



DE MOTT McCHESNEY
CURTRIGHT & ARMENDÁRIZ
LLP

Ineffective Assistance of Counsel: How to raise the claim and correct it

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Ineffective assistance of counsel in removal proceedings: *Matter of Lozada*

Substantive Requirements for the motion

1. Counsel's performance was deficient, and
2. Counsel's performance caused prejudice to the client.



Showing deficiency of prior counsel



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Would competent counsel have acted otherwise?



Showing prior counsel's deficiency prejudiced your client



- Counsel must demonstrate a reasonable probability that the results of the proceedings would have been different but for prior counsel's deficient performance.
- Since many *Lozada* motions fail for inability to show prejudice, counsel should fully brief the legal/factual issues to show the result would have been different.
- Prejudice not required to be shown if prior counsel's deficiency resulted in an *in absentia* order. *Matter of Grijalva*, 21 I&N Dec. 472, 474 n.2 (BIA 1996).



Ineffective assistance in removal proceedings: *Matter of Lozada*



Procedural requirements for a *Lozada* motion:

1. An affidavit from the Respondent attesting to relevant facts and setting forth in detail the agreement that was entered into with former counsel;
2. Before presenting the motion, former counsel must be informed of the allegations and allowed an opportunity to respond;
3. If it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should include evidence of a bar complaint or explain why one was not filed.



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Former counsel

- Don't panic. You're human and will make a mistake at some point in your career.
- Do not obstruct. This will not help you.
- Your client, not the attorney, owns the actual physical file. The attorney has no right to it and cannot charge for it.
- If you think you were not ineffective, then file a response so stating. It must be forwarded along with the motion.

Strict *Lozada* compliance in the 5th Circuit and Bar Complaints



- Strict compliance v. substantial compliance.
 - Depends on Circuit. Fifth Circuit is a strict *Lozada* compliance circuit.
- Although *Lozada* does not say it is unnecessary, your chances of winning without one is greatly diminished.
- The complaint should invoke ethical violations. What if counsel was ineffective, but not unethical?

Filing deadlines and equitable tolling



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- General rule is that an ineffective motion to reopen alleging ineffective assistance of counsel must be filed within 90 days of the order or 180 days in an *in absentia* case alleging exceptional circumstances.
- Equitable tolling finally available in the 5th Circuit! *Lugo-Resendez v. Lynch*, 831 F.3d 337, 343 (5th Cir. 2016)

Requirements to show equitable tolling should apply

- "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'"



Equitable tolling, cont'd.

- “The first element requires the litigant to establish that he pursued his rights with “reasonable diligence,” not ‘maximum feasible diligence.’”
- The second element requires the litigant to establish that an “extraordinary circumstance” “beyond his control” prevented him from complying with the applicable deadline.



Ineffective assistance of counsel before USCIS or in consular processing



- AAO has consistently used the *Lozada* formula in matters before USCIS.
 - Not enough to show counsel was deficient. You must also show that the client was qualified for benefit sought.
- Errors before consul could be fatal, e.g., failing to properly investigate a 212(a)(9)(c) issue.



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Issues outside of immigration court

Attorney Saul Goodman sees an opportunity to grow his practice by filing applications for asylum for his Mexican and Central American clients. He thinks all of his clients are somewhat afraid of returning due to drug violence. He starts up an “amnesty program” which involves his clients applying for asylum and then being referred to immigration court where they apply for work permits based on potential cancellation applications. Is this ineffective assistance of counsel?





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Naturalization context

Goodman's client, Walter White, wants to file for naturalization. White tells Goodman that he immigrated through a sham marriage, but immigration did not notice it. He also tells Goodman that in the past he made a fortune on selling illegal drugs, but was never arrested for it. White says that his criminal ways are long in his past. He has committed a crime in over 20 years and is now a pastor at his local church. He'd like to naturalize to vote for Donald Trump in 2020. What issues are involved?





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Ineffective assistance of counsel in removal proceedings:



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Surprising none, many of Saul's old clients end up in removal proceedings. Upset with Saul's antics, they hire my cousin Vinny to represent them before the immigration court. Client A has resided in the U.S. for many years and has 4 minor U.S.C. kids all dependent on her since her husband died after an unexplained meeting with Walter White. She provides Vinny with a pile of documents showing her physical presence in the U.S., but Vinny decides not to submit it to the IJ thinking he'll win the case on the hardship to the kids alone. Case is later denied for failure to show presence. Client comes to you for advice on how to proceed.





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- Vinny lost Walter White's case before the immigration court involving cancellation of removal for a lawful permanent resident. Vinny failed to timely file his notice of appeal with the Board of Immigration Appeals. Client hires you to take over the case. How do you raise the ineffective assistance of counsel claim?