10-6-2008

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

Michael C. Duff
University of Wyoming - College of Law, Michael.Duff@uwyo.edu

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, decided by the Supreme Court in 2002, was as indefensible for most labor lawyers as it was predictable for many immigration lawyers. 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]. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations." 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. 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].” In other words, for a "traditional" labor lawyer the status of an individual discriminatee 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. 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. 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, though covered as "employees" under the NLRA, were *not* entitled to backpay if not lawfully present in the United States. 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.” The Court essentially concluded that the policies of the IRCA - such as the Court found them to be - were more important than the policies underlying the NLRA, notwithstanding that the only legislative history of the IRCA showed that Congress had no intention of impacting NLRA remedies.

The purpose of this article, however, is *not* to engage in another extended critique of *Hoffman*. Rather, the article addresses percolating 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. 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, 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, the foot soldiers engaged in the vindication of the collective labor law rights and remedies now remaining to unauthorized workers.

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. 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 or abandon employment claims. 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. 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. To contend with this ill defined exoticism, the NLRB, contrary to its present practice, 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 - a prospect utterly inimical to the industrial 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. 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, predictably reacted to *Hoffman* in the manner described by Fisk and Wishnie. While acknowledging, as it was bound to do, that *Hoffman* was the state of the law, it subtly, perhaps unconsciously, resisted. A 2002 memorandum from the NLRB's General Counsel (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." 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." 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. . . " 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.

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. 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, 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. Any immigration issues that may exist are to be deferred until the compliance phase of a proceeding. Of course, if a discriminatee is unauthorized, no backpay or reinstatement will be available as a remedy. 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, 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. 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 occur. 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, employer counsel will probably be able to make an administrative law judge aware of the issue simply by making an offer of proof. 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. Such a revelation, to either an NLRB attorney or to employer counsel during either trial or pre-trial investigation, could have a 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. 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.

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 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." For those observers, the legitimacy of the NLRB as the enforcer of the labor rights of "illegal" workers appears indefensible, and certainly not in the public interest. 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.

The state professional responsibility rules applicable to private sector attorneys do not completely clarify whether an attorney acts within norms of state professional responsibility when representing unauthorized workers in employment litigation. Christine Cimini has argued that in most cases such representation would pass ethical muster under the Model Rules. 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. 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.

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, 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." 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. Before exploring these difficulties, the article will consider the factual circumstances that could 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 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. 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. 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. An NLRB attorney might also learn that a discriminatee or witness made a false claim of citizenship to obtain employment, or that fraudulent documents were tendered to the employer to obtain employment.

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. 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. 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.

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. 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 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. 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.

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 the idea that Department of Justice prosecutors may 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." This theory was roundly defeated through Congressional enactment of the McDade Amendment and its interpretive regulations.

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. 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 largely the state-adopted Model Rules, 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.

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".

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. 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..." 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. The essential reason centers on the enduring background of the contentious relations between labor and management. The structure of the NLRA "is focused on enforcement, with concentration on administrative agency models and on traditional legal processes to implement policy," creating "a propensity to litigate at the administrative agency level." In this litigious environment, labor and management, who are repeat players on this stage, could utilize professional responsibility complaints for tactical advantage in litigation. 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. Accordingly, no less 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. Nevertheless, at the state level general professional responsibility rules have seldom been applied in a coherent manner in immigration-specific contexts, 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 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.

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. Subsection (b) of the rule requires that an attorney "who represents a client in an adjudicative proceeding" take "reasonable remedial measures" with the tribunal, if the lawyer knows that "a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding." Assuming that an NLRB attorney is, within the meaning of the rule, representing a client in an adjudicative proceeding, 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." Courts have also found that an attorney may have an affirmative duty to investigate evidence the attorney intends to offer.

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." 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.

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, 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.

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 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. 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.

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, as are false representations of citizenship to an employer. Awareness by an NLRB attorney of these crimes could squarely present a Rule 3.3 issue.

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. In that event, even though the misrepresentation would not have occurred during trial, 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. 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. 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. In that situation, the NLRB attorney would arguably have an obligation to remedy any statement contained in the affidavit that is known by the attorney to be false.

The comments to Rule 3.3 are generally helpful in each of these contexts. 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. 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. 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."

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." 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.

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.

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." 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 generally requires that an attorney be "fair" to an adversary. 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.

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 addresses an attorney's "truthfulness in statements to others." 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. Subsection (a), however applies to attorney conduct outside the attorney-client relationship. 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." 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.

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." A significant factual omission appears adequate to trigger the rule. 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 the full details underlying the settlement. Presumably, however, the attorney could not breach the rule by proposing a settlement that did not include backpay for an unauthorized discriminatee.

4. Model Rule of Professional Conduct 8.4

Model Rule 8.4 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 . . ." 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." 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." 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," Comment 5 cautions that "[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." That language has expansive and uncertain connotations.

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" 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 norm directly applicable to immigration-related disclosures, is for the NLRB to take a very hard look at Model Rule 8.5. 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. In many practice areas the nationwide and international practice of law has created potential in an analogous fashion for professional responsibility conflict between jurisdictions.

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

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. 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. 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. 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 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 and the assertions of charging party witnesses are accepted as true for purposes of the investigation unless disproved by objective evidence. 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 - 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. 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 is crucial in [NLRB] proceedings, since the ALJ sits as judge and jury."

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." 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." 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.

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. 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 standard evidentiary parameters. 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*. 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. A representation election was initially scheduled for October 19, 2001. The union filed objections to the election 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. The union lost that election, but filed objections to the conduct of the second election, which were consolidated for hearing with an unfair labor practice allegation.

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. 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. An important credibility dispute arose as to whether the employer's principal, Lock, saw Sanchez in the building. 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 that Sanchez was engaged in protected activity. Sanchez unequivocally asserted that Lock saw him in the building. The union official could not remember if he saw Lock in the building, but only "believed" he did. Lock could not recall if he had seen Sanchez in the building. 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 his testimony, Lock discharged him. According to Lock's testimony, Sanchez simply abandoned his job following the election. 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.

Thus, the administrative law judge dismissed the complaint allegation that the discharge of Sanchez violated the NLRA. 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." For the plurality, comprised of Board member Liebman and then Board member Acosta:

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

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. 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?

On remand the same administrative law judge again discredited Sanchez' testimony, albeit on expanded grounds. 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 truthfully. On the other hand, lying is lying, and has been since the dawn of human civilization.

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. As the administrative law judge demonstrated in his decision on remand, there were alternative bases in the record evidence to discredit Sanchez. 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. 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. 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, membership in a particular social group, or political opinion. 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. Before rendering a decision, the judge must make an explicit credibility finding. If the judge makes an adverse credibility determination, or finds a lack of corroborating evidence, the asylum petition is denied. The applicant may appeal the denial of a petition to the Board of Immigration Appeals, and ultimately to the Federal appellate courts. 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. 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. 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. Following his release, Turcios reentered El Salvador at a different border location that he believed to be safe. After remaining in El Salvador for roughly six months, he again left the country because he feared imprisonment and death.

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. He traveled through Guatemala and Mexico and entered the United States without inspection. Thereafter, Turcios worked in the United States as a bus boy, gardener, painter, and construction worker. 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 Salvador. When asked why he never sought a legal visa to enter the United States, Turcios stated it had not occurred to him. The immigration judge found that Turcios “did not establish his credibility due to his evasiveness in answering questions.” 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.”

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, 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.

The Ninth Circuit further elucidated this nuanced view of credibility in *Ceballos-Castillo v. INS*, 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*."

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.'" This assertion seems similar to an argument that credibility determinations may 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.

In 2005, Congress passed the Real ID Act, which has since been codified. The Act, among other things, revised the standard for credibility determinations in asylum cases, explicitly in reaction to Ninth Circuit jurisprudence. 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."

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), the vehicle through which testimony "probative of truthfulness or untruthfulness" should properly be before a Federal judge, 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." 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*.

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 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.

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.

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 than the puzzling disregard of *Standard Dry Wall* credibility determinations. 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 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.

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. 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. 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, 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 Federal Rules of Evidence "in so far as practicable." Thus, if a direction by the NLRB to its judges 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, 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.

Nevertheless, the fact that the NLRB would not be prohibited from enacting modified evidentiary rules - whether through APA informal rulemaking procedures or formal adjudication - 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 despite its unambiguous authorization under the NLRA. 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.

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, 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 in conjunction with subpoena 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. 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 of their Fifth Amendment privilege against self-

incrimination. 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. Although commentators have criticized this kind of approach precisely because of the lack of input it affords, 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." 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.

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." 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 would be ill served by the certification of collective bargaining units 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. 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.

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

While the question of whether unauthorized workers are employees under the NLRA appears resolved, 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. The facts of the case are fairly straightforward.

The Agri Processor Company was a wholesaler of kosher meat products in Brooklyn, New York. In September 2005, the company's employees voted to join the United Food and Commercial Workers union. When the company refused to bargain, the union filed an unfair labor practice charge with the National Labor Relations Board. In a subsequent hearing before 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"of the numbers were either nonexistent or belonged to other people. 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.

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. 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 with the Union.

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.

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." 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. If, subsequent to the order, the 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 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. 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, 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 injunctive relief afforded by Section 10(j) of the NLRA. 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, the NLRB would be hard pressed to justify injunctive proceedings in a Federal court. 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, whose union sentiments cannot be known.

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.'" This simply tracks the statutory language. In formulating the definition of when relief is just and proper, 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.”

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.'" 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.

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. 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.

This balance of interests problem would probably be amplified if the 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.

Suppose a second scenario in which Agri Processor, upon receiving "no match" information, 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 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." Such a position would not reject the employee *status* of unauthorized workers, which was the ineffective 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. 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.

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." Because an employer has no obligation to bargain over an illegal subject, 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. 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.

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. 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,"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. 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. 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. Presumably, an employer and union could stipulate to a thousand-person 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, 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. If that information is missing, the NLRB will be in a position to argue to a court that the employer was not actually "unknowing," which should substantially improve its equitable position before the court.

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

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 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. In light of this continuing growth, refusal to treat immigrant workers as full and equal labor market participants is both contrary to American values 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.

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.