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**Policy Brief: Ending the Reign of *Lozada*
and Removing Barriers to Ineffective Assistance of Counsel Claims in Immigration Law**

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People rely heavily on attorneys for their expertise and guidance during stressful periods of their lives, and the consequences for ineffective assistance of counsel (IAC) can be dire. As a result, there are rightly high standards of competence within the profession, which are policed by state bar associations, who have the power to remove an attorney's license to practice law.

A long-standing Board of Immigration Appeals (BIA) decision known as *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) uses the state bar complaint system to unnecessarily burden immigrants, attorneys, and state bar associations in their effort to pursue justice when IAC occurs in removal proceedings.

What is ineffective assistance of counsel?

When a client gets bad legal advice from a lawyer, or the attorney does not properly (or timely) file with the court or an agency, this is IAC. IAC can be incompetence on the part of an attorney, but it can also be regular, human mistakes such as a calendar or administrative error.

If a client ends up with an adverse decision because of prior attorney IAC, the client can argue that their case should be reopened and re-examined. The standard for ineffective assistance in most areas of law comes from the Supreme Court decision in *Strickland v. Washington* (1984), which established a two-part test for IAC:

1. Did the prior attorney's assistance fall below an objective standard of reasonableness?
2. Would the result of the proceeding have been different but for the prior attorney's IAC?

Initially, *Strickland* also applied to immigration courts, as the BIA adopted this same standard for immigration cases just months later in *Matter of Santos*, 19 I&N Dec. 105 (BIA 1984).

How does ineffective assistance of counsel now work in immigration law?

Four years after *Strickland*, the BIA issued *Matter of Lozada*, which added a unique component to IAC for immigration matters. Specifically, in addition to having to demonstrate IAC as in *Strickland*, *Lozada* also requires that any motion to reopen based on IAC include:

1. An affidavit by the respondent (client) attesting to the facts.
2. Before the respondent can file a motion, the prior counsel must be informed and given an opportunity to respond.
3. A bar complaint should be filed, and if not, why not (an explanation should be provided).

The "if not, why not" language appears to offer room to argue why a bar complaint was not filed, but in practice, immigration courts will not accept a motion to reopen under *Lozada* without a

bar complaint. For example, even when a bar complaint was not justified due to the error being at the hands of the postal service, the court still found that was not a sufficient “why not” reason to overcome the requirement to file a bar complaint.¹ Indeed, an attorney may be risking their own bar complaint by skipping this step.

The bar complaint requirement does not contribute to the merits of the case itself or provide any meaningful guidance to the immigration court. In fact, under current practice, the immigration judge deciding on the merits of a motion to reopen based on IAC does not need to wait for the outcome of the disciplinary proceeding based on the bar complaint, which can take months or years to process. Disciplinary authorities also do not wait for a decision from the immigration court.

What impact does *Lozada* have on immigrants?

- *Lozada* adds unnecessary barriers to immigrants pursuing justice based on IAC.
 - It is not always possible to identify or find prior counsel, which can prevent an IAC claim from ever being filed.
- It contributes to access to counsel issues by having a chilling effect on the immigration bar.
 - Immigration attorneys may choose not to take a case because of the requirement that a bar complaint be filed.
 - Especially when the IAC is due to human error, an attorney may choose to not to take a *Lozada* case because it would require the filing of a bar complaint against a colleague.

What impact does *Lozada* have on attorneys?

- It creates a significant administrative burden on state bar associations that makes it difficult to police malpractice situations.
 - The bar complaint in *Lozada* results in a deluge of superfluous bar complaints for state bar associations to manage. Attorney General Michael Mukasey briefly vacated *Lozada* in the final days of the George W. Bush Administration, acknowledging that most bar complaints under *Lozada* are “unfounded” and observing “[s]uch unfounded complaints impose costs on well-intentioned and competent attorneys, and make it harder for State bars to identify meritorious complaints in order to impose sanctions on lawyers whose performance is truly deficient.”
- Discourages immigration attorneys from being forthcoming about their errors due to a fear of a potential bar complaint.
- Divides the immigration bar by pitting attorneys against each other even when an error does not rise to the level of malpractice.
- A bar complaint has a very significant impact on an attorney’s professional and mental well-being. There are reports of attorneys committing suicide after receiving a *Lozada*-based bar complaint.

¹ *Matter of Rivera*, 21 I&N Dec. 599, 608- 609 (BIA 1996).

How could this be changed?

- Senator Murphy (D-CT) introduced the bill “Strengthening Immigration Procedures Act of 2024,” which would remove the bar complaint requirement and bring immigration law in line with the *Strickland* standard.
- However, the Biden Administration could make this change without congressional action by:
 - EOIR and DHS should release joint regulations removing the bar complaint requirement and bringing immigration law in line with *Strickland*.
 - The Attorney General can revisit BIA cases using his statutory certification authority. The AG can and should issue a new legal standard that removes the bar complaint requirement and affirms the *Strickland* criteria.

It is important to remember that a bar complaint could still be filed even after bringing immigration law in line with *Strickland*. It would just no longer function as an additional barrier to pursuing justice in the immigration courts.

Resources and Further Reading

[Think Immigration: How the Immigration Court System Pits Immigration Lawyers Against Each Other for the “Good of Clients”](#)

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