

ETHICAL ISSUES INVOLVING IMMIGRATION

**(Adapted from a powerpoint by Olsa Vrapic, Esq.
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BAR COMPLAINTS AND LOZADA

- Be aware of *Matter of Lozada*
 - Avoid *Lozada* Motions
 - Preparation is Key

- Be aware of new EOIR Policy Memo
 - Memo of Director James R. McHenry III on December 18, 2018
Effective January 1, 2019
 - AILA Doc. No. 18121938. (Posted 12/19/18)

Right to Counsel in Immigration Proceedings

- Grounded on 5th Amendment –due process protection
- Ineffective assistance of counsel is a denial of due process only if it taints the proceedings as “fundamentally unfair” –in that it prevents respondent from reasonably presenting his case
- Prejudice arising from an attorney’s performance must be shown

Rules of Professional conduct

Remember Rules of Professional Conduct

- 1.01 Competent & Diligent Representation
- 3.01 Meritorious Claims and Contentions
- 3.03 Candor Toward the Tribunal
- 4.01 Truthfulness in Statements to Others
- 8.03 Reporting Professional Misconduct

LOZADA Motions Filed with the EOIR

WHAT TO DO?

- Motion should be supported by an affidavit of the allegedly aggrieved applicant attesting to the relevant facts.
- Provide Retainer Agmt or if not available describe fee arrangement
- Before the allegation is presented, the former counsel must be informed of the allegations.
- *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)
Provide an opportunity to the attorney to respond.
- Indicate whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

LOZADA Motions Filed with the EOIR

Affidavit of Respondent

- Must set forth in detail the retainer agreement if any; contracts; and any form of representation that the attorney did or did not make; as much information as possible.
- Must be sworn and notarized
- Must be translated if written in a different language. (NOTE: If Respondent speaks only Spanish yet the affidavit is written in English, it makes no sense)

LOZADA Motions Filed with the EOIR

Notice to Former Counsel/Provide Opportunity to Respond

- Send written letter to former counsel with all the allegations
- Provide an opportunity to respond/Set a deadline and abide by it
- Attorney's response or failure or refusal to respond should be submitted with the Motion to Reopen

LOZADA Motions Filed with the EOIR

Complaint filed with the disciplinary authority

- Indicate that a complaint has been filed with the *appropriate* disciplinary authority
 - If attorney is licensed in Florida-DO NOT FILE complaint with the State of Texas
- If not, explain why not

LOZADA Motions Filed with the EOIR

5th Circuit Greater Adherence to Lozada Criteria

- Petition for review denied where *pro se* applicant argued to the BIA after filing complaint with the State Bar alleging ineffective assistance of counsel, but did not comply with 2nd prong of *Lozada* and give counsel opportunity to respond before making ineffective claim.

Hernandez-Ortez v. Holder, 741 F.3d 644 (5th Cir. 2014).

- 2nd prong required despite the lawyer having left the country, and despite argument that it would not serve a bona fide purpose.

Rodriguez-Manzano v. Holder, 666 F.3d 948, 953 (5th Cir. 2012).

Defenses Against *LOZADA*

Prejudice to the Respondent

- Must demonstrate prejudice , even where *Lozada* is met
- "[T]he only way to cure the... defect in the original hearing is to afford [petitioner] not only a new hearing, but also a hearing in which counsel may protect [petitioner's] rights to the same extent that the attorney would have in the first hearing."

'Batanic v. INS, 12 F.3d 662, 667 (7th Cir. 1993) cited in *Castillo-Perez v. INS*, 212 F.3d 518,528 (9th Cir. 2000).

Defenses against *LOZADA*

Reasonable Tactical Decisions are not Ineffective Assistance of Counsel

- Concession of alienage with the goal of pursuing cancellation of removal, rather than pursue motion to suppress based on confidentiality provisions of 1986 Legalization Program was a reasonable tactical decision –
 - Torres-Chavez v. Holder*, 567 F.3d 1096, 1102 (9th Cir. 2009);
- It is not ineffective assistance of counsel to make tactical decisions that ultimately fail to the client's detriment –
 - LeBlanc v. INS*, 715 F.2d 685, 694 (1st Cir. 1983); *Rodriguez-Gonzalez, v. INS*, 640 F.2d 1139, 1142 (9th Cir. 1981);

Defenses against *LOZADA*

Reasonable Tactical Decisions are not Ineffective Assistance of Counsel

- **Hindsight applied to unwise tactical decision to withdraw asylum application does not constitute ineffective assistance of counsel –**
Awad v. Ashcroft, 328 F.3d 336, 343 (7th Cir. 2003);
- **Recommendation to seek voluntary departure instead of pursuing a meritless asylum application does not constitute ineffective assistance of counsel –**
Jiang v. Mukasey, 522 F.3d 266, 270 (2nd Cir. 2008);
- **Failure to inform immigration court that respondent was married to a U.S. citizen and potentially eligible for adjustment of status where respondent had previously been found to have entered into a fraudulent marriage to avoid challenge to credibility is a tactical decision did not result in violation of due process –**
Romero v. INS, 399 F.3d 109, 111-12 (2nd Cir. 2005);

Filing *LOZADA* with USCIS

- Applying *Lozada* to DHS decisions, other than Removal Proceedings
- Court rejected DHS claim that *Lozada* and ineffective claims only apply to removal proceedings.

Hovhannisyanyan v. DHS, 624 F.Supp.2d 1135, 1147-48 (C.D. Cal.2008).
- Ineffective assistance could be raised as an extraordinary circumstance for the untimely filing of a motion to extend status under 8 C.F.R. § 214.1(c)(4)
- Appeal with the AAO submitted to the wrong address

What Not to Do

- Do NOT Misrepresent
- DO- Make every effort to be accurate, in representing facts and law, to the State Bar, EOIR, BIA etc.



Internal Reporting of Ineffective Assistance of Counsel filed by EOIR/DHS/Staff/The Public

- James R. McHenry III Memo to “All of EOIR”, establishing policy and procedures for reporting suspected ineffective assistance of counsel and *other* professional misconduct
 - For representation before EOIR, BIA, OCAHO
- EOIR, through the Attorney Discipline Program administered by OGC and run by the EOIR disciplinary counsel, investigates complaints against practitioners who may have engaged in criminal, unethical, or unprofessional conduct

Internal Reporting of Ineffective Assistance of Counsel filed by EOIR/DHS/Staff/The Public

- Engaging in conduct that constitutes ineffective assistance of counsel, as determined by an immigration judge, the BIA, or a federal court judge or panel;
- Failing to act with reasonable diligence and promptness while representing a client, as a practitioner's workload must be controlled and managed so that each matter can be handled competently;
- Engaging in frivolous behavior in a proceeding before an immigration court or the BIA, including taking action to cause unnecessary delay;
- Attempting to coerce, by any means whatsoever, any person, including an immigration judge, to commit any act or to refrain from performing any act in connection with any case;

Internal Reporting of Ineffective Assistance of Counsel filed by EOIR/DHS/Staff/The Public

- Engaging in contumelious or otherwise obnoxious conduct which would constitute contempt of court in a judicial proceeding;
- Repeatedly failing to appear for pre-hearing conferences, scheduled hearings, or other case- related meetings in a timely manner without good cause;
- Failing to disclose to the immigration judge or BIA legal authority in the controlling jurisdiction known to be adverse to the client and not disclosed by opposing counsel; and
- Repeatedly filing notices, motions, briefs, or claims that reflect little or no attention to the specific factual or legal issues applicable to a client's case, but rather rely on boilerplate language indicative of a substantial failure to competently and diligently represent the client.

EOIR Grievances based on “Frivolous” Asylum Cases

- IJ’s threatening to report attorneys on asylum issues involving gang and domestic violence issues-potential frivolous issues
- What is considered a frivolous asylum application?
 - Under the Immigration and Nationality Act section 208(d)(6) and under the Code of Federal Regulations title 8 section 208.20 defines frivolous application for asylum.

Frivolous Asylum

- Material Elements are deliberately fabricated
- An Immigration Judge or Board of Immigration Appeals has made a final determination of such findings

Frivolous Asylum Claim Cont.

Frivolous Asylum Claim/ Section 208(d)(6) of the Act

- **An Alien who has Knowingly made a frivolous application for asylum, and**
- **Who has been notified of the consequences for filing a frivolous asylum application,**
- **Shall be Permanently Ineligible for Any Benefits under the Act**
- **As of the date of a Final Determination on such application.**

Frivolous Asylum Application under 8 C.F.R. § 1208.20

- **An Asylum Application is Frivolous if “any of its material elements is deliberately fabricated.”**

Frivolous Claims

- **8 C.F.R. §1003.102**
- **A. Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bounds of the law.**
- **B. False Statement**
 - 1. **Knowingly or with reckless disregard**
 - **a. Makes a false statement**
 - **i. Of material fact or law**
 - 2. **Willfully**
 - **a. Misleads, misinforms, threatens, or deceives**
 - **i. ANY PERSON (including a party to a case or an officer or employee of the Department of Justice)**
 - **ii. concerning any material and relevant matter relating to a case**
- **3. If a practitioner has offered material evidence and comes to know of its falsity,**
 - a. The practitioner shall take appropriate remedial measures.**

ABA Model Rule 3.1

- A. A Lawyer shall NOT**
 - 1. Bring or Defend a Proceeding, or**
 - 2. Assert or Controvert an Issue, unless**
- B. There is a basis in Law or Fact that is not frivolous**
- C. Which includes:**
 - 1. A Good Faith Argument for:**
 - i. Extension, Modification or Reversal of existing law**
- D. In a Criminal Proceeding or a proceeding that could result in Incarceration,**
 - 1. A Lawyer may defend the Proceeding by requiring that every element of the case be established**

EOIR Grievances on Asylum Cases

- IJ's threatening to report attorneys on asylum issues involving gang/domestic violence issues or other issues
 - Prepare the Case thoroughly (till the storm passes)
 - Law-Articulate position of the law
 - Articulate the Law/Differentiate the facts
 - Build PSG –have it aligned with something in the State Dept.
- Handling Difficult Judges:
 - Make sure that the record is protected.
 - Capture all that is being done on the record, not he said she said.
 - If IJ goes off the records. Ask - Can we get back on the record?
 - When back on the record-restate what was discussed off the record-build up the case

Questions



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