The Trial Attorney's Guide to Representing Undocumented Clients

by Philip H. Corboy, Jr. & Robert J. Bingle

Few issues are as controversial and complex as immigration policy in the current political climate. Illinois is a prominent example of immigration trends nationwide and why this sensitive issue has become a top political priority: In Illinois, immigrants make up 13.6 percent of the population, immigrants and their children constitute 26 percent, and the number of immigrants in Illinois grows by 35,300 people a year.[1] The Office of Immigration Statistics at the United States Department of Homeland Security reported that the unauthorized immigrant population in America totaled 11.5 million as of January of 2011.[2]

For trial attorneys across the country, immigration statistics like these mean that the next phone call from a potential client with a wrongful death or personal injury claim could present unique, unforeseen challenges. The prospective client who calls and then reveals there may be questions regarding their immigration status will inevitably infuse legal issues not present in the average plaintiff's claim, such as citizenship, earning capacity, and evidentiary obstacles. Moreover, certain practical concerns like maintenance of privacy, prevention of discrimination or bias, and management of client expectations will pervade the litigation. Consequently, lawyers from novice to senior partner will be faced with answering many questions probably not thought of a generation ago: What is the current status of the law regarding a plaintiff's immigration status? How will this affect my trial strategy? When will I need to turn to the expertise of an immigration attorney?

Questions like these must be anticipated and analyzed as soon as your client retains you. From the investigation stage through fashioning your complaint and executing discovery, a lawyer representing an individual whose immigration status is questionable must know the current and evolving relevant law and develop strategies to blunt the inevitable defense assault. The goal of this article is to give the lawyer a primer on the panoply of issues that might surface in a case involving an undocumented worker as a plaintiff.

Plaintiffs' Immigration Status During Discovery

Since immigration is such a hot-button issue, it's not surprising that parties tend to inquire into the facts surrounding a person's citizenship status and documentation at early stages of discovery. The objective of opposing counsel is clear: how can they somehow get the immigration status of undocumented, non-Americans before the jury, with the attendant and expected negative, social, and political implications. Although relevance for purposes of discovery is generally broader in scope than that which is admissible at trial, encompassing that which *could lead to* admissible evidence,[3] a number of courts faced with the issue have held that probing the immigration status of a plaintiff is nonetheless unwarranted.[4] In this respect, courts have expressed the need to balance the imperatives of optimal discovery against the "chilling effect" that an inquiry into immigration information may have because it opens the door to potential deportation.[5] Courts are cognizant of the fact that an inquiry into such matters places a substantial social burden on the individual involved, insofar as it presents a danger of intimidation that would oftentimes inhibit plaintiffs from pursuing their rights.[6]

With this in mind, several courts have denied all defense requests to discover information such as addresses, Social Security numbers, driver's license numbers, passports and tax returns.[7] It is important to alert the judge to this potential for prejudice as early as possible; even if you are unable to limit discovery into these areas, at least use the opportunity to frame the argument in anticipation that the issue will resurface when it comes time for the court to rule on the admissibility of such evidence at trial during motions *in limine*.

Of course, consideration of this factor should also play a role in crafting the allegations in your complaint. A number of Illinois courts have held immigration status may be relevant to damages only insofar as it affects a claim for lost wages or lost future earning capacity.[8] Courts in other states have followed the same logic, holding that immigration status may be irrelevant on the issue of liability, but is relevant on the issue of lost future earnings, if pursued.[9] In these cases, courts have usually allowed a defendant to rebut a claim for future lost wages with evidence that establishes a date of deportation, or the inability of a plaintiff to obtain future employment in the United States.[10] From a defense

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perspective, at worst, evidence of the plaintiff's citizenship status could be admissible to show what similarly situated foreign nationals living in the United States would earn in their country of origin. Since a vast majority of undocumented workers living in America hail from third-world countries, the disparity in lost future income can be significant.

Besides discovery battles with opposing counsel, other practical complications can begin to emerge during the discovery phase. For instance, maintaining effective communication about the status of an undocumented client's case and the litigation strategy may be more difficult to achieve than it would be for a typical client. Not only will a language barrier pose many problems, but the judicial system can perplex the most seasoned lawyers, let alone someone who is acquainted with—but not knowledgeable about—the nuances of a foreign legal system. Moreover, costs associated with these clients' special needs can quickly add up, including fees for interpreters, transportation costs, and, potentially, fees for attorneys who specialize in immigration or family law.

Clients' Immigration Status at Trial

The topic of immigration surfaces at one of the earliest stages of trial: *voir dire*. Jury selection is your first opportunity to shape the subject if it is going to be an issue at trial and to remove for cause any jurors who will be unable to decide the case impartially. The United States Supreme Court has weighed in on this issue, recognizing the importance of *voir dire* for exposing potential biases, but also giving trial judges considerable latitude to control the jury selection process.[11] The Supreme Court in *Rosales-Lopez v. U.S.* held that restricting the ability to question jurors about certain topics could impinge the constitutional guarantee of a fair trial, specifically where there are "substantial indications of the likelihood of racial or ethnic prejudice."[12] Regarding immigration status in particular, the Supreme Court held in *Rosales-Lopez* that the trial court reasonably determined that a juror's prejudice toward aliens might affect their ability to serve impartially.[13]

When litigating in state court, it is imperative to review your state's precedent regarding the right to question jurors during *voir dire*, since states may allow questioning prospective jurors above the floor set by the United States Supreme Court. For instance, Illinois courts have held that it is "within the province of a trial attorney to make any reasonable and pertinent search to ascertain whether the minds of prospective jurors are free from bias and prejudice, so that he may more wisely exercise the right of peremptory challenge."[14] Using this reasoning, the Illinois Supreme Court has held that a trial court, in a case involving attempted abortion, should have permitted inquiry into jurors' opinions about abortion, since it is a particularly fertile field for preconceived notions and prejudices.[15] Along the same lines, Illinois courts have allowed attorneys to probe jurors'

attitudes toward other controversial topics, such as the insanity defense, interracial relationships, and gang bias if and when such an issue becomes an integral part of the case.[16]

In line with these cases, it's not a stretch to argue that illegal immigration is also a fertile field for preconceived notions and prejudices. From a tactical point of view, if the issue of your client's immigration status will be a reality at trial, indirect questions such as "Are there immigrants that live in your neighborhood? How do you feel about that?" may be more effective for pinpointing biased jurors than direct questions, such as "What is your viewpoint regarding illegal aliens?"[17] The latter question may have the potential to make the prospective juror uneasy, embarrassed, and less likely to give an honest answer. (Unless, of course, they are trying to escape jury duty.)

It is worth noting that at least one court, in Arizona, denied an attorney's request to explore "anti-immigrant fervor" of prospective jurors, reasoning that the questions were unduly invasive and violated the jurors' right to privacy.[18] Again, if immigration becomes an issue you have to contend with at trial, and if the trial court refuses to allow questioning regarding immigration status, it is crucial to object and argue that your client is being denied the right to an impartial jury. Where counsel has failed to make the proper objection, courts have held that the argument is not preserved for review.[19]

If attempts to keep your client's immigration status confidential during pre-trial discovery have failed, there is still a good chance that this evidence will be inadmissible at trial. Many state courts have been reluctant to allow evidence of a plaintiff's immigration status at trial due to its highly prejudicial nature, even when a claim for future lost earnings is involved.[20] The Washington Supreme Court recognized immigration is a politically sensitive issue that can inspire passionate responses, so it creates a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation.[21] New York courts have also held that in order to rebut a claim for loss of future earnings, the defendants had to demonstrate something more than just the mere fact that the plaintiff resides in the U.S. illegally.[22] In *Klapa v. O & Y Liberty Plaza Co.*, the court reasoned that the fact that a plaintiff is deportable does not mean that deportation will actually occur, and whatever probative value illegal alien status may have is far outweighed by its prejudicial impact. In that case, the trial court precluded defendants from presenting evidence about the plaintiff's immigration status because it involved "prejudicial speculation which would have only served to color the jury's deliberations."[23]

Similarly, the California Supreme Court held where a plaintiff has been gainfully employed before an injury, and there is no evidence that they had any intention of leaving the country, the mere speculation that they might be deported at some point is so remote that it makes the issue of citizenship

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irrelevant to the damages question.[24] The Supreme Court of Wisconsin has also stated the admission of immigration status has "obvious and substantial prejudicial effect," and prohibited testimony regarding immigration status at trial.[25]

Conclusion

Every lawyer who has the opportunity to represent plaintiffs who may have issues relating to their immigration status must be knowledgeable about the nuances relating to this field. There is often a dearth of local legal authority, and lawyers must expand their research to other jurisdictions in order to educate the judge. In today's political and social environment, it will be difficult to counteract attempts by opposing counsel to take advantage of the issue. By carefully crafting the complaint, fighting to limit the scope of discovery, conducting an informed *voir dire*, and arguing against the relevance of immigration issues at trial, you will be much closer to enabling the jury to fairly apply the law to the facts of the case and produce a fair and reasoned verdict.

Endnotes

1 Illinois Office of New Americans, *Immigrant Demographics*, http://www2.illinois.gov/gov/newamericans/Pages/Demographics.aspx (last accessed June 27, 2013).

2 Office of Immigration Statistics, U.S. Dept. of Homeland Security, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011* (March 2012) (available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf).

3 *E.g.* Fed. R. Civ. P. 26(b)(1); *TTX Co. v. Whitley*, 692 N.E.2d 790, 797 (Ill. App. 5th Dist. 1998); *Serrano v. Underground Utilities Corp.*, 970 A.2d 1054, 1063 (N.J. Super. App. Div. 2009).

4 *Zeng Liu v. Donna Karan Intern., Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Asgar-Ali v. Hilton Hotels Corp.*, 2004 WL 2127230 (N.Y. Sup. 2004).

5 *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 191-92 (S.D.N.Y. 2006).

6 *Rengifo v. Erevos Enterprises, Inc.*, 2007 WL 894376 (S.D.N.Y. 2007); *Serrano*, 970 A.2d at 1065.

7 *Serrano*, 970 A.2d at 1065-66.

8 *Martinez v. Freeman*, 2008 U.S. Dist. LEXIS 112290 at *8 (N.D. Ill. Feb. 22, 2008); *Zuniga v. Morris Material Handling, Inc.*, 2011 WL 663136 at *4 (N.D. Ill. Feb 14, 2011).

9 See *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 585-86 (Wash. 2010); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994 (N.H. 2005); *Melendres v. Soales*, 306 N.W.2d 399 (Mich. App. 1981).

10 *Klapa v. O & Y Liberty Plaza Co.*, 645 N.Y.S.2d 281, 282 (N.Y. Sup. Ct. 1996); *Silva v. Wilcox*, 223 P.3d 127, 131-34 (Colo. App. 2009).

11 *Ham v. South Carolina*, 409 U.S. 524, 528 (1973); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976).

12 *Rosales-Lopez v. U. S.*, 451 U.S. 182, 190 (1981).

13 *Id.*

14 *People v. Murawski*, 117 N.E.2d 88, 90-91 (Ill. 1954).

15 *Id.*

16 *People v. Stack*, 493 N.E.2d 339, 344-

45 (Ill. 1986); *People v. Clark*, 664 N.E.2d 146, 151-52 (Ill. App. 1st Dist. 1996); *People v. Strain*, 742 N.E.2d 315, 320-21 (Ill. 2000).

[17] David Holland & Gil Lenz, *Exposing Immigration Bias During Voir Dire*, 99 Illinois Bar Journal (Feb. 2011).

[18] *U.S. v. Padilla-Valenzuela*, 896 F. Supp. 968, 972 (D. Arizona 1995).

[19] *Montoya v. State of Texas*, 2012 WL 1059699 at *1 (Tex. App. 2012).

[20] *Salas*, 230 P.3d at 586; *Peterson v. Neme*, 281 S.E.2d 869 (Va. 1981).

[21] *Salas*, 230 P.3d at 586-87.

[22] *Klapa*, 645 N.Y.S.2d at 282.

[23] *Id.*

[24] *Clemente v. State*, 707 P.2d 818, 829 (Cal. 1986).

[25] *Gonzalez v. City of Franklin*, 403 N.W.2d 747, 760 (Wis. 1987).

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