse inference upon a witness' invocation of the Fifth Amendment.[233] At first blush it might be thought that the present rule would in any event be distinguishable from an unauthorized worker's invocation of the privilege. Witness silence in the context of civil proceedings touching on immigration status and the possibility, at least in theory, of deportation or criminal conviction, seems more akin to criminal or quasi-criminal proceedings, where adverse inferences by a fact finder for the invocation of the privilege are forbidden. However, the Supreme Court rejected that theory decades ago in the context of deportation hearings, where it would appear most persuasive,[234] so it appears the NLRB would have to modify its present interpretive rule.

An explicit statutory impediment to modification does not exist. In matters of evidence the NLRA simply requires that the NLRB follow the

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testify adversely to their pecuniary interests and probably risk much more.

[232] *See* Mitchell v. U.S., 526 U.S. 314, 315 (1999) (finding that normal rule in criminal case permits no negative inference from a defendant's failure to testify); see also Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) *citing* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (explaining that Fifth Amendment also privileges defendant not to answer official questions in any proceeding where the answers might be criminally incriminating). But see Baxter, 425 U.S. at 318 (holding that in a clearly civil case an adverse inference may be drawn from the invocation of Fifth Amendment privilege even where the privilege is validly invoked). The case law almost universally speaks to whether adverse inferences on invocation of the privilege is constitutionally permissible. There is little or no suggestion in the doctrine that a legislative body would be prevented from *forbidding* the drawing of an adverse inference upon witness invocation of constitutional privilege in civil cases, and, indeed, such an expedient appears permissible. *See* Va. Code Ann. § 8.01-223.1; Travis v. Finley, 36 Va. App. 189, 201-02, 548 S.E.2d 906, 912 (2001) (acknowledging that under Virginia Code no adverse inference may be drawn for asserting constitutional claim in civil case).

[233] *See* National Labor Relations Board Division of Judges Bench Book, Chapter 13, § 291, *citing* In the Matter of Maurice, 73 F.3d 124, 126 (7th Cir. 1995) (drawing of adverse inference upon invocation of Fifth Amendment privilege in civil cases is permissive). There is scant NLRB decisional law on the point, and what law exists fails to demonstrate the ALJs' recognition of the rule. Monfort of Colorado, Inc., 256 NLRB 612, 622-23 (1981) (finding by ALJ that adverse inference improperly drawn); *Id.* at 612, 614, n.2 (affirming ALJ's ultimate conclusions but explicitly passing on adverse inference issue); Teamsters Local Union No. 215, 251 NLRB 1234, 1239 n.3 (1980) (finding by ALJ that drawing of adverse inference in Fifth Amendment context forbidden). At best, it might be said that the NLRB has established an interpretive rule rendered ambiguous, and probably nonbinding, by conflicting case law. *See generally*, WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 357 (3d ed. 2006).

[234] U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) ("...[T]here is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak.")

Federal Rules of Evidence "in so far as practicable."[235] Thus, if a direction by the NLRB to its judges[236] either to presume the credibility of immigration-vulnerable witnesses or to forbid the drawing of an adverse inference from witnesses' invocation of Fifth Amendment privilege is in conflict with the Federal Rules of Evidence,[237] the NLRB's enabling statute does not forbid the departure. The Administrative Procedure Act, moreover, confers administrative agencies functioning in an adjudicative capacity with extremely broad control over the creation and enforcement of evidentiary rules.[238]

Nevertheless, the fact that the NLRB would not be prohibited from enacting modified evidentiary rules - whether through APA informal rulemaking procedures or formal adjudication[239] - does not mean it should make the attempt to do so unless it is absolutely clear that a legislative solution is unlikely in the foreseeable future. This is true for two reasons. First, the NLRB's utilization of Administrative Procedure Act informal rulemaking has always been controversial[240] despite its unambiguous

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[235] 29 U.S.C. § 160(b) and Board's Rules and Regulations, § 102.39.

[236] A "direction" could take the form of formal adjudication, informal rulemaking, or promulgation of a nonlegislative rule. The NLRB could also simply reverse credibility determinations of administrative law judges on an ad hoc basis upon exception by an aggrieved party because, under the Administrative Procedure Act, the NLRB on appeal retains authority to decide cases with "all the powers which it would have in making the initial decision..." 5 U.S.C. § 557(b). Reversal of ALJ credibility determinations will subject the NLRB to the risk that reviewing courts will conclude the reversals are based on demeanor rather than policy. *See* Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. Nat'l Ass'n. Admin. L. Judges 1, 31-32 (2005) *citing* Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977).

[237] The NLRB might successfully argue that, assuming a witness' silence *is* evidence supporting an adverse credibility determination, in the context of immigration-related examinations or testimony, the probative value of any evidence likely to be adduced is substantially outweighed by the danger of unfair prejudice. *See* Federal Rule of Evidence 403; Cunningham-Parmeter, *Fear of Discovery* at 67-68.

[238] 5 U.S.C § 556(d) (stating only that party entitled to present case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts).

[239] Rulemaking involves the promulgation of regulations that establish guidelines to apply to particular people or practices. Under the Administrative Procedure Act the term "rulemaking" refers to informal notice and comment rulemaking. Section 553 of the APA requires a general notice of proposed rulemaking to be published in the Federal Register, including a statement of the time, place, and nature of public rulemaking procedures, a reference to the legal authority under which the rule is proposed; and the terms or substance of the proposed rule or a description of the subjects and issues involved. After giving notice in the Federal Register, the agency must give interested persons an opportunity to participate in the rulemaking, usually through submission of written data, views, or arguments. By statute, Congress provided the NLRB both rulemaking and adjudication powers, *see* 29 U.S.C. §§156, 160, but the NLRB has chosen to enforce the NLRA's substantive laws almost entirely through the process of adjudication.

[240] Scott A. Zebrak, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed* Beck *Union Dues Regulation*, 8 Admin. LJ. Am. U. 125, 158-59 (1994-1995) (proper timing for

authorization under the NLRA.[241] Second, formal, noisy establishment of rules might attract significant attention and provoke a Congressional response similar to the Real ID Act's intervention in Ninth Circuit asylum law.[242]

The best solution to the underlying evidentiary problem - the potential for categorical discrediting of witnesses merely by virtue of their unauthorized status or because of facts commonly attendant to that status - is for Congress to address through modified evidentiary rules of the type this article has proposed. This is not as implausible as it might at first appear. While efforts to reverse *Hoffman* have failed,[243] modified evidentiary rules are necessary to preserve even the limited regime of rights and status that *Hoffman* authorized. Given the vocal criticism of *Hoffman's* denial of remedies to the individual unauthorized workers who are the victims of discrimination, Congress might consider seemingly minor evidentiary modifications to be relatively painless, barely noticed compromises. The probable perception of the proposals' banality could help to avoid what has now become the reflexive rejection of any item of beneficent immigration reform.

In any event, either Congress or the NLRB must act, for failure to ensure a realistic evidentiary universe in immigration-related NLRB cases will erode and then annihilate the possibility of prosecution of cases involving unauthorized workers. The upshot of *Double D*, for all its subtlety and innuendo, was Tomas Sanchez' discrediting. Once unauthorized workers realize that, despite the risk of their involvement in NLRB cases, judges are likely to simply discredit them whenever difficult credibility disputes arise, they will have little incentive to come forward. At such a juncture, unless the NLRB is to abandon this class of cases altogether, it may have to offer use immunity[244] in conjunction with

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policy development is crucial for successful rulemaking).

[241] *See supra* at note 239.

[242] *See supra* at notes 218-221 and accompanying text.

[243] Arthur N. Read, *Protecting Worker Rights in the Context of Immigration Reform*, 9 J. L. & Soc. Change 65, 73, n.13 (2006).

[244] 18 U.S.C. § 6004 (administrative agencies may offer use immunity with the express permission of the attorney general). Although it might be presumed that the attorney general would refuse to offer the immunity, there have been a number of instances of Government-wide cooperation in immigration matters arising in the context of labor disputes. *See* Cunningham-Parmeter, *Fear of Discovery*, 78, citing MEMORANDUM FROM OFFICE OF FIELD OPERATIONS & OFFICE OF PROGRAMS, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT TO MGMT. TEAM et al., QUESTIONING PERSONS DURING LABOR DISPUTES, REVISED OPERATIONS INSTRUCTION 287.3a (Dec. 20, 1996), *available at* http://www.nilc.org/immsemplymnt/emprights/Revised_Op_Inst.pdf (last visited July 22, 2008); *see also* Christopher Ho and Jennifer C. Chang, *Drawing the Line after Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 Hofstra Lab. & Emp. LJ. 473, 522-23, n.216 (2004-2005) (discussing immigration enforcement guidelines that recommend interagency cooperation

subpoena[245] to assure the testimony of critical witnesses who are unauthorized workers.

This leaves the question of what the NLRB could do *now* to address these problems before cases have percolated upward to statutory policymakers, or in the event policy makers are too "ossified" to act in the near future.[246] One underappreciated possibility is that the NLRB could promulgate interpretive rules establishing presumptions of credibility in favor of witnesses who testify against their interests, and allowing witnesses to avoid adverse inferences upon appropriate invocation[247] of their Fifth Amendment privilege against self-incrimination.[248] Enactment of rules in this manner would not require contentious notice and comment procedures, as would be the case for informal rulemaking under the Administrative Procedure Act.[249] Although commentators have criticized this kind of approach precisely because of the lack of input it affords,[250] the NLRB has the responsibility for utilizing "administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation . . . that purpose is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the [NLRB] is to foster."[251] Given the well-acknowledged political reification of the NLRA statutory environment, the cautious use of interpretive rules may be one of the few ways for the NLRB to attempt flexible solutions to dynamic problems. As an additional virtue, this approach would provide clear guidance to administrative law judges in assessments of credibility that are interlaced with policy.[252]

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during labor disputes at targeted worksites, and suggesting that the guidelines reflect Government disapproval of enforcement actions covertly initiated by employers to intimidate and coerce employee-plaintiffs in order to dispose of them and their claims).

[245] *See generally* Baxter v. Palmigiano, 425 U.S. at 318.

[246] *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002) (analyzing with high scrutiny the statutory gridlock that is endemic to Federal labor law).

[247] Brown v. Walker, 161 U.S. 591, 599 (1896) (describing degree of witness' danger of apprehension to successfully invoke Fifth Amendment's privilege in any proceeding as "real and appreciable" and "not . . . a danger of an imaginary and unsubstantial character...").

[248] *See* Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 Cardozo L. Rev. 1117 (2005-2006).

[249] *Id.* at 1131; 5 U.S.C. § 553(b)(3)(A). It is also possible that such a rule would be exempt from APA Notice and Comment process as a rule of agency procedure under § 553(b)(3)(A).

[250] *See, e.g.*, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidance, Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L. J. 1311, 1317 (1991-1992) ("Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it . . . escapes the delay and the challenge of allowing public participation in the development of its rule.").

[251] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

[252] Krent & DuVall, *ALJ Decision Making Independence*, *supra* at 30 ("Most courts have agreed with the agencies that ALJs have no discretion to reject interpretive rules or policy

A second recommendation is for the NLRB to abandon the administrative policy of deliberately avoiding immigration facts by abrogating and re-writing the Hoffman Memorandum.

A third recommendation is for NLRB trial attorneys to fully explore Federal Rule of Evidence 608(b) to develop a coherent theory that immigration misrepresentations do not speak to a witness' "character for truthfulness or truthfulness."[253] This tactic will require NLRB attorneys to know much more about the basic immigration facts underlying their cases. For example, an attorney may learn that a worker entered the country unlawfully and misrepresented identity because the workers' family was slowly starving to death and there was simply no other work to be had. While a judge may hold to the view that "a lie is a lie," it makes good tactical sense for NLRB attorneys to know about facts that permit formulation of persuasive arguments that past misrepresentations do not, in fact, speak to a witness' *character* for untruthfulness.

Finally, even if the NLRB continues to follow its present procedures, trial attorneys can better prepare witnesses who are unauthorized workers by carefully advising them that nothing regarding the details of their immigration status, or facts surrounding the status, need be revealed spontaneously during the merits phase of an NLRB trial. Witnesses should also be cautioned that they should *immediately* cease testifying when an NLRB attorney has objected to an immigration-related question until the administrative judge has ruled on the objection.

## IV. STRUCTURAL PARADOX

The third problem generated by *Hoffman* arises from underdeterrence. Employers presently have absolutely no disincentive under the NLRA to discharge unauthorized workers. While this problem is most immediately experienced by the individual victims of discrimination, there are less obvious structural consequences that the NLRB must confront.

### A. STANDARD MODEL OF STRUCTURAL INTEGRITY

Given the problems inherent in cases involving unauthorized workers, it seems unlikely that prosecutorial policy makers would exhibit zeal in pursuing the cases if the fruit of those efforts are fragile, unstable bargaining units. The NLRB's overarching policy of industrial stability[254]

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statements.").

[253] *See supra* note 222.

[254] 29 U.S.C. § 151; Auciello Iron Works, 517 U.S. 781, 784 (1996) (defining object of the NLRA as "industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees.").

would be ill served by the certification of collective bargaining units[255] containing significant numbers of unauthorized workers if those units could be easily nullified by the strategic discharge of unauthorized workers. The NLRA confers bargaining rights only upon labor organizations able to garner the support of a majority of employees in an appropriate bargaining unit.[256] Thus, any union failing to achieve and sustain majority employee support in an appropriate bargaining unit, whether of authorized or of unauthorized workers, will simply lack rights under the NLRA to bargain for improvements to working conditions. Unit majority support is the touchstone of the entire NLRA statutory scheme.[257]

### B. AN EMPLOYER'S OBLIGATION TO BARGAIN WITH UNAUTHORIZED WORKERS

While the question of whether unauthorized workers are employees under the NLRA appears resolved,[258] an employer's obligation to *bargain* with a unit consisting substantially of such workers was until recently an open question. In *Agri Processor*, the NLRB firmly imposed such a requirement, and a divided panel of the D.C. Circuit Court of Appeals upheld the NLRB determination.[259] The facts of the case are fairly straightforward.

The Agri Processor Company was a wholesaler of kosher meat products in Brooklyn, New York.[260] In September 2005, the company's employees voted to join the United Food and Commercial Workers union.[261] When the company refused to bargain, the union filed an unfair labor practice charge with the National Labor Relations Board.[262] In a subsequent hearing before

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[255] 29 U.S.C. § 159(b) (directing that the NLRB is to decide in each case the appropriate unit assuring employees fullest freedom in exercising NLRA rights and defining unit possibilities as "employer unit, craft unit, plant unit, or subdivision thereto..."). The NLRB initially examines the unit - or grouping of employees in an individual workplace - that the union wants to represent. If appropriate, the inquiry ends. If inappropriate, the NLRB may examine alternative proposed units, or may reject alternative proposals and unilaterally select the unit it deems appropriate. *See* State Farm Mut. Auto. Ins. Co. v. NLRB, 411 F.2d 356 (7th Cir. 1969); *see also* Shares, Inc., v. NLRB, 433 F.3d 939, 944 (7th Cir. 2007) (reaffirming that selection of appropriate bargaining unit is for NLRB and is rarely to be disturbed).

[256] Union support from the majority of an employer's employees, once formalized, creates the legal obligation of an employer to bargain. *See* 29 U.S.C. § 158(a)(5) and 159(a).

[257] Employees in most private sector workplaces have the right under 29 U.S.C. § 157 to join and support a non-majority union free from interference by their employer, but the employer has no obligation to bargain with that union. *See supra* note 256.

[258] *But see* Agri Processor, 514 F.3d 1, 13 (D.C. Cir. 2008) (dissenting opinion) (denying that *Hoffman* actually decided the question of employee status of unauthorized workers).

[259] 347 NLRB No. 107 (2006) *aff'd.* 514 F.3d 1 (D.C. Cir. 2008).

[260] 514 F.3d at 2.

[261] *Id*.

[262] *Id*.

an administrative law judge, the employer claimed that after the election it processed the Social Security numbers previously given to it by all of the voting employees into the Social Security Administration's online database and discovered that "most"[263]of the numbers were either nonexistent or belonged to other people.[264] Based on this development, Agri Processor maintained that most of the workers who had voted in the election were "aliens unauthorized to work in the United States." Agri Processor argued that unauthorized workers were not employees protected by the NLRA and that the NLRB representation election was invalid. The company also argued that a bargaining unit consisting of authorized and unauthorized workers - as the facts eventually showed was the case - was inappropriate.[265]

The administrative law judge hearing the case disagreed with the employer's arguments and found that it had violated the NLRA by refusing to bargain with the union.[266] In a terse footnote, the NLRB upheld the judge and unequivocally found that an employer had an obligation to bargain with a unit comprised substantially of unauthorized workers:

> With respect to the separate view of our colleague, we note that, unless and until the employees are declared to be illegal and are discharged and/or deported, they remain employees of the Respondent, they remain employees under the Act, they lawfully voted in the election that the Union won, and since the Union lawfully represents the bargaining unit, we do not think it "peculiar" to require the [employer] to bargain

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[263] There was *never* a finding in the proceedings as to whether "most" of the employees voting in the election were unauthorized or for that matter whether any of them were. At trial, the employer made an offer of proof that a majority of the employees who were employed at the time of the election had submitted to the employer social security cards or other identification; and that upon a post election check at a social security web site, it discovered that these individuals either did not have social security numbers or that the numbers submitted did not match the numbers listed with the Social Security Administration. 347 NLRB No. 107, slip op. at 4. The administrative law judge characterized the employer's claim as an assertion that "a majority of the people who voted in the election 'were subsequently found to be illegal aliens' and therefore that the election should be declared a nullity because (a) the Union never had a valid showing of interest and (b) the illegal aliens, comprising most of the voting unit were not legally permitted to work for the Company." *Id*. at 3. Member Kirsanow's concurrence argued that the employer possessed "evidence that most of its unit employees presented social security numbers that do not match those in the Social Security Administration's records..." *Id*. at 2, n.2. The circuit court appeared to accept *arguendo* that "most" of the bargaining unit consisted of unauthorized workers. 514 F.3d. at 2-3. The upshot is that no one really knew, and least of all the NLRB, which has worked very hard not to know the facts in these cases.

[264] 514 F.3d at 2-3.

[265] *Id*.

[266] 347 NLRB No. 107, slip op. at 4-5.

with the Union.[267]

The allusion to *peculiarity* stemmed from the remarks of concurring NLRB member Peter Kirsanow who observed, later in the same footnote, that:

> ...an order compelling the Respondent to bargain with a union representing employees that the Respondent would be required to discharge under the Immigration Reform and Control Act, may reasonably be seen as somewhat peculiar by the average person.[268]

Member Kirsanow was not alone in finding the outcome peculiar. Concurring in the D.C. Circuit's subsequent agreement with the NLRB's determination that the employer *was* obligated to bargain with a bargaining unit in which "most" of the employees were unauthorized, Circuit Judge Henderson, echoing Member Kirsanow, opined that the situation was "'somewhat peculiar' indeed."[269] The sense of the peculiarity experienced by these jurists is not articulated beyond an almost casual acknowledgment of the evident conflict between immigration and labor law, which counterintuitively and simultaneously confer and forbid employee status to unauthorized workers. Leaving to one side, however, the issue of employee status, there are additional peculiarities to consider arising from *Hoffman's* denial of a practical discharge remedy.

### C. CONSEQUENCES OF AN EMPLOYER'S REFUSAL TO BARGAIN WITH A UNION REPRESENTING A BARGAINING UNIT IN WHICH "MOST" EMPLOYEES ARE UNAUTHORIZED

Consider the situation of the *Agri Processor* bargaining unit following the D.C. Circuit's order to bargain.[270] If, subsequent to the order, the

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[267] 347 NLRB No. 107, slip op. at 2, n.2.
[268] *Id.*
[269] 514 F.3d at 9. Judge Kavanaugh dissented, concluding, among other things, that the Supreme Court in *Hoffman* had not specifically dealt with the question of whether the IRCA had rendered unauthorized workers non-employees. *Id.* at 11-12.
[270] The outcome in *Agri Processor* was driven largely by the case's procedural posture. The NLRA provides a party to a representation proceeding no opportunity to appeal NLRB representation cases. American Federation of Labor v. NLRB, 308 U.S. 401, 404 (1940). When, in *Agri Processor*, the NLRB decided that the unauthorized workers in question were eligible to vote in the representation election, the employer could not challenge that determination in the representation cases forum. As a result, it did what employers often do in such circumstances, it refused to bargain with the union at all. This is known as a "technical" 8(a)(5) violation, or a "test of certification" because the employer's refusal to

employer promptly discharged unauthorized workers, which apparently consisted of most of the bargaining unit, claiming that it was obligated to do so under the IRCA, subsequently hired new employees to replace the discharged employees, and then withdrew recognition[271] from the union because it had lost majority support, the NLRB's remedial tool kit would be hard pressed to respond.

First, assuming the NLRB found that the discharges were unlawfully motivated, it is far from clear at this point in the law's development that the employer would not have a perfectly valid affirmative defense for its actions. In other words, it is possible that the employer could simply argue that it discharged the unauthorized workers because they were unauthorized and that even assuming the discharge was also motivated by the workers' protected activity, the primary immigration-related motive barred the finding of a violation.[272] Second, even in the absence of a valid defense, the union's majority will have been lost, thus compelling the NLRB to argue that the withdrawal of recognition was tainted,[273] and that the bargaining relationship therefore continued to exist as a matter of law. If the employer did not agree, lengthy litigation would ensue as the NLRB attempted to re-impose the bargaining obligation.

In sufficiently egregious circumstances the NLRB would be authorized to expedite the reestablishment of the bargaining obligation by seeking immediate reinstatement of discharged employees through resort to the

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bargain is undertaken solely to obtain "back door" review of the NLRB's representation decision, in this instance the decision that unauthorized workers were eligible to vote in the NLRB election. The court forum becomes available after the NLRB has, pro forma, found a violation in connection with the refusal to bargain and seeks enforcement of its bargaining order in a circuit court. *See* Union de La Construccion de Concreto Y Equipo Pesado v. NLRB, 10 F.3d 14, 16 (1st Cir. 1993). The only issues before the *Agri Processor* court were the status of the unauthorized workers as employees under the NLRA, and the inclusion of those workers in a bargaining unit with "authorized" employees, issues squarely within the NLRB's expertise and discretion. The more difficult problems discussed in this section transpire after the bargaining obligation has been established and it is the continued viability of the union's representational status that is at issue. That is a legal issue, and the NLRB's resolution of it is more likely to be questioned by a court.

[271] Levitz Furniture Co. of the Pacific, 333 NLRB 717, 725 (2001) (excepting the year following an NLRB election certifying a union, or the first three years of a collective bargaining agreement, employer may lawfully withdraw recognition from a union if it proves union has, in fact, lost the support of a majority of bargaining unit employees).

[272] *See supra* note 157 and accompanying text. *Compare* International Baking Co., 348 NLRB No. 76, slip op. at 6 (2006) (affirming judge's finding that employer would have discharged employee Zarco for immigration violations notwithstanding the protected activity in which the judge found she engaged) *with* Concrete Form Walls, 346 NLRB 831, 834 (2006) (rejecting employer's affirmative defense that it would have discharged workers who were purportedly unauthorized, in compliance with the IRCA and notwithstanding its anti-union motive, because it failed to prove that they were in fact "illegal aliens").

[273] *See* NLRB v. Goya Foods, 525 F.3d 1117, 1127 (11th Cir. 2008) ("The record reveals violations of a widespread and serious nature; the pervasive atmosphere of anti-union animus tainted the employees' discharges, as well as the ultimate withdrawal of recognition.").

injunctive relief afforded by Section 10(j) of the NLRA.[274] Since unauthorized workers have no reinstatement rights, however, the most the NLRB could reasonably seek from a Federal District Court would be a cease and desist order running to the benefit of the bargaining unit, not to the discharged employees. If the NLRB sought such an injunction, it is quite likely that an employer would voluntarily agree to resolve the matter. It would have effectively destroyed the union's majority and would have no backpay or reinstatement liability to consider. Assuming that the employer was not recidivist,[275] the NLRB would be hard pressed to justify injunctive proceedings in a Federal court.[276] Whether a bargaining order were voluntarily and promptly agreed to at the administrative level, or litigated in a 10(j) court case, it would in either event be a designation for the benefit of future employees,[277] whose union sentiments cannot be known.[278]

In the unlikely event such a case made its way to a 10(j) proceeding, a court's reaction to the situation would be difficult to predict. Various Federal circuits articulate standards for granting a 10(j) injunction differently, but the Seventh Circuit's formulation is reasonably representative of the standard the NLRB often finds most difficult to meet.

Like all the circuits, the Seventh Circuit holds that "the district court should issue an injunction before the Board has adjudicated a case where such equitable relief is 'just and proper.'"[279] This simply tracks the statutory language. In formulating the definition of when relief is just and proper,

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[274] 29 U.S.C. § 160(j). *See* Eisenberg for and on Behalf of NLRB v. Wellington Hall Nursing Home, 651 F.2d 902 (3rd Cir. 1981) (upholding NLRB's request for Section 10(j) injunction after employer discharged several union supporters despite the existence of a prior court-enforced order requiring that the employer bargain in good faith).

[275] *See, e.g.,* J.P. Stevens & Co., Inc., 268 NLRB 33, 35 (1983) (charged employer was "the most notorious recidivist in the field of labor law") quoting NLRB v. J.P. Stevens & Co., 563 F.2d 8, 13 (1977).

[276] However, if the employer failed to agree to bargain with the union as part of the settlement, it is possible that the NLRB would continue to pursue 10(j) relief. *See id*. at 907-908 (explaining that NLRB's application for 10(j) relief undertaken in the public interest in the integrity of the bargaining process and not on behalf of individual employees and that the exclusion of union supporters from the bargaining process pending resolution of unfair labor practice charges would undermine the bargaining representative as well as the process). On the clash of public interest policies *see infra* text at 60-61.

[277] *See* Hoffman Plastic Compounds, Inc., 535 U.S. at 154 (Breyer, J., dissenting) *citing* A.P.R.A. Fuel Buyers Group, Inc., 320 NLRB 408, 415, n.38 (1995) ("Without the possibility of the deterrence that backpay provides, the NLRA can impose only future-oriented obligations upon law-violating employers - for it has no other weapons in its remedial arsenal.").

[278] This assumes that the union had at some point established that it was supported by a majority of employees in the bargaining unit. Courts will not otherwise impose a bargaining order. *See, e.g.,* Conair Corp. v. NLRB, 721 F.2d 1355, 1384 (D.C. Cir. 1983) ("Congress has not placed nonmajority bargaining orders within the NLRB's remedial discretion.").

[279] NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1566 (7th Cir. 1996), *quoting* Kinney v. Pioneer Press, 881 F.2d 485, 490 (7th Cir. 1989).

however, the Circuit holds that a Federal District Court should "evaluate the propriety of the Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry."[280]

The circuit has "outlined the four traditional criteria that a party must demonstrate in order to obtain injunctive relief: (1) no adequate remedy at law, (2) irreparable harm absent an injunction that exceeds the harm suffered by the other party as a result of the injunction, (3) a reasonable likelihood of success on the merits, and (4) 'harm to the public interest stemming from the injunction that is tolerable in light of the benefits achieved by the relief.'"[281] This explicit emphasis on traditional equitable criteria is important because it requires the NLRB to make a showing and indeed to prevail on the traditional "balance of the harms" question.[282]

It is the fourth criterion of this standard - harm to the public interest - that presents a difficult problem for cases involving an employer's unlawful discharge of unauthorized workers, even if the case arrives at the court with no party disputing that the discharged workers are not entitled to the NLRB's reinstatement and backpay remedy. Typically, the NLRB is confronted, under this "just and proper" standard, with a situation in which a sole public interest - enforcement of the NLRA - is balanced against the private interest implicated in contended interference with the operation of an employer's business.[283] In cases involving unauthorized workers, however, the situation becomes more difficult because the public interest policy supporting collective bargaining is in tension with the public interest represented by Congressional immigration policy.[284]

This balance of interests problem would probably be amplified if the

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[280] *Id*.

[281] *Id*. at 1567, *citing* Pioneer Press at 490 n.3.

[282] *See* NLRB v. P*I*E* Nationwide, Inc., 894 F.2d 887, 893 (7th Cir. 1990) ("The principles of equitable jurisprudence are not suspended merely because a government agency is the plaintiff.").

[283] *See, e.g*., Bloedorn v. Francisco Foods, Inc., 276 F.3d 270 (7th Cir. 2001) (reversing the district court, the circuit court held in favor of the NLRB, balancing the deprivation to employees from a delay in bargaining and from diminution of union support against the employer's hardships of employee displacement resulting from reinstatement of discharged employees and mandated bargaining).

[284] *See* Note, *Propriety of Section 10(j) Bargaining Orders in Gissel Situations*, 82 Mich. L. Rev. 112, 132 (1983-1984):

> The Supreme Court has outlined the role of equitable components in the criteria for a statutory injunction in Hect Co. v. Bowles, 321 U.S. 321 (1944). The *Hect* court called upon district courts to act "in accordance with their traditional [equitable] practices, as conditioned by the necessities of the public interest which Congress has sought to protect." 321 U.S. at 330. The Court used the term "public interest" to mean the policies that Congress intended the statutory injunction to promote. 321 U.S. at 331. Thus, the fact that an injunction is authorized by statute requires the affected court to exercise its equitable discretion "in light of the large objectives of the [statute authorizing the injunction]." 321 U.S. at 331.

majority of unauthorized workers were no longer available for employment in the bargaining unit; a court would have difficulty divining the purpose for which it was providing relief, or even understanding the precise nature of the relief sought. There may be an attenuated public interest in demonstrating to future workers of an employer that prior workers of that employer, who were discharged in violation of the NLRA, would have been reinstated but for their unauthorized immigration status. It seems unlikely, however, that a court would find such an interest injunction-worthy.[285]

Suppose a second scenario in which Agri Processor, upon receiving "no match" information,[286] simply advised the union that, while it recognized it as the exclusive bargaining representative of the bargaining unit, and was willing to bargain in good faith, it would not agree to discuss or bargain over any subject relating to known unauthorized workers because the subject would be illegal[287] in light of the IRCA's prohibition of employment of any worker "knowing the alien is (or has become) an unauthorized alien with respect to such employment."[288] Such a position would not reject the employee *status* of unauthorized workers, which was the ineffective

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[285] *But see* Intersweet, *supra* note 41 (affirming NLRB's order, the Seventh Circuit ordered bargaining in a *Gissel* case, a remedy approved by the courts in which an employer is ordered to bargain with a union that once had employee majority support but was thereafter unable to achieve formal NLRB certification because of the employer's outrageous or serious unfair labor practices).

[286] "Each year, employers submit employee wages to the [Social Security Administration] on Forms W-2 - Wage and Tax Statements - and [the Social Security Administration] posts those earnings to its Master Earnings File so that workers receive credit for Social Security benefits. When [the Social Security Administration] is unable to match a worker's name and Social Security Number (SSN) from the Form W-2 with its own records, that worker's earnings are posted to [the Social Security Administration]'s Earnings Suspense File until they can be matched with [Social Security Administration] records." American Federation of Labor v. Chertoff, 552 F.Supp.2d 999, 1002 (N.D.Cal. 2007).

[287] *See* Eddy Potash, Inc., 331 NLRB 552 (2000) (finding that employer violated the NLRA by insisting on a collective bargaining provision illegal under Federal law governing the operation of mines on leased Federal lands); Hill-Rom, Co., 957 F.2d 454, 457 (7th Cir. 1992) citing Idaho Statesman, 836 F.2d 1396, 1400 (D.C. Cir 1988) (defining illegal subjects as those proscribed by federal law, or where appropriately applied, state law).

[288] 8 U.S.C. § 1324a(a)(2); *see* Aramark Facility Services v. Service Employees Intern. Union, Local 1877, 530 F.3d 817, 824-825 2008 (9th Cir. 2008) (holding that, notwithstanding the existence of a collective bargaining agreement requiring reinstatement of bargaining unit employees discharged without cause, public policy "would necessarily be violated if [the employer] knowingly reinstated undocumented workers"). The culmination of the bargaining process under present labor law model is a collective bargaining agreement containing a grievance-arbitration provision. Authority such as *Aramark*, *supra*, calls into question whether a court would enforce an arbitrator's award in favor of undocumented workers against an employer that was not aware of the immigration status of the grievant. This might in certain workplaces strip the agreement of significant vigor. On the other hand, assuming that a court interpreted sections of the collective bargaining agreement as applied to unauthorized workers, the entire agreement should not be rendered void. NLRB v. Rockaway News Supply Co., 345 U.S. 71, 79 (1953) (opining that employment contract should not be taken out of the hands of parties merely because they misunderstood the legal limits of their bargain, where the excess may be severed and separately condemned . . .").

position asserted by the employer in *Agri Processor*, but rather call into question the efficacy of bargaining with the union over unit employees that are unauthorized workers.[289] If the number of unauthorized unit employees were large, as in *Agri Processor*, the employer would have a substantial argument that bargaining would be pointless.[290]

The NLRB is familiar with the courts' reaction to mandated bargaining that cannot bear fruit. The Supreme Court, for example, has stated that employers have an obligation to bargain only over subjects that are "amenable to the bargaining process."[291] Because an employer has no obligation to bargain over an illegal subject,[292] there is low likelihood that any provision the employer can couch as inuring to the benefit of unauthorized workers could become incorporated in a collective bargaining agreement.[293] A bargaining unit comprised of a majority of unauthorized workers would increase the potential for these tactics, and increase the possibility that some courts would simply refuse to enforce an NLRB bargaining order because of the low likelihood of the parties ever reaching a collective bargaining agreement.[294]

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[289] This argument assumes that "most" of the employees in the bargaining unit, or at least a majority of the employees, are unauthorized. Obviously, if only a small percentage of the employees are unauthorized, the employer's refusal to bargain in connection with the terms and conditions of those employees would not be as significant a factor.

[290] The NLRB's deliberate avoidance of immigration facts will seldom inform it of situations in which the employer knows before a union organizing drive that most employees in a bargaining unit are unauthorized, and that an employer's subsequent avoidance of bargaining in reliance on immigration law is, accordingly, not in good faith. Sophisticated counsel will soon realize that employers are in a superior tactical position if they abandon resistance to union organizing in lieu of a bargaining strategy focused on tactical compliance with the IRCA following the union's certification.

[291] First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 678 (1981) (holding wholly entrepreneurial subjects not bargainable because "[t]he concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole...This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process").

[292] NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349 (1958).

[293] Of course, the employer could agree to bargain for a collective bargaining agreement that expressly disavowed its applicability to unauthorized workers. Such an agreement would be of little use to a union in a bargaining unit in which the majority of employees are unauthorized workers.

[294] *But see supra* note 289. If the unauthorized worker contingent of the unit is very small, the courts may view the matter in a different light. This was probably the situation in *NLRB v. Intersweet*, *supra*, 125 F.3d at 1064. In that case, decided before *Hoffman*, the Seventh Circuit ordered bargaining in a unit allegedly consisting of unauthorized workers, eighteen of whom the employer unlawfully discharged. The NLRB ordered backpay and reinstatement of the discharged employees pending final determination of remedial eligibility in the compliance phase. The court noted that the NLRB had estimated that the size of the expanding bargaining unit would reach 150 employees by 1995, two years prior to the decision. The court also noted that the unauthorized status of the discharged employees had not been proven. Similarly, in A.P.R.A. Fuel Buyers, a dispute litigated repeatedly in various procedural postures from 1991 to 1997, and resulting in three bargaining orders enforced by the Second Circuit, at 28 F.3d 103, 134 F.2d 50, 159 F.3d

Parsing some additional language from the Supreme Court in *Hoffman* anticipates another large problem potentially awaiting the NLRB in the courts. The Court found it troubling that the backpay award acted as an inducement for the worker to remain and work in the country unlawfully, because an unlawfully discharged, unauthorized worker was required to mitigate backpay losses by seeking and if possible obtaining post-discharge employment.[295] The same could be said of unauthorized workers' inclusion in union-represented bargaining units whose sole aim is to improve the working conditions of bargaining unit members. While not "condon[ing] and encourag[ing] future violations,"[296]courts might conclude that any benefit flowing from unauthorized workers' inclusion in a bargaining unit would encourage the workers' continued unlawful presence in the country and on that theory refuse to order bargaining.

### D. POSSIBLE RESPONSES TO STRUCTURAL PROBLEMS

The analysis above leads to the conclusion that bargaining units consisting of a large proportion of unauthorized workers are vulnerable. No easy answers exist as how to improve industrial stability in these circumstances. It is evident, however, that the NLRB must make efforts to know much more about the composition of the bargaining units it certifies. The NLRB is so far from making these efforts that the Hoffman Memorandum *forbids* the introduction of evidence touching on immigration status from its representation hearings.[297] Moreover, the Memorandum is silent regarding any attempt to *develop* immigration evidence during the initial investigation of a representation petition. In the overwhelming majority of representation cases, employers and unions privately agree to bargaining unit details in advance of an NLRB election.[298] The agreements are routinely approved at the regional level unless they are contrary to statute or the parties have agreed to a clearly inappropriate unit.[299] Presumably, an employer and union could stipulate to a thousand-person

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1345, the *original* fact finding established that the two admittedly unauthorized workers at issue, if included in the bargaining unit, "would not affect the Union's majority status." A.P.R.A. Fuel Oil Buyers Group, Inc., 312 NLRB at 474 n.2, *see supra* note 56.

[295] Hoffman Plastic Compounds, 535 U.S. at 151.

[296] *Id*. at 150.

[297] A party may be permitted to make an offer of proof on the issue, however. Hoffman Memorandum at 5, § E.

[298] *See, e.g.*, Seventy-First Annual Report of the National Labor Relations Board for the Fiscal Year Ended 2006, at 14 *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf (last visited July 15, 2008).

[299] *See generally* National Labor Relations Board Casehandling Manual (Part Two) § 11084.3.

bargaining unit consisting in the main of unauthorized workers. For reasons already described in the previous section, the employer in such a situation could agree to a unit for tactical reasons, suffer a loss in a representation election, stall in bargaining for a year,[300] and, at a tactically opportune moment, discharge enough of the bargaining unit to destroy the union's majority status, withdrawing recognition soon thereafter. The NLRB should develop sufficient expertise to be able to quickly identify situations carrying the potential for this type of fruitless wrangling.

The *sine qua non* of making sound and expeditious decisions to protect otherwise vulnerable bargaining units is to identify cases that are likely to present immigration issues and to devise strategies in those cases to quickly ascertain whether the involved employer has "knowingly" employed unauthorized workers. Armed with that kind of evidence, the NLRB could move more confidently in the knowledge that it is in an acceptable position on the equities should it at any point become engaged with the employer in a battle of "public interests." Although inquiries in this area would obviously be sensitive, the NLRB could require employers to submit I-9 records as part of its initial representation case processing. Possession of this data would allow the NLRB to more carefully evaluate future employer claims of unknowingly hiring or retaining unauthorized workers. If such a claim is bona fide, the name of the disputed employee should be reflected in the records with an indication of the documents the employee submitted during the employment process.[301] If that information is missing,[302] the NLRB will be in a position to argue to a court that the employer was not actually "unknowing,"[303] which should substantially improve its equitable position before the court.

In *Hoffman*, Justice Rehnquist scoffed at the notion that the NLRB had

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[300] *See* Brooks v. NLRB, 348 U.S. 96, 98-99 (1954) (affirming that following formal certification union entitled to irrebuttable presumption of majority support for one year during which time employer has duty to bargain in good faith).

[301] *See generally* 8 U.S.C. § 1324a(b). While employers may attempt to argue that the documents are confidential or privileged, § 1324a(b)(4) authorizes copying of the documents as ". . . otherwise permitted under law. . ." Any question on this point should be quickly resolvable by the Attorney General. Following the *Hoffman* majority's scolding of the NLRB for not accommodating IRCA policies, *see* text *supra* at 2-3, the NLRB should argue for intergovernmental cooperation.

[302] 8 U.S.C. § 1324a(b)(3)(B) (employer required to retain employment verification forms for three years after date of hire or one year after the date of termination, whichever is later).

[303] Whatever the ramifications of that conclusion under immigration law, it will smack of pretext in labor law contexts. In any subsequent charge alleging, for example, the unlawful discharge of an unauthorized worker for union activity, this kind of pretext may prove useful in rebutting a defense of good faith compliance with immigration law. *See, e.g.*, NLRB v. Kolkka, 170 F.3d 937, 940 (9th Cir. 1999) *quoting* New Foodland, Inc., 205 NLRB 418, 420 (1973) ("If the reason asserted by an employer for a discharge is a pretext, then the nature of the pretext is immaterial. That is true even where the pretext involves a reliance on state or local laws.").

made any attempt in its rules and procedures to accommodate the policies of IRCA because it was "recognizing employer misconduct but discounting the misconduct of illegal alien employees."[304] This raises an excellent point, though possibly not the one Justice Rehnquist intended.

The NLRB *should* accommodate the policies of the IRCA by recognizing and making use of the details of the immigration misconduct of *employers*. The *Hoffman* court accepted as the law of the case that the employer in that case was not aware of the involved employee's violation of the immigration laws.[305] That makes the case distinguishable, on equitable grounds, from the myriad of cases in which employers are keenly aware of the immigration status of their workers who are seeking unionization. While it is true that the unlawful immigration acts of an employer do not erase the unlawful immigration acts of a worker, "the question presented here [is] better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed."[306]

As presumed experts in industrial experience, the NLRB must marshal a wide variety of facts, arguments and perspectives applicable to bargaining units heavily comprised of unauthorized workers. Otherwise those bargaining units will be rendered disposable, further calling into question the practical significance of unauthorized workers' employee status under the NLRA.

## CONCLUSION

It is unlikely that the full extent of the ripple effect of the *Hoffman* opinion has been felt by NLRB prosecutors. However, at this juncture a number of observations are evident. First, the NLRB as an institution should be prepared to engage arguments that its attorneys breach professional responsibility norms if they fail to disclose evidence of immigration illegality of which the NLRB knew or arguably should have known. Second, the complicated question of how to credibly and persuasively present to fact finders witnesses who are unauthorized workers must be broached at both the micro level of trial tactics and at the macro level of institutional rule formulation. Finally, in light of the complexities of cases involving unauthorized workers, any resulting certified bargaining units will have to be protected in novel ways because of the ability of employers to discharge unauthorized workers engaged in NLRA activity without significant remedial consequence. The absence of remedy will, over time, function as an inducement for employers to simply extinguish

[304] Hoffman Plastic Compounds, 535 U.S. at 149-50.
[305] *Id*. at 140.
[306] *Id*. at 147.

bargaining units by tactically discharging unauthorized workers.

The difficulty of these cases is matched by their importance. The statistical evidence of the continuing presence of immigrants in the workplace is overwhelming. It is conceivable that immigrant workers in the coming decades will comprise the fastest growing segment of the workforce.[307] In light of this continuing growth, refusal to treat immigrant workers as full and equal labor market participants is both contrary to American values[308] and breathtakingly unmindful of the lessons of past industrial conflict. It is absolutely striking that not once in the Hoffman opinion itself did the Supreme Court deign to discuss NLRA polices. Instead, the Court trained its fire on the NLRB as a headless, purposeless, administrative agency that had somehow wandered into alien statutory terrain. But in a former time, a prior justice of the same Court, Oliver Wendell Holmes, perfectly understood and articulated the policy that eventually culminated in the NLRA:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[309]

The NLRB's mission is as relevant and noble now as ever. If the eternal battle between disorganized workers - unauthorized workers in this variant of the conflict - and highly organized employers is to carry on with some semblance of fairness and equality, the mediator of that battle, the NLRB, should not engage in the retreat from the field that the Hoffman Memorandum represents. Rather, the NLRB should combatively embrace *Hoffman's* paradoxes and move forward with its mission.

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[307] *See supra* note 28.

[308] Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 Berkeley J. Empl. & Lab. L. 223, 229 (2005) ("NLRA policies matter . . . [because] . . . they say that work and the way workers are treated is central to determining the sort of country the United States will be [and because] [t]hey provide the tools so workplaces can operate on principles consistent with those of a democratic country.").

[309] Vegelahn v. Gunter, 167 Mass. 92, 108 (Holmes, J., Dissenting)