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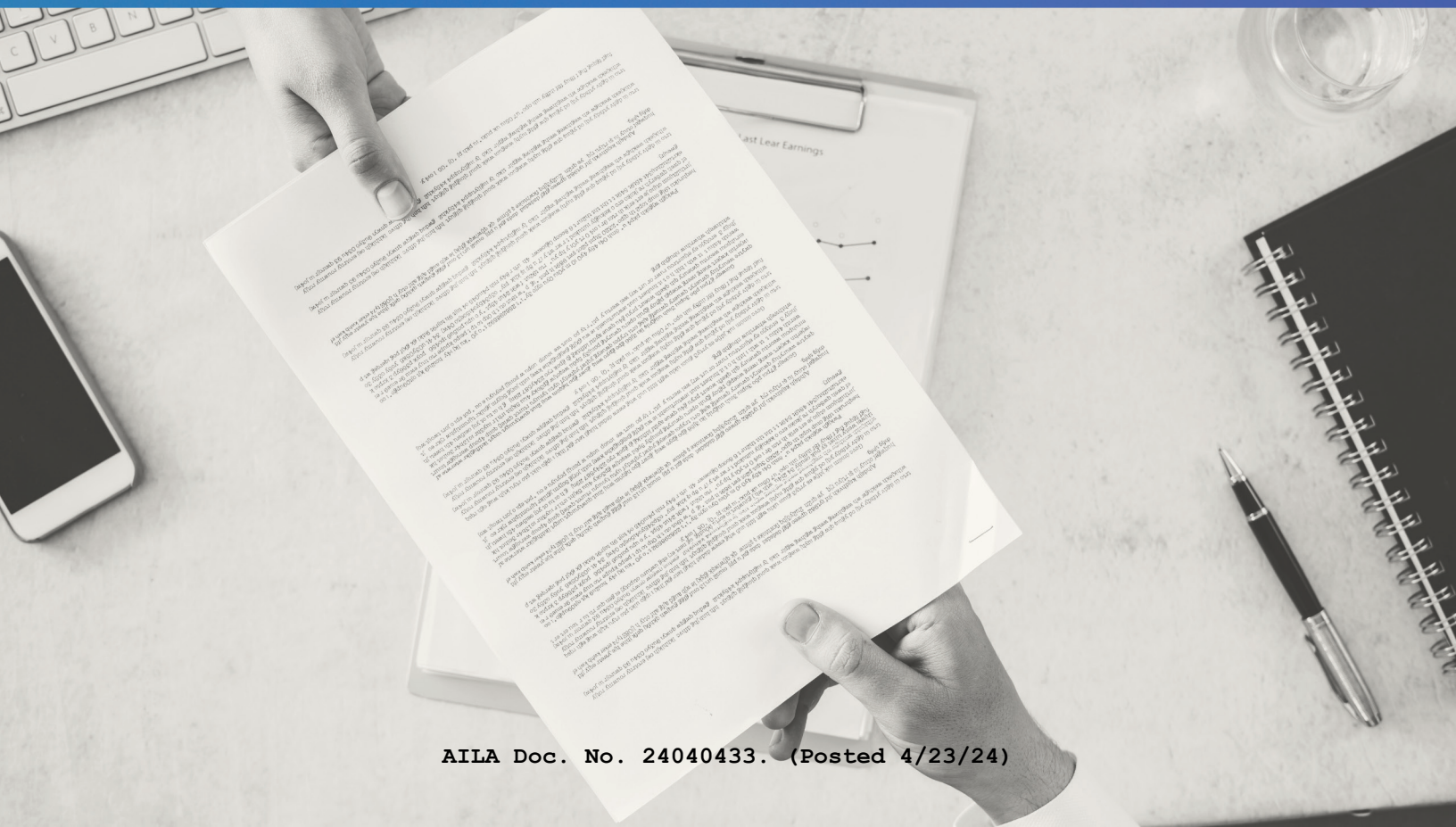
AILA Ethics Committee Recommends Eliminating the Bar Complaint Requirement under *Matter of Lozada*, Urges Flexible Approach as Interim Measure



AILA Doc. No. 24040433. (Posted 4/23/24)

AILA Ethics Committee Recommends Eliminating the Bar Complaint Requirement under *Matter of Lozada*, Urges Flexible Approach as Interim Measure

By The AILA Ethics Committee

The specter of a bar complaint haunts every attorney who practices in the area of removal defense. Regardless of whether the attorney competently represented their client, if the client receives an unfavorable decision, another attorney may claim that there was ineffective assistance of counsel and file a bar complaint against the previous attorney. The bar complaint requirement was introduced in 1988 when the Board of Immigration Appeals (BIA) decided *Matter of Lozada*[1] and imposed the following requirements to establish ineffective assistance of counsel:

1) The noncitizen must submit an affidavit setting forth the relevant facts that detail the agreement between the noncitizen and the previous counsel regarding the specific assistance to be provided.
2) The noncitizen must inform former counsel of the allegations and provide former counsel with the opportunity to respond.
3) If it is asserted that the prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.[2]

The requirement of filing a bar complaint can deter attorneys from providing much-needed representation to noncitizens in removal proceedings. The bar complaint creates a chilling effect on removal practice and may also lead to defensive lawyering, where the attorney is as concerned about a future bar complaint as they are about developing creative strategies for the case. It pits one attorney against the other, undermining the collegiality that is needed to support one another in a complex area of the law.[3] The bar complaint requirement also imposes an onerous requirement on the client, who must go through the hoops and hurdles of filing a bar complaint.

In addition, paradoxically, the immigration judge deciding on the merits of a motion to reopen does not need to wait for the outcome of the disciplinary proceeding, which can take months or years to process. Disciplinary authorities also do not wait for a decision from the immigration court. All that is required under *Matter of Lozada* is to file a bar complaint, which in itself does not provide any meaningful guidance to the immigration court or to the disciplinary authority. In the meantime, the bar complaint overburdens the ethical attorney who needs to respond, even if it may be frivolous. It also deters new attorneys from wading into this field, which in turn deprives

[1] *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). The BIA continued to affirm *Matter of Lozada* in *Matter of Rivera*, 21 I&N Dec. 599, 600 (BIA 1996) and *Matter of Melgar*, 28 I&N Dec. 169 (BIA 2020).
[2] *Id.*
[3] *See* letter from attorney Rekha Sharma-Crawford to Director Neal of the Executive Office for Immigration Review (EOIR) with over 1,000 signatories.

noncitizens of being represented in removal proceedings that can result in their removal and permanent banishment from the United States.

Furthermore, the requirement to file a complaint deprives noncitizens of the ability to access justice in a simple way. In fact, if a noncitizen wants to file a motion to reopen and relies solely on the Executive Office of Immigration Review's (EOIR) website for guidance, they will not find the bar complaint requirement on the instruction page for Motions to Reopen. Chapter 5.7 of the Immigration Court Manual provides instructions on filing a Motion to Reopen, such as time limits, number limits, or changed circumstances, but says nothing about the bar complaint requirement.[4]

The Ethics Committee of the American Immigration Lawyers Association (AILA) is mindful of the need to protect noncitizen clients from incompetent representation. At the same time, however, the Committee questions whether the bar complaint requirement is always necessary to protect the client from incompetent representation. Indeed, there are no other practice areas that mandate a bar complaint when there is an allegation of ineffective assistance of counsel. The Committee recommends that the bar complaint not be an essential requirement when alleging ineffective assistance. The attached report entitled "*Matter of Lozada* and the Bar Complaint Requirement: A Comprehensive Report" (the Vanderbilt Report) is a summary of the disparate ways the bar complaint requirement in *Matter of Lozada* is interpreted in the various circuit courts and serves as the basis for the Committee's recommendation.[5] Circuit courts have varyingly required strict compliance, substantial compliance, or reasonable compliance when deciding whether a noncitizen respondent must adhere to *Lozada's* procedural requirements, including the disciplinary complaint requirement.[6]

As of the writing of this recommendation, the U.S. Supreme Court is considering *Loper Bright Enterprises v. Raimondo*[7] and *Relentless Inc. v. Department of Commerce*[8], which involves the

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[4] *See* Executive Office for Immigration Review, *Immigration Court Manual*, Chapter 5.7, Motions to Reopen. Even if the *Immigration Court Manual* provided such guidance, the requirements would continue to remain onerous for the noncitizen.

[5] *Matter of Lozada* & the Bar Complaint Rule: A Comprehensive Report is authored by Vanderbilt University Immigration Practice Clinic under the Supervision of Professor Karla McKanders & AILA's National Ethics Committee.

[6] *See Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000) (stating that the formal requirements for filing a claim of ineffective assistance under *Lozada* are unnecessary if the record shows a clear, meritorious, and obvious case of ineffective assistance of counsel); *Yero v. Gonzales*, 236 F. App'x 451, 453–54 (10th Cir. 2007); *Habchy v. Gonzales,* 471 F.3d 858, 864 (8th Cir. 2006); *Yang v. Ashcroft*, 354 F.3d 1192, 1196–97 (10th Cir. 2003); *Gbaya v. U.S. Attorney Gen.*, 342 F.3d 1219, 1222 n.2 (11th Cir. 2003) (stating that alien's "fail[ure] to comply with at least two out of three *Lozada* requirements … would not be in substantial compliance with *Lozada*"); *Hamid v. Ashcroft*, 336 F.3d 465, 468–69 (6th Cir. 2003) (holding that alien's failure to provide an affidavit and make a bar complaint precluded substantial compliance); and *Fadiga v. Attorney General*, 488 F.3d 142, 156–57 (3rd Cir. 2007) (when prior counsel "has fully and openly owned up to his error and provided a detailed affidavit attesting to the problems in the representation," the goal of identifying and correcting possible conduct has been achieved).

[7] *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted in part sub nom. Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023).

[8] *Relentless Inc. v. Department of Commerce*, No. 21-1886 (1st Cir. 2023).

high level of deference afforded agency decisions by federal courts under *Chevron v. National Resources Defense Council, Inc*.[9] If the Court reduces or eliminates *Chevron* deference, attorneys may be able to advocate for circuit courts rejecting the bar requirement of *Lozada*, even if they previously upheld the decision.

The Ethics Committee recommends that the bar complaint requirement be eliminated but recognizes the reality that immigration practitioners must currently contend with *Lozada*. While *Lozada* remains in place, the Committee favors a flexible application of the standards established in the Third and Ninth Circuits.

The *Strickland* Standard in Criminal Proceedings and Due Process

Matter of Lozada is not the only case that has dealt with ineffective assistance of counsel. In 1984, the U.S. Supreme Court issued a pivotal decision for ineffective assistance of counsel cases in criminal proceedings. Under *Strickland v. Washington*,[10] criminal defendants have a guaranteed Sixth Amendment right to effective assistance of counsel, which noncitizens in removal proceedings do not have. This provides due process legal rights to those accused of a crime. These rights are designed to protect the defendant and ensure a fair criminal trial. Criminal defendants also have a Fifth Amendment right not to testify if it will result in self-incrimination. These rights are fundamental to the principles of due process and the presumption of innocence in criminal cases.

The *Strickland* case involved Mr. Washington, a defendant who pleaded guilty to three capital murder charges. While these were heinous crimes, Mr. Washington testified to the court during his plea that he was under extreme stress at having to support his family. The defense counsel did not seek any character witnesses, psychiatric evaluation, or presentence report. Instead, the defense counsel made the strategic choice to allow the judge to sentence the defendant pursuant to a plea consisting of the defendant's own statements. The Supreme Court noted that defense counsel had pursued pretrial motions and discovery, but stated:

> He cut his efforts short, however and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders.[11]

The decision later notes that counsel decided not to present or seek further evidence based on "counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes."[12]

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[9] *Chevron v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[10] *Strickland v. Washington*, 466 U.S. 688 (1984).
[11] *Id*.
[12] *Id.* at 673.

Later in the opinion, the Court noted that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[13]

The Court went on to state that in evaluating an ineffective of assistance claim, the reasonableness of the attorney's actions should be viewed at the time of counsel's conduct and not in hindsight. The Court stated:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test.[14]

The Court established a two-part test for an ineffective assistance of counsel claim. First, the attorney's performance must fall below an objective standard of reasonableness, and second, that performance must give rise to a reasonable probability that the result would have been different had representation been effective. In short, the defendant must show that counsel's performance was deficient and that it prejudiced the defense.[15]

Despite the similarities between criminal defense and removal defense, the remedies for ineffective assistance claims differ. Noncitizens facing removal do not share the same Sixth Amendment rights as criminal defendants for appointed counsel.[16] However, where immigration consequences are interwoven with criminal defense pleas, the right may attach. In the case of *Padilla v. Kentucky*,[17] the U.S. Supreme Court held that an attorney's failure to advise a client of the immigration consequences of a guilty plea constitutes ineffective assistance of counsel and violates a defendant's Sixth Amendment rights. Likewise, noncitizens also have the Fifth Amendment guarantee of due process in removal proceedings, which is violated if the proceedings were so fundamentally unfair that the noncitizen was prevented from reasonably presenting their case, e.g., due to ineffective assistance of counsel.[18]

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[13] *Id*. at 689.
[14] *Id*. at 693.
[15] *Id*. at 669.
[16] While respondents in removal proceedings can hire their own attorney, they do not have a Sixth Amendment right to appointed counsel in removal proceedings since they are considered civil in nature. *See* INA §240(b)(4)(A).
[17] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[18] *Matter of Assaad*, 23 I&N Dec. 553, 557 (BIA 2003). *See also* J. Mills, K. Echemendia, and S. Yale Loehr, Death *is Different and a Refugee's Right to Counsel*, Cornell Int. Law Journal, Fall 2009.

Due process concerns should be heightened in removal proceedings where, as in the context of criminal defense, life and freedom may be at stake. It could be argued that this is even more so important where respondents do not have access to counsel in the first place. Yet, even when respondents are able to obtain representation, immigrants face more obstacles than criminal defendants in making ineffective assistance claims. Not only must they satisfy the substantive requirements that closely follow the *Strickland* standard (i.e., that counsel's performance was deficient and prejudiced the client), but they also must comply with *Lozada's* procedural requirements, including the filing of a bar complaint (potentially in several jurisdictions), even if the deficient performance and prejudice is clear from the record. Failure to satisfy both the substantive and procedural requirements can result in a noncitizen's motion to reopen or reconsider[19] being denied, even where the ineffective performance and prejudice is clear on its face. Conversely, the requirement to file a bar complaint can have a chilling effect on representation—incentivizing immigration counsel to avoid practicing in the area of removal defense altogether for the fear of a frivolous bar complaint and exacerbating the very high legal services gap in this area. [20]

The Flexible Approach to *Lozada's* Procedural Requirements Adopted by the Third and Ninth Circuits Mitigates the Bar Complaint Requirement, Addressing the Broad Policy Goals of *Lozada* While Reducing the Establishment of Unnecessary Barriers to Relief

The BIA's 1988 *Lozada* decision has been interpreted quite extensively by the federal circuit courts and the BIA. The BIA and some of the circuits have defaulted to strict adherence to *Lozada's* procedural requirements, finding them necessary to weed out frivolous motions to reopen and to prevent collusion between attorneys and clients. The BIA's recent decision in *Matter of Melgar*[21] similarly insists on strict adherence to the procedural requirements, specifically the prong that a bar complaint should be filed against prior counsel or the movant must give a "consequential" reason for not filing one.

By contrast, the Third and Ninth Circuits have adopted a more flexible approach to the procedural requirements. While both circuits have found that *Lozada* establishes reasonable guardrails to ensure that litigants do not flood the courts with meritless motions to reopen, these circuits avoid rigid application of the three *Lozada* prongs, particularly the requirement that the movant should file a bar complaint or provide an explanation as to why the movant has not filed a bar complaint.

Both circuits have considered the broad policy goals that they believe *Lozada* was trying to achieve. If those policy goals are achieved, strict compliance with one or more of the *Lozada*

[19] It should be noted that in some jurisdictions *Lozada* also applies to direct appeals. *See Yi Long Yang v. Gonzales*, 478 F.3d 133, 142 (2d Cir. 2007); *Cf. Correa-Rivera v. Holder*, 706 F.3d 1128, 1130–31 (9th Cir. 2013); *Ferreira v Barr*, 939 F.3d 44 (1st Cir. 2019).
[20] *See* https://www.vera.org/downloads/publications/why-does-representation-matter.pdf.
[21] *Matter of Melgar*, 28 I&N Dec. 169 (BIA 2020).

prongs is waived. Each case is decided on its merits, with the goal of assuring that timely and meritorious motions to reopen are still considered so long as attempted compliance with the procedural steps has been "reasonable."

The Ninth Circuit has defined *Lozada* as "a framework within which to assess the bona fides of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance."[22] The Third Circuit has identified the policy goals as: (1) identifying, policing, and correcting misconduct in the immigration bar; (2) deterring meritless claims of ineffective assistance of counsel; (3) highlighting the expected standards of lawyer conduct for immigration attorneys; (4) reducing the need for an evidentiary hearing; and (5) avoiding collusion between counsel and alien clients.[23] Both circuits, therefore, agree that the *Lozada* framework has usefulness: to make it easier to identify or deter meritless claims, to highlight "standards" that immigration attorneys should adhere to, and to reduce the possibility of collusion.

Unlike the BIA in *Melgar* and in several other circuits, the Third and Ninth Circuits are less likely to consider a failure to meet one of the procedural prongs as fatal to an otherwise meritorious claim of ineffective assistance. While other circuits seem to establish a "rebuttable presumption" that the failure to strictly comply with each prong makes the claim less credible or meritorious (without actually using the "rebuttable presumption" language), the Third and Ninth Circuits examine the actual facts and circumstances and do not "presume" that lack of rigid compliance with *Lozada* undermines the substance of the ineffectiveness claim.

In adopting the more flexible approach, particularly with respect to the bar complaint prong, the Third and Ninth Circuits mostly avoid repeating outdated and unsupported tropes that immigration lawyers are more likely to commit misconduct and/or are less ethical, as well as the implication that state bar associations and the EOIR need "leads" from *Lozada*-based bar complaints to adequately "police" the immigration bar. These tropes are repeated by the BIA and in some of the circuits without any data or evidentiary backing. In fact, most state bar associations report that family and criminal law attorneys receive far more bar complaints than immigration lawyers.[24] There is no evidence that immigration lawyers require special "policing" through a requirement that the movant filed a bar complaint against their prior counsel who is alleged to be ineffective in a civil proceeding.

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[22] *Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003).
[23] *Rranci v. Attorney General*, 540 F.3d 165, 174 (3rd Cir. 2008).
[24] See the annual reports of the Washington Discipline System, 2022-discipline-system-annual-report.pdf (wsba.org) (page 11); Attorney Grievance Commission of Maryland, annualreport23.pdf (mdcourts.gov) (page 27); and Attorney Registration and Discipline Commission of Illinois, AnnualReport2022.pdf (iardc.org) (chart 13 and page 53) where complaints against immigration attorneys do not feature as highly as attorneys in other practice areas.

Examples of the more balanced approach of the Third and Ninth Circuits are evident in individual cases. For instance, in *Castillo-Perez v. INS*, the Ninth Circuit held that the formal requirements for filing a claim of ineffective assistance under *Lozada* are unnecessary if the record shows a clear, meritorious, and obvious case of ineffective assistance of counsel.[25] In that case, the record was undisputed that Castillo's lawyer failed, without reason, to timely file an application despite having told Castillo that he did file it, and that Castillo would have been prima facie eligible for the relief had the application been filed. The lawyer's "non-explanation" for his incompetence was already in the record, and the lawyer had previously been suspended in California for willful failure to perform in other immigration cases. Rather than allowing Castillo-Perez's highly meritorious motion to be dismissed where it was clear that ineffective assistance occurred, the Ninth Circuit reversed the BIA, and held that the "*Lozada* requirements are not sacrosanct."[26]

Furthermore, both circuits have held that where prior counsel admits that they erred, the policy goal of making lawyers aware of their misconduct is met, obviating the need for filing a bar complaint. When prior counsel "has fully and openly owned up to his error and provided a detailed affidavit attesting to the problems in the representation," the goal of identifying and correcting possible conduct has been achieved.[27] The Ninth Circuit has agreed but with slightly different reasoning, i.e., that if prior counsel has filed a declaration admitting error, it is "clear from the record" that counsel's performance was deficient.[28]

Finally, the Third and Ninth Circuits do not "presume" collusion simply because a bar complaint has not been filed (or no reason has been given for not filing one). Both circuits have stated in dicta that a declaration admitting misconduct by prior counsel is highly unlikely to be the result of collusion, because as a matter of common sense, a lawyer who declares falsely under penalty of perjury that the lawyer has committed error is committing perjury, not to mention furnishing evidence against themselves that could be used in a future disciplinary proceeding or a civil suit for malpractice.[29] Both circuits require some actual evidence of collusion and do not consider the fact that the movant did not file a bar complaint (or did not provide an explanation for not filing one) as evidence of possible collusion.

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[25] *Castillo-Perez v. INS*, 212 F.3d 518 (9th Cir. 2000).
[26] *Id*. at 525–56.
[27] *Fadiga v. Attorney General*, 488 F.3d 142, 156–57 (3rd Cir. 2007).
[28] *Lopez v. Garland*, No. 22-329 (9th Cir. July 27, 2023) (not for publication). It is also worth noting that both the immigration judge and the BIA can refer cases to DHS and EOIR disciplinary counsel, which in turn can also refer the case to a state bar disciplinary committee. Hence, there is no need for the noncitizen to file a bar complaint in order to police the bar.
[29] *See Correa-Rivera v. Holder*, 706 F.3d 1128, 1133 (9th Cir. 2013); *Fadiga*, 488 F.3d at 157 ("it seems unlikely that a lawyer would go as far as to commit perjury … in furtherance of such collusion").

AILA Ethics Committee's Recommendations

In sum, although both the Third and Ninth Circuits have found the *Lozada* prongs reasonable as a framework, they have also recognized that requiring strict compliance would put procedure over substance and prevent movants with deserving cases from having them reopened. A strict interpretation encourages the de facto presumption that immigration attorneys require special "policing" and that a motion to reopen filed in immigration proceedings should be used as means to "police" the immigration bar through requiring the filing of a bar complaint. The Supreme Court in *Strickland* never suggested the need for a bar complaint against criminal defense attorneys.[30] There is no rational reason in the modern era to continue to subject immigration lawyers to this kind of disparate treatment. In addition to the unfairness or placing additional burdens on respondents attempting to reopen their cases, the rationale for the bar complaint prong is far less compelling than 30 years ago. The bar complaint actually creates barriers to access to justice for respondents.

In 2009, then Attorney General Michael Mukasey certified a BIA case to himself and overruled the *Lozada* framework in *Matter of Compean*.[31] Although this decision eliminated the bar complaint requirement and allowed the BIA to reopen proceedings based on the deficient performance of the lawyer, the Committee does not endorse this decision as it also stated that there is no Fifth or Sixth Amendment right to effective assistance of counsel in removal proceedings. It is not necessary to eliminate Fifth and Sixth Amendment rights to effective assistance of counsel in removal proceedings even if the *Lozada* framework is overruled. The evidentiary requirements established in *Compean* would continue to be onerous for the noncitizen, including the submission of a mock *Lozada*-style complaint.[32] Attorney General Mukasey's new standard for ineffective assistance of counsel was overturned less than six months later in *Compean II*[33] by Attorney General Eric Holder.[34] In *Compean II,* Attorney General Holder held that the BIA and immigration judges should "apply the previously established standards" (i.e., the *Lozada* framework) when reviewing motions to reopen based on ineffective assistance of counsel claims.[35] Attorney General Holder also directed the EOIR to initiate rulemaking procedures to determine what modifications

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[30] Even BIA Chairman Paul W. Schmidt in his dissenting opinion in *Matter of Rivera* stated:
"I do not need a *Lozada* motion or a state bar complaint to find that ineffective assistance has occurred here. The respondent's affidavit and that of former counsel are sufficient to establish that former counsel's duties to the respondent were not properly discharged. There is no hint of collusion between former counsel and the respondent. Under these circumstances, I see no basis for making the filing of a state bar complaint the determinative factor."
[31] *See Matter of Compean I*, 24 I&N Dec. 710 (AG 2009).
[32] *Matter of Compean I* cited a comment filed by the Committee on Immigration & Nationality Law, Association of the Bar of the City of New York (Sept. 29, 2008), in response to the *Proposed Rule for Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44,178 (July 30, 2008) ("Under the *Lozada* Rule, an ineffective assistance of counsel charge is often required in order to reopen a case or reverse or remand an unfavorable decision. The practice of filing such claims is rampant, and places well-intentioned and competent attorneys at risk of discipline.").
[33] *See Matter of Compean II*, 25 I&N Dec. 1 (AG 2009).
[34] *Id*.
[35] *Id.*

should be made to the *Lozada* framework.[36] Although there were proposed rules relating to *Lozada* in 2016 and 2020, they have yet to be promulgated as final rules.[37] The lack of clarity and split in the circuit courts remain.

It is far more likely now than thirty years ago that a seriously deficient and/or unethical lawyer will come to the attention of regulators. Reasons for this include: (1) improved sophistication of lawyer discipline systems and the establishment of consumer assistance programs within state bar associations, as well within the enforcement arm of a state attorney general's office; (2) the development of email, social media, and the internet, all of which enable clients to share information among themselves and others regarding misconduct of lawyers; and (3) a more sophisticated and better-staffed EOIR discipline system.[38]

It is time to decouple the discipline process from the motion to reopen process and to abandon the use of the *Lozada* bar complaint requirement to "police" the immigration bar. In doing so, movants will have fewer procedural hurdles to overcome, disciplinary authorities will receive fewer complaints that usually allege some kind of malpractice error rather than a disciplinary violation, and removal defense attorneys will no longer be treated differently than other lawyers. There is no indication that the flexible approach of the Third and Ninth circuits has inhibited any of *Lozada's* policy goals. In fact, these goals are furthered by removing a crucial obstacle to advancing *legitimate* claims of ineffective assistance, while also removing the obstacle to representation that the threat of a *frivolous* bar complaint may pose to counsel considering removal defense practice.[39]

It is worth mentioning that by advocating the elimination of the bar compliant requirement, the Committee is not suggesting that a client or successor counsel should not file a bar complaint if they wish. A client or successor counsel may want to alert disciplinary authorities of possible unethical conduct, and they are of course within their rights to do so, just as a criminal defendant or successor counsel may wish to file a bar complaint to alert the bar to possible unethical conduct on the part of a criminal attorney. The problem is that *Lozada* requires the filing of a complaint (or the providing of a good reason why it has not been filed), a standard which in strict compliance circuits seems impossible to meet, when it is neither helpful to immigration judges in resolving the

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[36] *See Compean II*, 25 I&N Dec. at 2.
[37] See 81 FR at 49557 and 85 FR at 75953.
[38] For the grounds for disciplining immigration practitioners, *see* 8 CFR §1003.102.
[39] In *Paucar v. Garland*, No. 21-6043 (2d Cir. 2023), the Second Circuit recently analyzed prior counsel's deficient performance from purely a *Strickland* analysis, even though complaints against prior counsel had been filed: "Here, the parties do not dispute that prior counsel's performance was deficient; the sole issue, therefore, is whether Paucar was prejudiced by prior counsel's deficient performance. To establish prejudice in this context, Paucar must show that, 'but for counsel's unprofessional errors,' there is a 'reasonable probability' the IJ would have granted the relief Paucar requested. *Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020). Such a probability is demonstrated where a movant makes 'a prima facie showing that, but for counsel's ineffectiveness, "he would have been eligible for ... relief," and "could have made a strong showing in support of his application."' *Scarlett v. Barr*, 957 F.3d 316, 326 (2d Cir. 2020) (quoting Rabiu, 41 F.3d at 882). While this prejudice standard is factually demanding, it requires a 'reasonably probable,' not a 'likely' grant of relief."

issue nor helpful to noncitizens who are seeking to reopen their cases in immigration court, and who are unlikely to have much interest in the "policing" of the immigration bar.

In conclusion, the Committee recommends the adoption of the *Strickland* test in removal proceedings, relying on the approach of the Third and Ninth Circuits as an interim measure. This far more straightforward test—the defendant must show that counsel's performance was deficient and that it prejudiced the defense—can apply equally well in removal proceedings and would also overcome barriers for noncitizens to establish ineffective assistance of their counsel.[40] As referenced in the Vanderbilt report, we encourage AILA to seek amended rule-making that was initiated but never finished by the EOIR in 2020, or in the alternative, advocate with the Attorney General to issue a decision modifying *Matter of Lozada* to comport with the *Strickland* test. If the bar complaint requirement is eliminated in removal proceedings, the Committee sees no reason why it should be required by U.S. Citizenship and Immigration Services (USCIS).[41]

In the meantime, until there is a change in the standards, practitioners must continue to adhere to the *Lozada* framework when demonstrating that prior counsel's performance was deficient.

[40] For another well-reasoned criticism of the *Lozada* requirement in favor of *Strickland*, see "Amending *Lozada*" by Jeffrey Chase, available at https://www.jeffreyschase.com/blog/2022/10/11/amending-lozada.

[41] For instance, 8 CFR §208.4(a)(5)(iii) includes as an exception to the one-year filing deadline for asylum applications a demonstration of counsel's ineffectiveness through the *Lozada* framework. The USCIS Policy Manual, Chapter 7, also prescribes a procedure under the *Lozada* framework to demonstrate that counsel was ineffective in failing to timely seek to acquire permanent resident status in order to protect the age of the child under the Child Status Protection Act.

Matter of Lozada and the Bar Complaint Requirement: A Comprehensive Report

February 6, 2024

By Vanderbilt University Immigration Practice Clinic under the Supervision of Professor Karla McKanders & AILA's National Ethics Committee & The Coalition on Lozada and Access to Counsel

AILA Doc. No. 24040433. (Posted 4/23/24)

Foreword

In January 2023, the American Immigration Lawyer's Association's (AILA) National Ethics Committee partnered with Professor Karla McKanders, who directs the Vanderbilt University Law School Immigration Practice Clinic, to examine the impact of *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), on the immigration bar and its clients. The Vanderbilt Immigration Practice Clinic was tasked with specifically focusing on *Lozada's* bar complaint rule, including researching:

- The current state of *Lozada* in the federal circuit courts and analyzing the extent to which a circuit split exists;
- Actions and opinions that different attorneys general have issued on *Lozada*;
- State bar processes relating to *Lozada* disciplinary complaints in jurisdictions across the country; and
- Determining and comparing how different practice areas handle ineffective assistance of counsel claims, specifically whether other practice areas mandate bar complaints.

This report is the result of that research and is intended to inform and update the immigration bar on the status of *Lozada's* bar complaint requirement.

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Introduction: Ineffective Assistance of Counsel and *Matter of Lozada*

In 1988, the Board of Immigration Appeals (BIA) decided *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). This case established the requirements for filing a motion to reopen or reconsider in immigration proceedings where there is an allegation of ineffective assistance of counsel. The BIA imposed the following requirements that a noncitizen must establish in order to pursue a claim of ineffective assistance of counsel:

1) The noncitizen must submit an affidavit setting forth the relevant facts that detail the agreement between the noncitizen and the previous counsel regarding the specific assistance to be provided.[42]
2) The noncitizen must inform former counsel of the allegations and provide former counsel with the opportunity to respond.[43]
3) If it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.[44]

In addition to the above requirements, the noncitizen must establish a prima facie case for relief by demonstrating that the previous counsel's performance was so inadequate that it likely deprived the noncitizen of a potentially meritorious claim.[45]

Matter of Lozada has become a significant precedent in immigration law, providing a framework for individuals seeking to challenge the effectiveness of their previous legal representation in immigration proceedings. It established a procedural mechanism for addressing claims of ineffective assistance of counsel before immigration courts.

The bar complaint requirement has raised concerns with immigration practitioners because:

1) There is a federal circuit court split as to whether the bar complaint is a mandatory requirement;
2) No other practice area mandates the filing of a bar complaint in order to allege ineffective assistance of counsel;
3) There are varied U.S. attorneys general opinions and attempts to pass regulations clarifying *Matter of Lozada*; and

[42] *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988).
[43] *Id*. (stating "Any subsequent response from counsel, or report of counsel's failure or refusal to respond, should be submitted with the motion").
[44] *Id*.
[45] *Id*.

4) State bar disciplinary authorities process *Lozada* disciplinary complaints in ways alongside other bar complaints outside of immigration.

The BIA also addressed *Lozada*'s disciplinary complaint requirement in *Matter of Rivera*.[46] In *Rivera*, the BIA explained the need for the disciplinary complaint requirement, stating that immigration judges "rely on the disciplinary process of the relevant jurisdiction's bar as the first, and ordinarily the fastest, means of identifying and correcting possible misconduct."[47]

In *Rivera*, the Board cited numerous rationales for upholding *Lozada's* disciplinary complaint requirement, even when "it is … possible to resolve an ineffective assistance of counsel claim either on the documentary submissions or after an evidentiary hearing, without requiring the filing of a bar complaint."[48] The Board found that the bar complaint requirement served the following important purposes:

> [I]t increases our confidence in the validity of the particular claim, … it reduces the likelihood that an evidentiary hearing will be needed, … it serves our long-term interests in policing the immigration bar, [and it] protects against possible collusion between counsel and the alien client.[49]

Finally, the Board concluded that a bar complaint requirement was a "relatively small inconvenience" when viewed in light of a noncitizen's request to reopen costly and time-consuming administrative proceedings.[50] Multiple U.S. federal circuit courts cite *Rivera* when examining the underlying rationale for the bar complaint requirement.[51]

Another often-cited case is *Matter of Melgar*. In *Melgar*, the Board held that even when counsel admits error, the noncitizen must comply with *Matter of Lozada* and submit a complaint with the relevant disciplinary authority. The Board emphasized that this need is particularly obligatory "where the ineffective assistance allegation is rendered by the same attorney against himself."[52] Again, the Board stated that this requirement "is still required to ensure effective policing of bar misconduct and prevent collusion between aliens and attorneys."[53]

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[46] *Matter of Rivera-Claros*, 21 I&N Dec. 599 (BIA 1996).
[47] *Id.* at 604.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Patel v. Gonzales*, 496 F.3d 829, 832 (7th Cir. 2007) (citing *Rivera*, the court states that the bar complaint requirement "increases the BIA's confidence in the claim's validity, reduces the need for an evidentiary hearing, and helps the BIA to police the quality of the immigration bar").
[52] *Matter of Melgar*, 28 I&N Dec. 169 (BIA 2020).
[53] *Leon-Nicolas v. Garland* (unpublished), No. 20-9628, 2021 WL 4891634, at *3 (10th Cir. Oct. 20, 2021) (citing *Medgar* at 170–71).

In the larger context of the bar disciplinary complaint requirement, there are no other practice areas that require submitting a bar complaint when there is an allegation of ineffective assistance of counsel. The bar complaint rule in *Matter of Lozada* imposes a unique requirement for immigration attorneys. Aligning the disciplinary procedures for immigration attorneys with the broader legal profession will promote consistency and fairness. It is essential to maintain a cohesive approach across legal disciplines while upholding the highest ethical standards in immigration representation.

Ensuring Access to Effective Representation and Barriers to Justice

The *Matter of Lozada* rule places a heavy burden on noncitizens seeking to bring ineffective assistance of counsel claims in immigration proceedings. The strict requirements, such as filing a formal bar complaint against their attorney, create additional obstacles for noncitizens who already face numerous barriers accessing the legal system. *Lozada's* rigorous procedural requirements may discourage noncitizens from pursuing legitimate claims of ineffective assistance of counsel, which can undermine the principles of fairness and due process within the immigration court system.

In addition, in our survey of state bar disciplinary counsel, the investigator from Montana noted that, due to the lower numbers of immigration-related complaints received by her office, she suspects that many immigration clients may decline to file complaints because they fear their attorneys turning against them, or they mistrust the Office of Disciplinary Counsel and fear retaliation.[54] By reevaluating the rule, we can create a more accessible and equitable process that encourages individuals to come forward with credible claims of ineffective representation. This, in turn, will enhance the integrity of immigration proceedings and ensure that justice is served.

Circuit Court Decisions: *Lozada's* Disciplinary Complaint Requirement

This section provides an overview of the development of federal circuit courts' treatment of the disciplinary complaint requirement based on *Matter of Lozada*, [55] *Matter of Melgar*,[56] and *Matter of Rivera*. [57] The circuit courts review the BIA's decisions on ineffective assistance of counsel claims for abuse of discretion. This is a very high standard; circuit courts will only find abuse of discretion if the BIA provides no rational explanation for its decision, if it inexplicably departs from established policies that are devoid of any reasoning, or if it contains only summary or conclusory statements.[58]

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[54] *See* note 164.
[55] *See* note 1.
[56] *See* note 11.
[57] *See* note 5.
[58] *See Ke Zhen Zhao v. United States Department of Justice*, 265 F.3d 83 (2d Cir. 2001).

Circuit courts have applied variations requiring strict compliance, substantial compliance, or reasonable compliance when deciding whether a noncitizen respondent must follow *Lozada's* disciplinary complaint requirement.[59] The circuit court decisions fall on a continuum:

1. The Tenth and Eleventh Circuits adhere to a strict compliance standard, holding that the failure to file a bar complaint is fatal.
2. The Second and Ninth Circuits require substantial compliance and will excuse noncompliance where the policy goals underlying *Lozada* are clearly demonstrated in the administrative record.
3. The Third,[60] Fifth,[61] Seventh,[62] and Sixth[63] Circuits have applied a reasonableness standard that requires the noncitizen to provide a reasonable explanation for the disciplinary complaint's absence.
4. The Fourth and Eighth Circuits require substantial compliance with *Lozada* but have very few or no cases directly addressing the bar complaint requirement.

The following describes in detail the varying circuit court decisions. While the circuits agree on the reasoning for the disciplinary complaint requirement,[64] some of them provide for exceptions (such as when counsel admits in open court to ineffective assistance of counsel or when the bar has already suspended the attorney), while others do not.[65] While this report cites multiple cases within each circuit, an American Law Report on ineffective assistance of counsel in immigration proceedings also provides an extremely in-depth review for further analysis.[66]

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[59] *See Yero v. Gonzales*, 236 F. App'x 451, 453–54 (10th Cir. 2007); *Habchy v. Gonzales,* 471 F.3d 858, 864 (8th Cir. 2006); *Yang v. Ashcroft*, 354 F.3d 1192, 1196–97 (10th Cir. 2003); *Gbaya v. U.S. Attorney Gen.*, 342 F.3d 1219, 1222 n.2 (11th Cir. 2003) (stating that a noncitizen's "fail[ure] to comply with at least two out of three *Lozada* requirements … would not be in substantial compliance with *Lozada*"); *Hamid v. Ashcroft*, 336 F.3d 465, 468–69 (6th Cir. 2003) (holding that noncitizen's failure to provide an affidavit and make a bar complaint precluded substantial compliance); *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 134-35 (3d Cir. 2001); *Xu Yong Lu v. Ashcroft,* 259 F.3d 127, 133 (3d Cir. 2001).

[60] *Id.* at 133.

[61] *Lara v. Trominski*, 216 F.3d 487, 498 (5th Cir. 2000).

[62] *Stroe v. INS*, 256 F.3d 498, 502 (7th Cir. 2001).

[63] *Guzman-Torralva v. Garland*, 22 F.4th 617, 620 (6th Cir. 2022).

[64] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988); *Matter of Melgar*, 28 I&N Dec. 169 (BIA 2020); *Lara v. Trominski*, 216 F.3d 487, 498 (5th Cir. 2000); *Pepaj v. Mukasey*, 509 F.3d 725 (6th Cir. 2007); *Stroe v. INS,* 256 F.3d 498, 502–03 (7th Cir. 2001); *Leon-Nicolas v. Garland* (unpublished), 2021 WL 4891634 (10th Cir. Oct. 20, 2021).

[65] *Sabaratnam v. Holder*, 2011 WL 2647898 (2d Cir. 2011); *Esposito v. INS,* 987 F.2d 108 (2d Cir. 1993).

[66] Emmanuel S. Tipon and Jill M. Marks, *Comment Note: Ineffective Assistance of Counsel in Removal Proceedings—Legal Bases of Entitlement to Representation and Requisites to Establish Prima Facie Case of Ineffectiveness,* 58 A.L.R. Fed. 2d 363 (2011).

First Circuit

In general, the First Circuit reviews, on a case-by-case basis, whether an immigration judge (IJ) or the BIA has arbitrarily applied *Lozada's* procedural requirements.[67] The First Circuit rule requires filing a bar complaint and does not provide for much flexibility.[68]

Under this framework, the First Circuit has held that substantial compliance is not enough to satisfy the exceptional circumstances when attempting to rescind an in absentia removal order under INA §240(b)(5)(C)(I). This means that the court rigidly adheres to the *Lozada* procedural requirements and rejects appeals even where the petitioner mistakenly files the disciplinary complaint with the wrong bar disciplinary authority.[69] The court has explained, "Making a complaint to a body that is powerless to address it is the same as making no complaint at all. That is particularly true where, as here, the misdirection is unexplained."[70]

In 2016, in *Garcia v. Lynch*, the First Circuit affirmed that it explicitly disavows "plain on the face of the administrative record" ineffective assistance of counsel claims, and instead prefers a case-by-case assessment of the BIA's application of *Lozada* to the facts of the case.[71] In support of its holding, the court firmly stated that respondents are not excused from complying with *Lozada*. The Court in *Garcia* relied on *Saakian v. INS* as precedent where the court found the existence of extraordinary circumstances.[72]

Notwithstanding the rigid requirement to comply with the *Lozada* requirements, there may also be exceptions made when the circumstances are extraordinary. In *Saakian*, the pro se noncitizen respondent failed to comply with the *Lozada* requirements, and the immigration judge did not provide him with the option to remedy the deficiencies in his previously filed motion.[73] The court found the existence of extraordinary circumstances where the respondent was pro se and he was not time-barred from submitting additional evidence. The court reasoned that the immigration judge should have given the noncitizen time to satisfy the *Lozada* requirements. The court stated that the "IJ's de facto denial with prejudice of [respondent's] motion to reopen deprived him of

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[67] *Garcia v. Lynch*, 821 F.3d 178, 181 (1st Cir. 2016); *Zeng v. Gonzales,* 436 F.3d 26, 31 (1st Cir. 2006); *Punzalan v. Holder*, 575 F.3d 107, 111 (1st Cir. 2009) (citing *Asaba v. Ashcroft*, 377 F.3d 9, 11 (1st Cir. 2004) (stating, "The BIA acts within its discretion in denying motions to reopen that fail to meet the *Lozada* requirements as long as it does so in a non-arbitrary manner").

[68] *Beltre-Veloz v. Mukasey*, 533 F.3d 7, 10 (1st Cir. 2008) (citing INA §240(b)(5)(C)(I)). Under INA §240(b)(5)(C)(1), an in absentia removal order may be rescinded "upon a motion to reopen filed within 180 days after the date of the order if the alien demonstrates that the failure to appear was because of exceptional circumstances." One ground for demonstrating exceptional circumstances and tolling the 180 days is by demonstrating ineffective assistance of counsel through the *Lozada* framework.

[69] *See* 533 F.3d at 11.

[70] *Id*.

[71] *See Garcia*, 821 F.3d n.20 at 181.

[72] *Id*.

[73] *See Saakian v. INS,* 252 F.3d 21 at 26 (1st Cir. 2001) (citing *Ontiveros–Lopez v. INS,* 213 F.3d 1121, 1124–25 (9th Cir. 2000) (internal citations omitted); *see also Castillo-Perez v. INS,* 212 F.3d 518, 525–27 (9th Cir. 2000); *Escobar-Grijalva v. INS,* 206 F.3d 1331, 1335 (9th Cir. 2000).

due process under the circumstances of this case."[74] The court remanded the case for the noncitizen to resubmit documentation in compliance with *Lozada's* procedural requirements.

Second Circuit

The Second Circuit favors substantial compliance with the *Lozada* requirements, although it acknowledges that "slavish adherence" to *Lozada*'s requirements is not necessary.[75] The Second Circuit has held that "where facts supporting a 'claim of ineffective assistance are clear on the face of the record,' noncompliance with those requirements may be excused"—including the bar complaint requirement.[76]

For example, in *Yang v. Gonzales*, while on appeal to the BIA, the attorney against whom ineffective assistance of counsel was alleged was disbarred. The Second Circuit found that the evidence on which the noncitizen relied "to make his claim of ineffective assistance are clear on the face of the record, which plainly shows both the IJ's explicit reliance on counsel's competence and the fact that counsel was subsequently disbarred for malpractice as an immigration attorney.[77] Disbarment was enough to demonstrate substantial compliance where the noncitizen did not file a bar complaint.

In another case, *Esposito v. INS*, the court found that the noncitizen complied with *Lozada* without filing a disciplinary complaint when the noncitizen believed his attorney was already suspended from the practice of law.[78] While the Second Circuit has not waived the disciplinary complaint requirement, the court has held that substantial compliance with *Lozada* is sufficient when there is some form of evidence that clearly demonstrates an attorney's ineffective assistance.

Third Circuit

The Third Circuit has adopted a reasonable approach to *Lozada's* procedural requirements. The court has held that not filing a bar complaint is not fatal where a noncitizen provides a reasonable explanation for the absence of the complaint.[79] This rule is derived from "*Lozada* [which] explicitly allows petitioners to provide a reasonable explanation for *not* filing a complaint."[80] The Third Circuit articulated this rule in its first review of a *Lozada* claim on appeal in *Xu Yong Lu v.*

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[74] *Id.*
[75] *See Yang v. Gonzales*, 478 F.3d 133, 142–43 (2d Cir. 2007).
[76] *Id*.
[77] *Id.* at 143.
[78] *See Esposito v. INS,* 987 F.2d 108 (2d Cir. 1993).
[79] *Xu Yong Lu v. Ashcroft,* 259 F.3d 127, 134 (3d Cir. 2001).
[80] *Id.* at 133.

Ashcroft.[81] In this case, the Third Circuit seems particularly worried about the impact of strict, formulaic interpretations of *Lozada*.[82] The court stated:

> In particular, we are concerned that courts could apply *Lozada*'s third prong so strictly that it would effectively require all petitioners claiming ineffective assistance to file a bar complaint.[83]

The Third Circuit focuses on the reasonableness of the noncitizen's explanation for the absence of filing a bar complaint.[84]

This circuit seems more willing to accept the absence of a complaint than other circuits and requires the BIA to provide a clear analysis when it rejects an ineffective assistance claim where a bar complaint was not filed.[85] For example, in *Fadiga v. Attorney General,* the court found that the bar complaint requirement could be excused when counsel "acknowledged the ineffectiveness and made every effort to remedy the situation."[86] The court again strongly cautioned against a strict requirement that a bar complaint be filed. "[W]e stressed that the filing of a complaint … is not an absolute requirement" and that "the failure to file a complaint is *not* fatal if a petitioner provides a reasonable explanation."[87] The Third Circuit has also found that not filing a complaint is excusable where there is clear evidence of ineffective assistance and no suggestion of collusion between the noncitizen and the attorney.[88]

Fourth Circuit

There are very few Fourth Circuit cases directly addressing *Lozada's* disciplinary complaint requirement. This circuit has held that substantial compliance with *Lozada* is required.[89] Even though the Fourth Circuit has held that strict compliance is not necessary, the court states that "an alien who fails to satisfy any of the three *Lozada* requirements will rarely, if ever, be in substantial compliance."[90] This sets a fairly high bar for substantial compliance.

In *Barry v. Gonzales*, the noncitizen did not submit an affidavit explaining the scope of her agreement with prior counsel, did not provide evidence that she timely notified prior counsel of the allegations and gave an opportunity to respond, and did not address whether she had filed a

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[81] *Id.* at 132.
[82] *Id*. at 133.
[83] *Id.*
[84] *See Xu Yong Lu*, 478 F.3d at 134 ("In many, if not most, cases, petitioners alleging ineffective assistance should file disciplinary complaints. However, this is not an absolute requirement, and we stress that the failure to file a complaint is *not* fatal if a petitioner provides a reasonable explanation for his or her decision").
[85] *Id*.
[86] *Fadiga v. Attorney General*, 488 F.3d 142, 157 (3d Cir. 2007).
[87] *Id.* at 156.
[88] *See Huai Cao v. Attorney General,* 2011 WL 1206673 (3d Cir. 2011).
[89] *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006).
[90] *Id*.

disciplinary complaint against former counsel.[91] The court found that the noncitizen failed to put forth any evidence of ineffective assistance of counsel to the BIA and denied her petition for review.[92]

In *Figeroa v. U.S. I.N.S,* the court found that the noncitizen met the Fourth Circuit's substantial compliance standard under unusual and rare circumstances.[93] Even though the noncitizen did not take any action against his attorney, the court reversed the BIA's finding that counsel was effective. The court stated:

> [W]hile petitioner took no "action" against [his attorney], we fail to see how this indicates that [his attorney's] representation was effective. Figeroa is an adolescent alien who speaks no English and who has only a third-grade education. He is, no doubt, unaware of any action he might be able to take against Tellez, such as filing either a complaint with the state bar or a legal malpractice claim. Additionally, Figeroa's new counsel probably recognized that neither a disciplinary proceeding nor a civil action against Tellez would have provided petitioner with much assistance in terms of his deportation proceedings. Their energies were properly directed at stopping the deportation, rather than pursuing Tellez.[94]

The court found that the evidence was clear that the attorney's conduct failed to meet a minimal level of competence expected where the attorney did not act in their client's best interests and follow their client's wishes.[95] This case is aberrant in that it does not directly cite *Lozada* and relies on a due process standard for the ineffective assistance claim.

Fifth Circuit

The Fifth Circuit has held that *Lozada* does not absolutely require that a disciplinary complaint be filed. Rather, a reasonable explanation can excuse the failure to file a complaint."[96]

In *Lara v. Trominski*, the noncitizen did not file a disciplinary complaint against the attorney alleged to have provided ineffective assistance of counsel by having failed to inform the noncitizen of the BIA's denial decision, thus preventing a timely petition for review.[97] The noncitizen argued that, because counsel's ineffective representation did not involve violations of legal or ethical responsibilities under Texas's rules of professional responsibility, he was not required to file a

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[91] *Id*.
[92] *Id*.
[93] *See Figeroa v. U.S. INS*, 886 F.2d 76, 79 (4th Cir. 1989).
[94] *Id*.
[95] *Id*.
[96] *See Lara v. Trominski*, 216 F.3d 487, 497–99 (5th Cir. 2000).
[97] *Id.* at 490.

disciplinary complaint.[98] The Fifth Circuit found that the BIA's denial of the noncitizen's ineffective assistance of counsel claim was reasonable. In particular, the court noted that the attorney's failure to inform the noncitizen of the BIA's decision amounted to legal malpractice—a clear violation of legal responsibilities, which makes the discipline requirement of *Lozada* applicable.[99] The court noted that accepting the noncitizen's argument that prior counsel's actions did not amount to a violation of professional or ethical responsibilities would require the BIA to "investigate the relevant state disciplinary law underlying each failure to file a complaint," thus undermining the administrative efficiency rationale of the *Lozada* framework.[100]

Sixth Circuit

The Sixth Circuit has applied a strict compliance approach unless the noncitizen has a reasonable explanation that is congruent with *Lozada's* rationale warranting the non-filing of a complaint.[101] The court has held that a noncitizen who fails to comply with *Lozada's* requirements forfeits their ineffective assistance of counsel claim.[102] The underlying rationale for the bar complaint requirement is "deterring collusion between the alien and his or her lawyer and enlisting the alien's help to raise the ethical standards of the immigration bar."[103] This holding is cited in other circuit court decisions. When the noncitizen's rationale for failing to file a bar complaint is not aligned with *Lozada's* rationale, the Sixth Circuit would reject the noncitizen's reasonableness explanation.[104]

Under this standard, the court rejected the noncitizen's claim that he was "not interested" in pursuing a bar complaint, reasoning that this explanation did not address *Lozada's* underlying rationale for requiring that a bar complaint be filed.[105]

In *Pepaj v. Mukasey*, the court rejected Pepaj's argument that requiring the filing of a bar complaint was a violation of the U.S. Constitution's Equal Protection Clause. The noncitizen argued that only immigration attorneys were required to comply with *Lozada* requirements, which is disparate treatment that served no rational basis under the law.[106] The court rejected this argument, reiterating that failure to file a bar complaint results in the noncitizen forfeiting ineffective assistance of counsel claims.[107]

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[98] *Id*. at 497.
[99] *Id.* at 498.
[100] *Id*.
[101] *See Hamid v. Ashcroft*, 336 F.3d 465, 469 (6th Cir. 2003); *Pepaj v. Mukasey*, 509 F.3d 725 (6th Cir. 2007); *Guzman-Torralva v. Garland*, 22 F.4th 617, 620 (6th Cir. 2022).
[102] *See Pepaj v. Mukasey*, 509 F.3d 725 (6th Cir. 2007).
[103] *See Guzman-Torralva v. Garland*, 22 F.4th 617, 620 (6th Cir. 2022).
[104] *Id.* at 620.
[105] *Id*.
[106] *Id.,* note 61.
[107] *Id*.

It is worth noting that the Sixth Circuit has not adopted the Third Circuit's holding that, if counsel acknowledges ineffectiveness and attempts to remedy the situation, a bar complaint is unnecessary, which for the Third Circuit would meet the reasonableness standard.[108]

Seventh Circuit

The Seventh Circuit has required strict compliance with *Lozada* unless the noncitizen provides a reasonable explanation for the absence of a bar complaint.[109] The Seventh Circuit agrees with the BIA that reopening an ineffective assistance of counsel case should be reserved for only the most "egregious circumstances."[110] This circuit also cites the deficiencies in the immigration bar as justification for *Lozada*'s stringent procedural requirements.[111]

Stroe v. INS is a seminal case in the Seventh Circuit. Judge Richard Posner, an ardent critic of immigration courts, authored the majority opinion and referred to *Lozada* as an "ingenious screen to prevent strategic invocation of ineffective assistance."[112]

Here, the noncitizen was found to have satisfied the first requirement of *Lozada* but not the second two requirements.[113] Regarding the second requirement, the noncitizen failed by both not advising prior counsel about all claims of ineffective assistance, and by not providing sufficient time for prior counsel to respond to the allegations of effective assistance before filing the motion to reopen. The court found that the second failure, in particular, deprived the BIA of an opportunity to evaluate the motivation behind prior counsel's actions, which were alleged to have been deficient.[114]

To satisfy the third requirement of *Lozada*, the noncitizen provided an explanation for why they did not file a bar complaint against prior counsel.[115] The court held that their explanation did not satisfy *Lozada's* third prong, stating simply that "[i]t was not a good explanation."[116] Rejecting the noncitizen's argument that *Lozada*, interpreted literally, does not require a good explanation so long as any explanation is given, the court found that interpreting the third requirement this way would render it senseless. [117]

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[108] *See Omran v. Garland,* 852 F. App'x 206 (6th Cir. 2021).
[109] *See Stroe v. INS*, 256 F.3d 498, 502 (7th Cir. 2001). *See also Patel v. Gonzales,* 496 F.3d 829, 831–32 (7th Cir. 2007).
[110] *Id*. at 501.
[111] *Id.* at 504 (asserting that "the deficiencies of the immigration bar are well known").
[112] *Id.* at 501.
[113] *Id*. at 502.
[114] *Id*.
[115] *Id.*
[116] *Id*.
[117] *Id*.

In *Stroe*, Judge Posner explicitly rejected the Ninth Circuit's application relaxing *Lozada* standards:

> We are mindful that some cases allow an alien who has not complied with the *Lozada* rules to establish an infringement of the supposed due process right to effective assistance of counsel, nevertheless. [citations omitted] These are mainly Ninth Circuit cases … [where] hostility to the Board of Immigration Appeals is well known.[118]

It is important to note that no cases in the Seventh Circuit have found the existence of a "good explanation" sufficient to waive the bar complaint requirement.

In another notable case, *Patel v. Gonzales*, the noncitizen failed to comply with the requirement of notifying the attorney of the complaint.[119] The noncitizen directly filed a complaint with the Illinois Attorney Registration and Disciplinary Committee. He argued that because his removal was imminent he could not provide his former counsel with the opportunity to respond to his allegations.[120] The court rejected this argument, finding that "[t]his two-step notification requirement is a particularly important screening tool because in many cases it removes the need for an evidentiary hearing and enables the BIA to resolve ineffective-assistance claims on the basis of documentary submissions."[121] The court evaluated all three *Lozada* requirements together to determine whether there was an excuse for respondent's failure to comply with *Lozada*.[122]

Eighth Circuit

The Eighth Circuit requires substantial compliance with *Lozada*.[123] This circuit uses *Lozada* as "a substantive and procedural compass" to evaluate ineffective assistance of counsel claims in immigration proceedings.[124] The few Eighth Circuit decisions relating to *Lozada*, unlike those of other circuits, first focus on whether the noncitizen was prejudiced as a result of counsel's ineffective assistance prior to evaluating if the noncitizen has met *Lozada's* procedural requirements.[125] These cases also place heavy emphasis on the fact that the right to effective

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[118] *See Stroe*, 256 F.3d at 503 (emphasis added) (citing *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir. 2000); *Figeroa v. INS,* 886 F.2d 76, 78–79 (4th Cir. 1989); *Lopez v. INS,* 184 F.3d 1097, 1099–1100 (9th Cir. 1999).
[119] *Patel v. Gonzales,* 496 F.3d 829 (7th Cir. 2007).
[120] *Id.* at 832.
[121] *Id*. at 831–32 (7th Cir. 2007).
[122] *Id*.
[123] *See Habchy v. Gonzales*, 471 F.3d 858, 864 (8th Cir. 2006).
[124] *See Ortiz-Puentes v. Holder*, 662 F.3d 481, 484 (8th Cir. 2011).
[125] *See Rafiyev v. Mukasey*, 536 F.3d 853, 860 (8th Cir. 2008) (remanding case for administrative agency to determine whether respondent complied with *Lozada* requirements).

assistance of counsel is not guaranteed under the Fifth Amendment's Due Process Clause in immigration proceedings.[126]

In *Habchy v. Gonzales*, the court stated that, under the particular circumstances of the case, the substantial evidence approach required the noncitizen to demonstrate that he "lodged a formal complaint against the lawyer, or at least some explanation why [he] did not take such action, because it would have added strength to his allegations that the lack of notice was attributable to his lawyer's negligence rather than his own."[127] Similarly, in *Lopez v. Holder*, the court again clarified what adherence with the substantial compliance rule required.[128] The court stated that "it is questionable that fulfilling only one requirement could constitute substantial compliance."[129] Unlike other jurisdictions, the Eighth Circuit has not ruled on whether a strict application of *Lozada* is required.

> Our Circuit has not ruled on whether a strict application of [*Lozada*] requirements could constitute an abuse of discretion in certain circumstances, and we need not do so here. At the very least, an IJ does not abuse his discretion in requiring substantial compliance with the *Lozada* requirements when it is necessary to serve the overall purposes of *Lozada*[.][130]

Ninth Circuit

More than any other circuit, the Ninth Circuit has been flexible in its application of *Lozada's* procedural requirements.[131] Specifically, this circuit has held that compliance with the *Lozada* requirements is not mandatory in cases where it is clearly established that counsel was

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[126] *Habchy v. Gonzales,* 471 F.3d 858, 864 (8th Cir. 2006); *Rafiyev v. Mukasey*, 536 F.3d 853 (8th Cir. 2008); *Ortiz-Puentes v. Holder*, 662 F.3d 481, 484 (8th Cir. 2011). *See also Obleshchenko v. Ashcroft*, 392 F.3d 970, 971–72 (8th Cir. 2004).
[127] *Habchy v. Gonzales*, 471 F.3d 858, 864 (8th Cir. 2006).
[128] *See Lopez v. Holder*, 390 F. App'x 623, 626 (8th Cir. 2010).
[129] *Id*.
[130] *Avitso v. Barr*, 975 F.3d 719, 722 (8th Cir. 2020). *See also Habchy v. Gonzales*, 471 F.3d 858 (8th Cir. 2006).
[131] *See Lo v. Ashcroft*, 341 F.3d 934, 937 n.4 (9th Cir. 2003) (stating, "We seldom reject ineffective assistance of counsel claims *solely* on the basis of *Lozada* deficiencies"); *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000) (stating, "the *Lozada* requirements are not sacrosanct.").

ineffective[132] or where the noncitizen has diligently attempted to comply with *Lozada's* requirements.[133] The Ninth Circuit has reasoned:

> [Fl]exibility in applying the *Lozada* requirements comports with *Lozada's* policy goals, which are to provide a framework within which to assess the *bona fides* of the substantial number of ineffective assistance claims asserted, to discourage baseless allegations and meritless claims, and to hold attorneys to appropriate standards of performance. When these goals are met, we have not insisted upon strict compliance.[134]

Accordingly, in the absence of compliance with *Lozada*, the Ninth Circuit evaluates the substance of each ineffective assistance claim to determine whether the record clearly demonstrates ineffectiveness.[135] "When [the underlying policy] goals are met, we have not insisted upon strict compliance."[136]

In *Lo v. Ashcroft*, the Ninth Circuit addressed the failure to file a bar complaint with the proper disciplinary authorities.[137] In this case, the noncitizen complied with *Lozada's* first and second requirements but failed to file a bar complaint. The Ninth Circuit stated:

> A primary goal of the third requirement, that of filing or satisfactorily explaining the non-filing of a complaint with the proper disciplinary authorities, is to protect against the collusive use by aliens and their counsel of ineffective assistance of counsel claims to achieve delay.[138]

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[132] *See Castillo-Perez,* 212 F.3d at 526 (holding that *Lozada* need not be rigidly enforced where it was clearly demonstrated that counsel "completely failed in his duties to his client"; excusing failure to submit affidavit where hearing transcript and other record evidence clearly showed ineffectiveness); *Escobar-Grijalva v. INS,* 206 F.3d 1331, 1335 (9th Cir. 2000) (holding that the *Lozada* rules for ineffective assistance of counsel are not dispositive when the hearing transcript clearly established that the petitioner was denied the right to choose counsel); *Castillo-Perez v. INS,* 212 F.3d 518, 526 (9th Cir. 2000) (excusing failure to submit affidavit where hearing transcript and other record evidence clearly showed ineffectiveness).

[133] *Ontiveros–Lopez v. INS,* 213 F.3d at 1124–25 (holding that arbitrary application of *Lozada* requirements was abuse of discretion where new counsel's declaration described his diligent efforts to comply with the *Lozada* standard).

[134] *See Castillo-Perez v. INS*, 212 F.3d 518, 525–27 (9th Cir. 2000) (explaining that while the *Lozada* requirements are generally reasonable under ordinary circumstances, they are not sacrosanct, and will not be dispositive when the relevant facts are plain on the face of the administrative record). *See also Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003) (citing *Lozada*, 19 I&N Dec. at 639); *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) ("While the requirements of *Lozada* are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means.").

[135] *See Castillo-Perez*, 212 F.3d at 526 (excusing failure to submit affidavit where hearing transcript and other record evidence clearly showed ineffectiveness).

[136] *Lo*, 341 F.3d at 937.

[137] *Id.* at 938 (citing *Rivera*, 21 I&N Dec. at 604–05).

[138] *Id*.

The court remanded *Lo* when the record demonstrated there was no collusion.[139] "To the contrary, the circumstances indicate that the petitioners did all they reasonably could to have their cases heard promptly." [140]

Tenth Circuit

The Tenth Circuit applies the substantial compliance doctrine and requires strict compliance with *Lozada's* procedural requirements, including the bar complaint requirement.[141] Unlike the Ninth Circuit, this circuit has held that the bar complaint cannot be waived based on "counsel's own view of the gravity of error."[142]

In *Leon-Nicolas v. Garland*, the noncitizen complied with the first two *Lozada* requirements but did not file a bar complaint.[143] Leon-Nicolas argued that filing a complaint was not warranted where:

> [T]he ordinary purposes for a complaint were already fulfilled" by the attorney's admission of error on the record. The IJ deemed this explanation inadequate and denied the motion to reopen on that basis.[144]

Accordingly, the question on appeal was whether the BIA abused its discretion in denying the noncitizen's motion to reopen for lack of compliance with *Lozada's* bar complaint requirement.[145] The court upheld the lower court's decision relying on *Lozada's* policy rationale:

> The IJ emphasized that "preventing collusion" and "policing immigration courts" were important reasons for the (bar complaint) requirement. The court found that allowing respondents to bypass the bar complaint requirement would undermine the purpose of Lozada.[146]

The court agreed with the BIA that "speculation by [Mr. Leon-Nicolas's current] counsel about the usefulness of filing a bar complaint is not a substitute for filing a bar complaint."[147]

Leon-Nicolas further argued that a noncitizen's due process rights are violated by the imposition of greater demands for asserting an ineffective assistance of counsel claim than those faced by

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[139] *Id*.
[140] *Id*.
[141] *See Leon-Nicolas v. Garland* (unpublished), 2021 WL 4891634 (10th Cir. Oct. 20, 2021).
[142] *See Yero v. Gonzales*, 236 F. App'x 451, 454 (10th Cir. 2007); *Leon-Nicolas v. Garland*, 2021 WL at *3.
[143] *See Leon-Nicolas*, 2021 WL at *2.
[144] *Id*. (citing the administrative record).
[145] *Id*.
[146] *Id.* at *3.
[147] *Id*.

defendants in criminal proceedings—namely, that criminal defendants need not commence litigation against former counsel as a precursor to court review.[148,149] This argument was summarily dismissed for not having been first raised before the BIA and the IJ.[150]

Ultimately, the Tenth Circuit has held that the *Lozada's* procedural requirements are essentially a "screening device" that the BIA considers before considering the merits of ineffective assistance claims.[151] In multiple opinions, in dicta, the Tenth Circuit affirmed the need for strict application of *Lozada's* procedural requirements. The Tenth Circuit relies on *Lozada's* rationale that there is "the need for adherence to the 'high standard … necessary … [as] a basis for assessing the substantial number of claims of ineffective assistance of counsel that come before the Board.'"[152]

Eleventh Circuit

The Eleventh Circuit requires substantial compliance with *Lozada* and does not have any case law providing for exceptions to the bar complaint requirement. "A petitioner claiming ineffective assistance of counsel in an immigration proceeding must demonstrate substantial compliance with the *Lozada* requirements."[153] Failing to fulfill one of the three *Lozada* requirements, including the bar complaint requirement, is not substantial compliance in the Eleventh Circuit.[154] A bar complaint is even required where counsel's ineffective assistance was clear on the record.[155] Additionally, the Eleventh Circuit has reasoned that simply filing the bar complaint does not constitute notice to the attorney and separate notice must be given to fulfill the requirements.[156]

To sum up, all circuit courts have upheld *Lozada*, though to varying degrees, with some requiring strict or substantial compliance without exception.

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[148] *Id.* at *4.
[149] *Id*.
[150] *Id*.
[151] *See Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir. 2004) (citing *Ariko v. Gonzales*, 167 F. App'x 27, 30 (10th Cir. 2006)).
[152] *Id*. at 1363 (citing *Lozada*, 19 I&N Dec. at 639; *Mickeviciute v. INS*, 327 F.3d 1159, 1161 n.2 (10th Cir. 2003) (noting that motion based on claim of ineffective assistance of counsel must be supported as outlined in *Lozada*); *Tang v. Ashcroft*, 354 F.3d 1192, 1196–97 (10th Cir. 2003) (noting no abuse of discretion by BIA's denial of motion to reopen where petitioner failed to comply with *Lozada*).
[153] *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1272 n.3 (11th Cir. 2005).
[154] *See,* e.g., *Campbell v. Att'y Gen.*, No. 20-12577, 2021 WL 3034035 (11th Cir. 2021); *Abbah v. Att'y Gen.,* No. 21-12531, 2022 WL 3697188 (11th Cir. 2022); *Point du Jour v. Att'y Gen.*, 960 F.3d 1348, 1350 (11th Cir. 2020).
[155] *See Gbaya v. Att'y Gen.*, 342 F.3d 1219, 1222–23 (11th Cir. 2003).
[156] *See Point du Jour v. Att'y Gen.,* 960 F.3d 1348, 1351 (11th Cir. 2020).

State Processing of *Lozada* Disciplinary Complaints

Despite the variation in the circuit courts application of *Lozada*, state bar disciplinary authorities tend to process *Lozada* ineffective assistance claims similarly to all state bar disciplinary complaints.[157] In general, they do not give any extra weight to the claim or cause disciplinary counsel to disregard the complaint simply because it is being brought to fulfill the *Lozada* requirement.[158] This section documents how various state lawyer disciplining authorities handle attorney disciplinary complaints filed as a prerequisite to a motion to reopen or reconsider in compliance with *Matter of Lozada*.[159] This section is based on interviews conducted in AILA's *Conversations with Discipline Counsel Podcast Series*,[160] and via telephone and email surveys the Vanderbilt Immigration Clinic conducted with various state bar disciplinary entities. In most jurisdictions, the state disciplinary authorities handle the complaint as they would any other disciplinary complaint.[161]

AILA's Interviews with State Disciplinary Counsel

AILA published a podcast series titled *Conversations with Discipline Counsel* that interviewed discipline counsel across nine different state bars, including Arizona, California, Florida, Georgia, Illinois, Minnesota, Pennsylvania, Texas, and the District of Columbia.[162] These state entities span 6 of the 11 different circuit courts, including the D.C. Circuit Court, and include many of the states with large immigration populations.[163]

In eight of nine interviews, the state bar's discipline counsel was asked how they handle complaints brought under *Matter of Lozada*.[164] In almost every interview, state discipline counsel were aware of *Lozada* and the requirement to file a complaint as a prerequisite to an immigration ineffective assistance of counsel claim.[165] Disciplinary counsel agreed that *Lozada* complaints are processed in the same way as all bar complaints.[166] The state bar discipline counsel all agreed that that *Lozada* bar complaints are not given less weight because they are a procedural requirement to ineffective assistance of counsel claims.[167]

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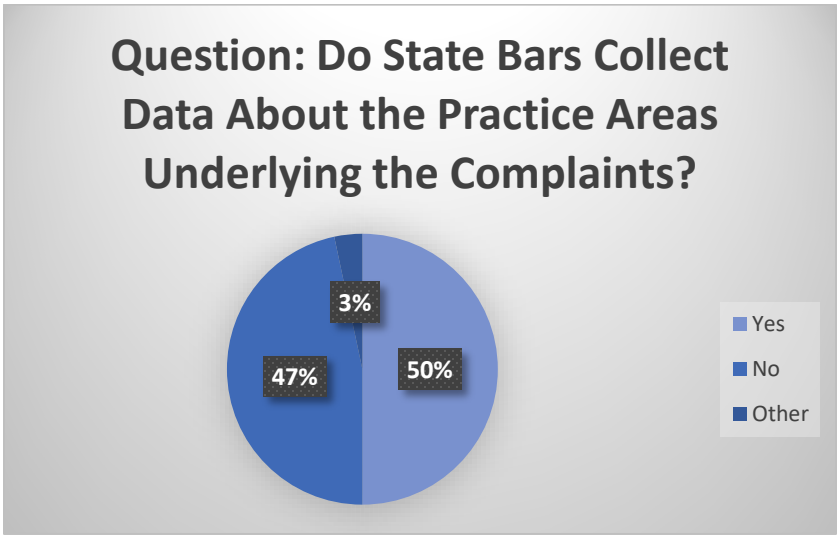
[157] S*ee Conversations with Discipline Counsel Podcast Series* (Oct. 29, 2021).
[158] *Id.*
[159] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[160] *See Conversations with Discipline Counsel Podcast Series* (Oct. 29, 2021), https://www.aila.org/practice/ethics/ethics-resources/2016-2019/conversations-with-discipline-counsel-podcast.
[161] *Id.*
[162] *Id.*
[163] Includes interviews with discipline counsel from states in the 3rd, 5th, 7th, 8th, 9th, 11th, and D.C. Circuits.
[164] *See Conversations with Discipline Counsel Podcast Series* (Oct. 29, 2021).
[165] *Id.*
[166] *Id.*
[167] *Id.*

State Survey of *Lozada* Disciplinary Complaints

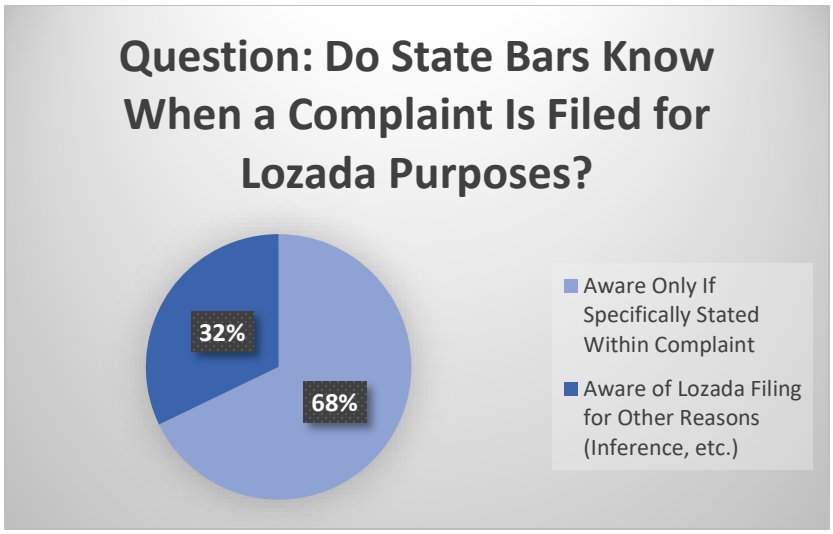
In June 2023, the Vanderbilt Immigration Practice Clinic surveyed 50 state bar and four U.S. territory bar discipline counsel offices to discuss how they process *Lozada* disciplinary complaints. The goal was to evaluate whether the trend identified in the *Conversations with Discipline Counsel* podcast was consistent and replicable. The Clinic contacted discipline counsel through email and telephone calls. The Clinic received 38 responses (70 percent response rate).[168] The Clinic posed the following questions:

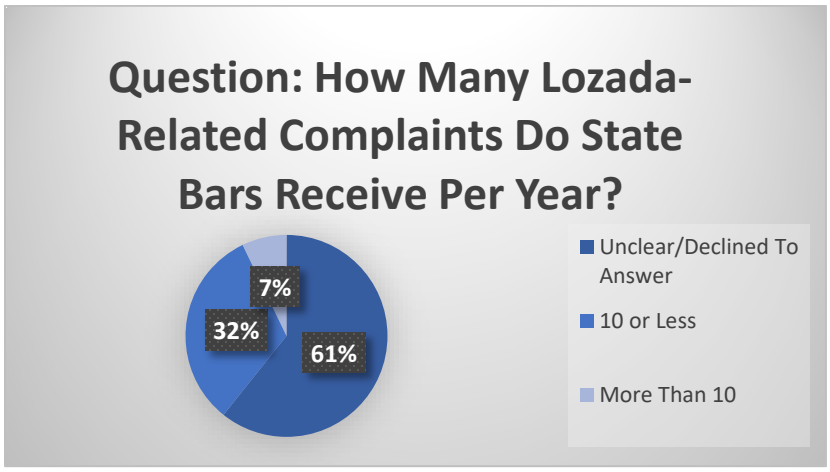
- Do state bars (disciplinary entities) collect data on the area of practice for which the attorney against whom the complaint is filed?
- Do you know when a complaint is made for *Lozada* purposes?
- How many *Lozada* bar complaints do you receive per year?
- How do you handle *Lozada* bar complaints?

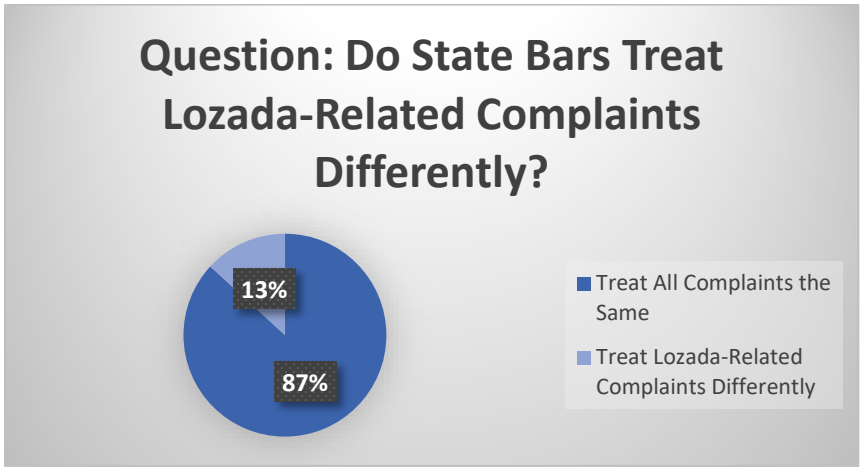
June 2023 State Bar Discipline Survey Results



[168] The findings are on file and can be made available on request.







Of the 38 states surveyed, only five reported any variation from the standard practice of treating all complaints uniformly. The Illinois State Bar representative stated that they understand that there

is procedural nuance related to complaints filed pursuant to *Lozada*.[169] Accordingly, Illinois State Bar discipline counsel uses *Lozada* complaints as one factor in the overall analysis of the case, and views *Lozada* requirements as contextual information to better understand why the complaint was filed.[170] For this reason, in assessing *Lozada* complaints, they do not "take every word literally; [they] examine them in context."[171]

Discipline counsel from the Pennsylvania State Bar also mentioned that when an ethical issue is clear on its face, she will proceed with the complaint as normal. However, in some circumstances, she may wait until the underlying *Lozada* complaint is resolved before moving forward.[172]

Discipline counsel from the Utah Office of Professional Conduct noted that, while the rules of professional conduct apply uniformly to all complaints, some procedures are specific to immigration complaints. For example, with immigration complaints, there is specific documentation that the office requests from the government.

Discipline counsel from the New Hampshire Supreme Court's Attorney Discipline Office mentioned that, while they treat *Lozada*-related complaints the same as others, they are aware that the complaint may have been filed simply to fulfill the *Lozada* requirement, rather than to address the alleged violation itself.

The most significant departure came from Iowa. Discipline counsel from the Iowa Supreme Court Office of Professional Regulation stated that their office generally declines to open a complaint that is strictly a *Lozada* complaint unless there are other embedded rule violations in the complaint. These were the only variations from the other state bar discipline counsel.

Based on multiple state bars' discipline counsel, it appears that almost all *Lozada* complaints are treated similarly to other disciplinary complaints.[173] While some state bars and particular discipline counsel view *Lozada* complaints with additional context, the general consensus clearly indicates that they are not treated differently by state bars.[174]

[169] *Id*.
[170] *Id.*
[171] *Id.*
[172] *Id*.
[173] *Id.*
[174] *Id.*

U.S. Attorneys General Decisions, Actions, and Regulations

Since *Matter of Lozada*[175] was decided in 1988, various U.S. attorneys general have attempted to clarify *Lozada's* procedural requirement by certifying cases from the BIA to themselves[176] (*Matter of Compean I*[177] and *Matter of Compean II*)[178] and by proposing new regulations.[179] The *Compean* opinions and proposed regulations attempt to resolve the differing circuit court interpretations of *Lozada's* procedural requirements for establishing an ineffective assistance claim.[180] This section focuses on *Compean I & II* and the proposed regulations to evaluate how different attorney generals have viewed *Lozada's* disciplinary complaint requirement.

Compean I & II

In 2009 in *Compean I*, Attorney General Michael Mukasey certified a BIA case to himself and overruled the *Lozada* framework.[181] In *Matter of Compean*, the BIA held that the noncitizen did not file a bar complaint and did not suffer prejudice from his lawyer's conduct.[182] The BIA denied his motion to reopen. *Compean I* overruled BIA decisions in *Lozada* and *Matter of Assaad*.[183] In *Compean I*, the first Attorney General clarified that there is no Fifth or Sixth Amendment right to effective assistance of counsel in civil immigration proceedings;[184] the BIA may, in its discretion, allow a noncitizen to reopen removal proceedings based on the deficient performance of his lawyer,[185] and this determinate should hinge on whether the lawyer's deficient performance *likely* changed the outcome of a noncitizen's initial removal proceedings.[186]

The Attorney General established a new administrative framework for extraordinary circumstances: "[W]here a lawyer's deficient performance likely changed the outcome of an alien's removal proceedings, the Board may reopen those proceedings notwithstanding the absence

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[175] *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
[176] *See* 8 CFR §1003.1(h)(1)(i) (2007) (providing Attorney General the power to certify cases to themselves from the Board of Immigration Appeals).
[177] *See Matter of Compean I*, 24 I&N Dec. 710, 712 (AG 2009).
[178] *See Matter of Compean II*, 25 I&N Dec. 1 (AG 2009).
[179] *See Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel*, 81 FR 49556-01; *Motions to Reopen and Reconsider; Effect of Departure*; Stay of Removal, 85 FR 75942-01 (collectively regulations).
[180] *See Compean I*, 24 I&N Dec. 710; *Compean II*, 25 I&N Dec. 1; and regulations.
[181] *See Compean I*, 24 I&N Dec. 710.
[182] *Id.* at 715–16 (2009). *See also Matter of Bangaly* 25 I&N Dec. 1, 3 (AG 2009) (consolidated case) (denying motion to reopen where respondent failed to comply with one of *Lozada's* requirements because he had not given his former counsel a chance to respond to his allegations of ineffective representation); *Matter of J–E–C–*, 24 I&N Dec. 710 (AG 2009) (consolidated case) (holding that respondents "had suffered no prejudice from the failure to file a brief because a brief would not have changed the outcome of their proceedings").
[183] *See Compean I*, 24 I&N Dec. at 712 (citing *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) and *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003)).
[184] *See Compean I*, 24 I&N Dec. at 718–21 (Fifth Amendment due process rights are against the government and cannot be construed against private counsel).
[185] *See Compean I*, 24 I&N Dec at 714.
[186] *Id*.

of a constitutional right to such relief."[187]

The Attorney General's goal in amending the *Lozada* standard was "to permit the Board to resolve the great majority of claims expeditiously on the basis of an [noncitizen's] motion to reopen and accompanying documents alone."[188] Under the new standard, noncitizens had to establish the following elements:

1. The lawyer's failings were egregious;
2. In cases where the noncitizen moves to reopen beyond the applicable time limit, he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance; and
3. There was prejudice suffered from the lawyer's errors, and but for the deficient performance, it is more likely than not the noncitizen would have been entitled to the relief sought.[189]

This opinion also established the evidentiary requirements a noncitizen *must* satisfy to demonstrate their counsel's deficient performance:[190]

1. An affidavit recounting the facts that form the basis for the ineffective assistance of counsel claim;
2. A copy of the agreement between the noncitizen and the deficient attorney;
3. A copy of a letter addressed to the former attorney specifying the attorney's deficient performance and the lawyer's response;
4. A complete, signed complaint addressed to, but not necessarily filed with, the appropriate state bar or disciplinary authority;
5. A copy of any document or evidence, or an affidavit summarizing any testimony that the noncitizen alleges the lawyer failed to submit previously; and
6. A statement by new counsel expressing a belief that the performance of the former counsel fell below minimal standards of professional competence.[191]

If any of these documents is unavailable, the noncitizen must explain why.[192] If any of these documents is missing rather than nonexistent, the noncitizen must summarize the document's contents in his affidavit.[193]

Endorsing this standard, the Attorney General rejected the continuum that the circuit courts created allowing for substantial compliance with *Lozada* in some cases.[194] The rationale for making the

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[187] *Id*.
[188] *Id.* at 731.
[189] *Id.* at 732–35.
[190] *Id*.
[191] *Id.* at 735–39.
[192] *Id*.
[193] *Id.* at 711.
[194] *Id.* at 739 (2009) (citing *Reyes v. Ashcroft*, 358 F.3d 592, 597–99 (9th Cir. 2004)).

documents mandatory was to help the court develop a complete record and to reduce uncertainty regarding when *Lozada* requirements would be enforced or waived.[195]

Regarding the bar complaint requirement, *Compean I* required only that an unfiled copy of the complaint be filed with the Motion to Reopen.[196] The BIA then has the discretion to decide "whether to refer the complaint to the state bar or to the Executive Office for Immigration Review disciplinary counsel for further review."[197] Attorney General Mukasey implemented this rule in response to the Association of the Bar of the City of New York's comment that the bar complaint requirement led to overfiling and extreme difficulty for "well-intentioned and competent attorneys."[198] Attorney General Mukasey understood the risks of frivolous complaints and allowed the BIA to decide if filing the complaint with the state bar was necessary.[199]

Attorney General Mukasey's new standard for ineffective assistance of counsel was overturned less than six months later in *Compean II*[200] by Attorney General Eric Holder.[201] In *Compean II,* Attorney General Holder held that the BIA and immigration judges should "apply the previously established standards," (i.e., the *Lozada* framework).[202] Attorney General Holder also directed the Executive Office for Immigration Review (EOIR) to initiate rulemaking procedures to determine the *Lozada* framework.[203]

Attorney General Holder's 2016 Proposed Regulations

In 2016, seven years after Attorney General Holder's direction to initiate rulemaking, the EOIR proposed new filing and adjudication standards for motions to reopen removal proceedings based on ineffective assistance claims.[204] This proposed rule required that the noncitizen establish that they were prejudiced by former counsel's deficient representation.[205] Similar to *Lozada* requirements, noncitizens alleging ineffective assistance of counsel would be required to submit:

1. An affidavit;

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[195] *Id*.
[196] *Id*.
[197] *See Compean I,* 24 I&N at 737–38.
[198] "Under the *Lozada* Rule, an ineffective assistance of counsel charge is often required in order to reopen a case or reverse or remand an unfavorable decision. The practice of filing such claims is rampant, and places well-intentioned and competent attorneys at risk of discipline." Comment filed by the Committee on Immigration & Nationality Law, Association of the Bar of the City of New York (Sept. 29, 2008), in response to the *Proposed Rule for Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44,178 (July 30, 2008).
[199] *See Compean I*, 24 I&N Dec. at 710.
[200] *See Compean II*, 25 I&N Dec. at 1.
[201] *Id*.
[202] *Id.*
[203] *See Compean II*, 25 I&N Dec. at 2.
[204] *See* Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel, 81 FR 49556-01 (July 28, 2016).
[205] *Id*.

2. A copy of any applicable representation agreement;
3. Evidence prior counsel was notified; and
4. Evidence a complaint was filed with the appropriate disciplinary authorities.[206]

The 2016 proposed rule allowed for noncompliance in a very limited number of circumstances.[207] The proposed rule sought input on the bar complaint requirement specifically and its potential efficacy in assisting "state licensing authorities in regulating the legal profession."[208] In order to be excused from any of the requirements of the proposed rule, "compelling reasons" are required.[209] The only example given of a compelling reason for failure to file the bar complaint is the death of counsel who allegedly provided ineffective assistance.[210] Non-compelling reasons include where attorneys have already been "disciplined, suspended from the practice of law, or disbarred."[211] Comments were received for the 2016 proposed rule, but no final rule was published.[212]

In 2020, the EOIR proposed a new rule and withdrew the 2016 proposed rule.[213] This 2020 proposed rule required three pieces of evidence to support a motion to reopen for ineffective assistance of counsel claims:[214]

1. An affidavit with a copy of the agreement with counsel and describing counsel's deficiencies;
2. Notice be given to counsel informing them of the allegations; and
3. A complaint be filed with appropriate disciplinary authorities *and* with EOIR disciplinary counsel.[215]

The three requirements essentially replicate *Lozada* requirements.[216]

The 2020 proposed regulation necessitated filing a bar complaint with the state bar and also required filing an EOIR disciplinary complaint.[217] The rationale was for EOIR to track disciplinary actions brought against attorneys in the immigration court.[218] The 2020 proposed rule has also not been published as a final rule.

The Attorneys General, Department of Justice, and the EOIR have released multiple decisions and

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[206] *See* 81 FR at 49557.
[207] *Id*.
[208] *Id*.
[209] *See* 81 FR 49565.
[210] *Id*.
[211] *Id.*
[212] *See* Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 FR 75942-01.
[213] *Id*.
[214] *See* 85 FR at 75951.
[215] *See* 85 FR at 75952.
[216] *Id*.
[217] *See* 85 FR at 75953.
[218] *Id*.

proposed regulations relating to *Lozada* to clarify an increasingly complicated process.[219] Despite the cases and proposed regulations, *Lozada* is still the governing precedent. As our circuit court section demonstrates, the circuit courts do not help in establishing uniformity in the *Lozada* requirements.[220] To date, the recent attorneys general have not made any announcements or comments on when or if the 2020 proposed rule will be implemented.

Conclusion

It is crucial for immigration lawyers to advocate for changes to *Matter of Lozada's* requirement that noncitizens file a disciplinary complaint. The current requirement of filing a disciplinary complaint against attorneys places a burden on noncitizens seeking to address claims of ineffective assistance of counsel, hindering access to justice and effective representation. There is already a movement underway to effectuate change, and this report highlights the uneven way that the bar complaint requirement has been dealt with in different jurisdictions. The accompanying recommendation of AILA's Ethics Committee suggests adoption of the more flexible approach of the Third and Ninth Circuits, and ultimately replacing *Matter of Lozada* with the *Strickland* test in removal proceedings.[221] This far more straightforward test—the defendant must show that counsel's performance was deficient and that it prejudiced the defense—can apply equally well in removal proceedings and would also overcome barriers for noncitizens to establish ineffective assistance of their counsel.

[219] *See Matter of Compean I,* 24 I&N Dec. 710 (AG 2009); *Matter of Compean II*, 25 I&N Dec. 1 (AG 2009); Motions to Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel, 81 FR 49556-01; Motions to Reopen and Reconsider; Effect of Departure; Stay of Removal, 85 FR 75942-01.
[220] *See Lozada,* 19 I&N Dec. 637.
[221] *Strickland v. Washington*, 466 U.S. 688 (1984).