**Representation of Undocumented Workers- Claimant’s Perspective**

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1. Undocumented vs. Illegal

Do not call PNC’s “illegal” immigrants. There is probably nothing more insulting then telling a prospective client they are actively breaking the law. Many undocumented migrants are highly defensive regarding this topic.

1. Benefits under the statute
   1. Indemnity during total incapacity
   2. Medical benefits
   3. PPD
   4. TPD benefits
2. Communication with clients:
   1. General mistrust of lawyers / fears of clients
      1. Immigration / DHS concerns
         1. Prospective clients that are undocumented always have immigration concerns/considerations, even if they don’t bring it up. They are always concerned that, by initiating a legal proceeding, they will draw attention to their immigration status. As practitioners, we know this is highly unlikely. They, however, do not. So it is always wise, at the outset, to raise and discuss these concerns.
      2. Lawyers working with carriers
         1. Many undocumented, Latino PNC’s come from countries where extortion, bribery, and fraud are commonplace. In those countries, the police work with the gangs. Its everyone for themselves, and lawyers can, and commonly do, take advantage of their clients. Clients have no idea that there are ethics rules for lawyers, and that we cannot, in fact, have conflicts of interest. This is particularly relevant because, in all comp cases, the end payment for PPD is lackluster. Lets be honest: its woefully outdated and inadequate. A client who has lost his thumb is NEVER going to be satisfied with his PPD payments. Naturally, hes going to question his attorney, their competence, and/or whether or not they are working with the carrier. If you wait to address these issues until the end, your client will never believe you. You have to confront it early.
      3. Self-profiting lawyers
         1. Similar to the above concerns, clients may think they lawyer is just out for themselves. A common refrain we hear is that the attorney did nothing for them, and that they are the one that was injured. They don’t want to pay their attorney 20% + costs. Again, avoided with appropriate client counseling, in advance.
      4. Lawyer education abroad vs domestically
         1. In Central and South America, lawyers attend college and nothing more. Its doesn’t have the same gravitas as a post-graduate degree. Client’s don’t realize that being a lawyer requires a dedication to this profession. They have no idea about CLE requirements. To them, a lawyer is just another college graduate which, while more rare in their home country, is nothing super special.
      5. You have to remember that negotiating is a cultural thing. Americans don’t negotiate for groceries, or items at a hardware store. But it is commonplace in Latin and South America. When a client accuses you of doing no work on their case, or of working for the carrier, they are probably just negotiating a discount. They don’t realize that they are, in fact, attacking your professional integrity.
   2. Comprehension issues
      1. Lack of math education
         1. This is probably one of the most painful aspects of representing undocumented migrants from South/Central America: their higher propensity for minimal education. Part and participle of that is that they have no understanding of mathematics. This comes into play on the fee agreements, but more importantly, in helping them evaluate their cases. If a client doesn’t understand basic addition, they wont understand how a comp rate is calculated, or how to put in a reasonable demand. You have to thin about how you are going to speak to the client, in advance, in order to help them understand the situation
      2. Lack of general education / literacy
         1. This situation comes into play in interesting ways. Defense attorneys love to inquire with a client about whether they read a medical record or read a safety pamphlet. The sad reality is that, at least in our practice, a huge percent of our clients cant read or write in any language.
      3. Lack of fluency in any language
         1. Again, another common issue. Many clients have a bare minimum grasp of Spanish.
         2. Actually Lynn just had a hearing with my associate, Jose. A big problem in that case was different versions of events on how the accident happened. The reality of the case, from our perspective, is that our client is VERY bad at Spanish. She had created a word “murrito” for a “little wall” that caused her trip. Her deposition, the translator struggled. At trial, the translator struggled. It was also that, when nervous, she spoke in turbo mode. These are things, that if you don’t speak Spanish, you have to watch for.
   3. Modalities of communication
      1. US Mail
         1. Think about this: Many undocumented migrants live in multi-family homes. Mail, in a multi-family home where everyone is a stranger, is inherently unreliable.
      2. Phone
         1. A consideration of concern is the propensity for pay-as-you-go phones, due to an inability to get a service contract. In turn, this means you need to get all evidence off a client’s phone immediately, but it also makes it an unreliable primary means of communication. Numbers change when the service changes.
      3. ER Contacts
         1. Emergency contacts are very important. Probably 50% of our cases involve emergency contacts in some capacity. Its also important because, by virtue of undocumented, there is a chance the client will disappear without notice.
      4. Text Messages
         1. Suffers from the same issues as phones, but in addition, due to illiteracy issues, may be completely useless. Not recommended.
      5. Email
         1. While the pandemic has seen a meteoric rise in emails for undocumented migrants, it is still an unreliable means of communications. Ive had clients forget their passwords countless times.
      6. Whatsapp
         1. Undoubtedly the best form of communications. Clients will use this to call family in their home country. They never forget the password. They take it with them from phone to phone.
      7. Facebook
   4. Appropriate naming schemes –
      1. Hyphenated names
         1. Latino undocumented migrants often have multiple names, and often have two last names. Case management software does not handle the hyphenated, double last name phenomenon well. Father’s name comes first and Mother’s name is second.
      2. Aliases
         1. Most discovery requests this information. Many undocumented migrants entered the country with false identities. Many have worked under a friends SSN or ITIN. You have to know their aliases.
3. Obtaining information from clients
   1. Cell phone photos
      1. Clients with disposable phones lose evidence every time they change phones. If you don’t get the photos at intake, they will likely disappear.
   2. Recorded conversations
      1. For some reasons, many undocumented clients will record conversations they think are relevant. Ask your client if they have recorded anything. Example: We have a case with an uninsured employer. Client sent his brother to meet with the uninsured employer at a café, and they recorded the whole conversation.
   3. Use of smart phone throughout representation
      1. If your client is capable of sending you photos, then they can send you documents they get in the mail. Teaching them how to do this early on is a great idea.
      2. This demographic is the most likely to let you actually use their phone. Clients will often just hand me their phone and let me send whatever I want to whoever I want.
4. Representation Documents
   1. Signing Retainer + HIPAA
5. Client Management
   1. Medical Treatment
      1. Distrust of doctors based on cultural norms
         1. Always remember that some people come from areas without modern medicine. Some cultures simply don’t view doctors in the same way we tend to. Some are inherently afraid of doctors, and the bad news going to one might generate. Ask your clients at intake when they last went to a PCP. This may be a cultural norm, or a lack of access. Either way, the answer is normally shocking.
      2. Preference for traditional or holistic medicine modalities
         1. If left to their own devices they might very well treat with a neighbor who has a stash of medicine or a “Sobador” who provides massage and herbal remedies. Herbal medicine is fairly common in Mexico and Central america, especially in the countryside where medical care is sparse. Similarly, they will treat serious back injuries with a chiropractor. I had a client once that trusted his chiro more than a neurosurgeon.
      3. Nurse Case Management
         1. Most comp carriers will approve NCM these days. Its hugely beneficial because, if your client doesn’t speak English, scheduling appointments is hard. They can also arrange transportation and translation (which are likely necessary if your client is undocumented).
6. Payment Issues
   1. Paid by cash
      1. Similarly situated employees
         1. The reality is that undocumented workers are often paid by cash. Proving an AWW becomes difficult. The standard go-to is the similarly situated employee. Of course, employers that knowingly hire undocumented migrants often only hire undocumented migrants.
         2. Complicating the issue is that the money is often cashed, as opposed to deposited.
         3. If they are sending large percentages of their pay back to their home country, there is often documentation of that.
         4. Similarly, when paid in cash proving employment can be an issue.
   2. Paid by cash + check – variable
      1. When paid by both, its virtually impossible to get the pash payments included in the AWW.
   3. TPD
      1. There are no TPD benefits for undocumented migrants with no legal right to work.
7. Death cases
   1. Death cases for undocumented migrants are different. Often, they have “partners” not wives. Often, their “partners” and children are in a foreign country. Often, the children don’t have a birth certificate, or one with the fathers name on it.
   2. Parent in destitute circumstances - 65.2-515
      1. Culturally, many Latino parents, as they age, rely on their children for income. Its part of a cultural bargain: they provide for you when you are young, you provide for your parents later in life.
      2. Destitution is a fact based inquiry. Photographs of where the parent lives. Testimony as to the remoteness, their literacy, their lack of income. Talk to an immigration attorney, they will have country information available regarding poverty.
   3. Proof of financial support for parent in foreign country
      1. At the outset of the case, begin this inquiry. Often, a wallet or a drawer will have dozens of Western Union receipts for payments sent back to a parent. They may use aliases on the payments, but they will almost always be directed to a parent.
8. Discovery
   1. Objecting to immigration status requests
      1. Standard Objection. The Claimant invokes his/her right to avoid self-incrimination. Without waiving and subject to the foregoing objection, the Claimant agrees to limit his/her claim to those benefits available to an employee not eligible for lawful employment as set for in Va. Code §§ 65.2-101, -502(A), and -603(A)(1).
   2. Stipulating prior to deposition / hearing
      1. Most defense attorneys will accept a stipulation that you wont be applying for any benefits to which legal status is required. Always specify “at this time,” as an employee may obtain a work permit at some point down the road.
9. Settlement possibilities
   1. Denied posture settlement
      1. One huge benefit of undocumented migrant cases is the ability to settle in denied posture. This is something carriers love as well. If a client is undocumented, and has no plans to remain in the U.S. forever, and isn’t afraid of collections, then they can take a denied posture settlement and let their bills go to collections.
   2. No MSA consideration
   3. Big value cases – annuities and their benefits
      1. If you have a catastrophic injury case where the claimant survives, get a guardianship/conservatorship set up. In fact, in any case where there is value, it is wise. A conservatorship allows for safety. It gives a claimant a legal vehicle to purchase and acquire property, annuities, plausibly even health insurance.
   4. Mediation and its benefits
      1. Many client simply don’t have the education to understand the concept and value of settlement. Request a mediation. Stress the power of a DC to the client. When the client walks in the rom, they’ll be ready to listen to what this person of authority thinks. We often request mediations specifically to “assist the claimant in putting a value on his/her injuries.” Those words make clear to the mediator that they will have to spend time explaining the math and the PPD statute.

Attorney Daniel Barrera, Esq.

For the past 37 years, Attorney Daniel Barrera has represented thousands of injured accident victims. He has been lead counsel in more than 100 trials, and has obtained several judgments and settlements in excess of one million dollars.

Admitted to practice in Virginia, Maryland, and Washington, D.C., Attorney Barrera has an active multi-jurisdictional practice, regularly appearing before the courts of these states. [Fluent in Spanish](https://www.virginia-abogados-de-accidentes.com/perfil-de-los-abogados/daniel-barrera/), he maintains an active presence in the Latino community. On days away from the office, he is usually found playing his guitar, or sailing the lower Chesapeake Bay with his three sons.

Areas of Practice

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Education

* State University of New York at Stony Brook, B.A. (1980)
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Bar Admissions

* Colorado (1984)
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Honors & Memberships

* Virginia Trial Lawyers Association
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* Workers Injury Law & Advocacy Group
* Virginia, Maryland, and District of Columbia Bar Associations
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