UNITED STATES DEPARTMNET OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

Matter of J-E-C-M-, A79-506-797/798/799/800	)	ORDER NO. 2990-2008
Matter of Bangaly, A78-555-848	)	ORDER NO. 2991-2008
Matter of Compean, A78-566-977	)	ORDER NO. 2992-2008

BRIEF OF AMICI CURIAE

The American Immigration Law Foundation (AILF) files this Amici Curiae brief in response to the August 7, 2008 and September 8, 2008 orders in the above-referenced cases. The following organizations and individuals support the arguments in this brief:

American Immigration Lawyers Association
Asista Immigration Assistance
Barbara Hines, Clinical Professor of Law
Capital Area Immigrants' Rights Coalition
HIAS Inc.
Immigrant and Refugee Appellate Center, LLC
Immigrant Law Center of Minnesota
Immigration Law Clinic at University of California Davis School of Law
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Respectfully submitted this 6th day of October, 2008.

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Introduction

The great majority of representatives in removal proceedings are ethical, hard-working people who work diligently and competently, in a highly complex and demanding field of law, to represent their clients. However, there must be a workable, realistic, accessible remedy for the unfortunate situations when a representative was incompetent, unethical, fraudulent, or simply absent. As Amici Curiae discuss in this brief, this remedy not only protects constitutional, statutory and regulatory rights of individuals in removal proceedings, but it also satisfies the expressed goals of the government to build and protect the integrity of its immigration court system. The present *"Lozada"* system too often is administered inflexibly by the Board of Immigration Appeals (BIA), and with little appreciation for the realities immigrants face in trying to establish that prior counsel erred and that the immigrant was harmed.

Amici Curiae recommend the Attorney General not alter the current process for evaluating ineffective assistance claims. Rather, the Attorney General should propose a set of ameliorative changes, in an open, deliberative process, with notice and comment of all details, and adequate opportunity for all interested parties to respond.

Further, as discussed *infra*, in § XIII, Amici Curiae submit that there is an urgent need for an accessible system for remedying lawyers' simple errors, the less serious mistakes that too often result in a waste of resources and years of litigation. Other court systems have such provisions. The Executive Office for Immigration Review could avoid significant amounts of work for itself, for the courts, for the government, and for individuals and their counsel if it developed and consistently applied such a system.

I. The Attorney General's Positions on These Issues Are Well Known

Amici curiae appreciate the Attorney General's seeking input on these important questions. On all of the questions posed, however, the Attorney General already has a well-known position. In recent, and not-so-recent, litigation at the Attorney General and in the federal courts, the Attorney General has urged the BIA and courts to reverse their previous holdings and find that there is no constitutional right to claim ineffective assistance of counsel in removal proceedings, and to impose more restrictive and demanding requirements on ineffectiveness claims. *E.g.*, *Afanwi v. Mukasey*, 526 F.3d 788 (4th Cir. 2008) (Supplemental Brief for Respondent, Jan. 17, 2008).[1]

As early as 2001, the Attorney General argued to the BIA that it should expand the holding of *Coleman v. Thompson*, 501 U.S. 722 (1991) to the immigration court context. After extensive briefing in 2001 and 2002 by amici curiae and the Attorney General, the BIA declined to apply the *Coleman* argument to this context, and adhered to the *Lozada* construct in *Matter of Assaad*, 23 I & N Dec. 553 (BIA 2003). [2]

We respectfully question the Attorney General's need to certify these particular cases and to review these issues at this time. The BIA *denied* relief and motions to reopen in all three named cases in decisions ranging from the oldest, on October 19, 2007, to the most

[1] In his Supplemental Brief, the Attorney General urged the Fourth Circuit to adopt the argument that the government has been putting forward at least since 2001: that *Coleman v. Thompson*, 501 U.S. 722 (1991) means there is no constitutional right to effective assistance of counsel in immigration proceedings because there is no right to appointed counsel. The Fourth Circuit declined to adopt the *Coleman* reasoning, without discussion, but adopted a "state actor" analysis. *See* discussion *infra* § VI.

[2] Amicus Curiae American Immigration Law Foundation was involved in that pre-*Assaad* briefing, and in briefing on rehearing in *Afanwi*. Consequently, we are conversant with the issues raised by the Attorney General's certification of these cases, and have been able to file this brief within the very tight time deadline set by the Attorney General. Other interested parties had hoped to file briefs, but because of the short time permitted, have not been able to respond.

recent, on May 20, 2008.[3] Further, as noted, the BIA revisited *Lozada* and posed substantially the same questions in 2001, but in an *en banc* decision in *Assaad,* adhered to its well-established authority. There has been no statutory or other change that would warrant disturbing this authority now, other than that these are the waning days of this administration. Courts may look very skeptically at and will not defer to sudden, material alterations to a 20-year old administrative scheme. *See INS v. Cardoza-Fonseca*¸ 480 U.S. 421, 446 n.30 (1987); *Batanic v. INS,* 12 F.3d 662 (7th Cir. 1993).

II. Deference is not Due to the Attorney General on Matters of Constitutional Interpretation; The Attorney General Should Avoid Giving His View of Constitutional Questions, as do the Courts.

Deference is due by courts to the executive where Congress has left a gap to be filled, or where the agency has special expertise in the subject under consideration. *Chevron USA v. Natural Resource Defense Council,* 467 U.S. 837, 843-44 (1984); *Francis v. Reno,* 269 F.3d 162, 168 (3d Cir. 2001) (BIA does not have expertise in construing 18 U.S.C. § 16 to determine aggravated felony). Congress assigned to the Attorney General (who assigned to his delegatee, the BIA), the authority to administer and enforce the Immigration and Naturalization Act. INA § 103(a)(1), 8 U.S.C. §1103(a)(1), but not to rule on the constitutionality of statutes or regulations. *Matter of U—M--*, 20 I & N Dec. 327 (BIA 1991); *Matter of Toro,* 17 I & N Dec. 340 (1980).

The Attorney General has no special expertise and is therefore not specially qualified to interpret the Constitution. Courts owe no deference to the Attorney General's

[3] In *Matter of Compean*, A 78-566-977, the BIA denied the motion to reopen on May 20, 2008. In *Matter of J-E-C-M_*, A79-506-797/798/799/800, the BIA decisions were issued on October 19, 2007 (dismissing respondents' appeal) and April 8, 2008 (denying the motion to reopen). In *Matter of Bengaly*, A78-555- 848, the BIA denied the motion to reopen on March 7, 2008.

constitutional interpretation. *See Sheet Metal Workers' Intl. Assn. v. NLRB*, 491 F.3d 429, 434 (D.C. Cir. 2007) ("The Board receives no deference, however, insofar as we review an order for consistency with the Constitution.") , quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574-76 (1988).

Courts are obligated to resolve constitutional questions as a last resort. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). Addressing regulatory or statutory issues before reaching constitutional ones is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157-58 (1984). Courts also interpret statutes and regulations so as to avoid having to decide constitutional questions. *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2279 (2001). Similarly, the Attorney General should exercise restraint and decline to give his view on any constitutional questions involving ineffective assistance of counsel.

III. The Attorney General Affirmatively Exercises the Authority to Control, Monitor and Censure Practitioners who Represent People in Removal Proceedings.

The Attorney General has forcefully articulated and actualized an interest in protecting the integrity of the immigration court system. Specifically, the Attorney General has enacted and enforces regulations to determine and control who is permitted to represent individuals in removal proceedings. The primary purposes of prescribing rules and setting standards for determining who may practice before the BIA and the Immigration Courts, the Attorney General said, "[i]ncludes the protection of the public, the preservation of the integrity of the Immigration Courts, and the maintenance of high professional standards." *Professional Conduct for Practitioners -- Rules and Procedures*, 65 Fed. Reg. 39513,

39514, 39516 (June 27, 2000). The Attorney General identified these goals as "important public interest objectives." *Id*.

The specific regulations demonstrate the length and breadth of the Attorney General's interest in and control over the practice of immigration law. First, 8 C.F.R. § 292.1(a) delineates the people who may appear. Some representatives may appear *only* with the permission of the IJ, BIA or other official before whom the proceedings are conducted. 8 C.F.R. §§ 292.1(a)(2)(iv) (law students or law graduates not yet admitted to the bar); 292.1(a)(3)(iv) (reputable individuals); 292.1(a)(6) (attorneys outside the United States). Even where an individual meets the requirements of "law graduate not yet admitted to the bar" or "reputable individual," the IJ is permitted to deny permission to appear, even though the respondent may choose him to represent her. *Ramirez v. INS*, 550 F.2d 560, 564 (9th Cir. 1977). Further, an attorney cannot withdraw as counsel without the permission of the IJ or BIA. 8 C.F.R. § 3.17(b); *Matter of Rosales*, 19 I & N Dec. 655 (BIA 1988).

Since 2000, the Attorney General has enforcing standards for those appearing before the EOIR and has disciplined practitioners for failure to conform to those standards. *See* Professional Conduct for Practitioners -- Rules and Procedures, 65 Fed Reg. 39513, 39514, 39516 (June 27, 2000).

Especially pertinent to the questions posed herein, a practitioner who engages in conduct that constitutes ineffective assistance can be sanctioned. 8 C.F.R. § 3.102(k). The sanctions include the ultimate penalty of permanent expulsion from practice before the Immigration Courts and this Board. As the EOIR explained in promulgating its Professional Conduct regulations:

> The primary purpose of this rule is to protect vulnerable aliens from unscrupulous immigration practitioners … Numerous complaints have been reported about practitioners

who fail to appear or to file essential documents or evidence on behalf of their clients. The Board adjudicates numerous motions to reopen filed before it based on such claims of ineffective assistance of counsel. The rule will provide an effective means to address the mounting instances of practitioners' failure to represent their clients.

65 Fed. Reg. at 39521.

The EOIR has active involvement with the day-to-day application of the Professional Conduct rules. Specifically, complaints are filed with the EOIR's Office of General Counsel. 8 C.F.R. § 3.104(a). EOIR's OGC acts as the investigating agency, the charging agency, and the prosecuting agency. 8 C.F.R. §§ 3.104(b), 3.105, 3.106(a)(1)(iv). The Chief Immigration Judge appoints an Immigration Judge as adjudicating official. 8 C.F.R. § 3.106(a)(1)(i), 3.106(b). Either party may appeal a decision to this Board, which may conduct a de novo review of the record. 8 C.F.R. § 3.106(c). This Board issues a final administrative order, imposing discipline. *Id*. The discipline may include permanent expulsion from practicing immigration law before the BIA, immigration courts or the Service; suspension; or other sanctions. 8 C.F.R. § 292.3(a)(1).

The Attorney General's interests in the consequences of ineffective assistance are reflected in the statute and other regulations and interpretations. The INA requires asylum applicants to file their application within one year after arrival in the United States, unless there are "extraordinary circumstances" relating to the delay. INA § 208(a)(2)(B), (D), 8 U.S.C. § 1158(a)(2)(B), (D). The Attorney General has identified ineffective assistance of counsel as one of the few "extraordinary circumstances" excusing an asylum applicant's failure to file within the deadline. *See* 8 C.F.R. § 208.4(a)(5)(iii). This reflects the Attorney General's acknowledgement that the consequences of ineffective assistance of counsel must be ameliorated to preserve statutory rights.

The BIA's interpretation of another Attorney General regulation has the effect of mandating a certain level of competence in order to simply preserve appellants' rights. Specifically, the Board has interpreted 8 C.F.R. § 3.1(d)(1-a)(i)(A) [sometimes cited as 8 C.F.R. § 3.1(d)(2)(i)(A)] to require a notice of appeal to be sufficiently specific to prevent the Board from summarily dismissing an appeal, regardless of the merits of the underlying case. *Matter of Lodge*, 19 I & N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I & N Dec. 354 (BIA 1986); *Townsend v. INS*, 799 F.2d 179 (5th Cir. 1986).[4] This regulation and interpretation directly penalize respondents who rely on incompetent counsel to perfect their appeals, and contrast with what federal courts permit as a notice of appeal or petition for review. *See Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 1033 (2000) (notice of appeal is generally a one-sentence document stating that the defendant wishes to appeal; filing it is a purely ministerial task that imposes no great burden on counsel).

The Attorney General exercises extensive authority and control over the appearance and conduct of practitioners in removal proceedings, authorizing practitioners to appear and enforcing standards. The existing rules, as well as the proposed rules described immediately *infra*, convey and codify the Attorney General's strong interest in the competent performance of counsel in removal proceedings. This extensive disciplinary system demonstrates that the Attorney General believes competent counsel is central to the proper functioning of the immigration courts, and to guaranteeing the rights of the people who are subjected to removal proceedings.[5]

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[4] Under a separate subsection of the same regulation, an attorney or representative who files an appeal that is summarily dismissed under 3.1(d)(1-a)(i) is subject to disciplinary proceedings. 8 C.F.R. § 3.1(d)(1-a)(ii).

[5] This extensive involvement in assuring effective counsel also distinguishes the EOIR system from the situation in *Coleman v. Thompson*, 501 U.S. 722 (1991), discussed *infra.*

IV. The AG's Recently-Published Proposed Regulations on Professional Conduct for Practitioners Expand the Attorney General's Reach and Highlight the Need for Cooperation from Complaining Victims

On July 30, 2008, the Attorney General published in the Federal Register a proposed rule, 73 FR 44178, to add new grounds for disciplining attorneys and accredited representatives, including failure "to provide competent representation"(8 C.F.R. § 1003.102(o)), failure "to act with reasonable diligence and promptness" (8 C.F.R. § 1003.102(q)), and failure "to maintain communication with the client" (8 C.F.R. § 1003.102(r)). The proposed changes "are based upon the Attorney General's recent initiative for improving the adjudicatory processes for the immigration judges and the Board." 73 FR 44178.

The Justice Department explained in the preamble to the proposed regulations that the proposed rules' purpose is to strengthen the existing rules on attorney discipline. The proposed rule, "will allow EOIR to investigate and prosecute instances of misconduct more effectively and efficiently while *ensuring the due process rights of both the client and the practitioner."* 73 FR at 44180 (emphasis added).

The proposed rule expands the grounds of sanctions for ineffective assistance of counsel to include findings made by federal courts. *Id*., proposed new rule 8 C.F.R. § 1003.102(k)). To date, this ground of attorney sanctions applies only to findings by the BIA or an IJ that counsel was ineffective. *Id.* This new rule anticipates that the federal court will have overturned a decision by the BIA rejecting the ineffectiveness claim.

The proposed rule also proposes adding a new ground for disciplinary sanction: the failure "to provide competent representation to a client." Proposed new rule 8 C.F.R. § 1003.102(o). The preamble explains:

> The stakes are quite high in immigration proceedings, which determine whether aliens are allowed to remain in the United States. As such, competence is perhaps the most fundamental and necessary element in providing representation to clients in immigration proceedings. 73 FR at 44181.

The preamble is explicit that the proposed regulations also are intended to protect the integrity of the administrative process and prevent conduct that impedes immigration judges' ability to efficiently adjudicate cases. 73 FR at 44182.

Importantly, the proposed regulations require the cooperation of and participation from the victims of ineffective counsel. For example, proposed new rule 8 C.F.R. § 1003.102(p) requires a practitioner to "act in accordance with the scope of representation… the scope of representation, of course, is a fact-specific matter that turns on the specific agreements in each case." 73 FR at 44181. Proposed new regulation 8 C.F.R. § 1003.102(r) pertains to the duty to maintain communication with the client throughout the duration of the relationship, which is "of fundamental importance." The proposed new regulation also would impose an obligation on the practitioner to ensure that all necessary communications with the client are in a language the client understands. Further, this proposed rule mandates four specific areas of communication between attorney and client that the practitioner must do "to properly maintain communication."

These and other provisions of the proposed new regulations are meaningless and unenforceable without the active participation of the complaining victim. Thus, there must be a significant incentive for the client to come forward and pursue an ineffective assistance of counsel claim. To truly increase sanctions and discipline for incompetent, unethical, or fraudulent practitioners, the Attorney General must ensure that the prospects for relief are sufficiently high.

On the other side, for the threat of sanctions against unscrupulous practitioners to be credible, those practitioners must believe they will be caught, that is, that their clients will pursue complaints. If there is no realistic threat the victim will pursue the matter because the requirements are made even more onerous, the prejudice standard is too high, or the deadlines too unforgiving, unscrupulous practitioners will have free reign. Unrepresented people will not pursue ineffective assistance claims; and those who consult lawyers will be told not to pursue claims. The unscrupulous or incompetent lawyers will go on to victimize others, knowing they can continue to operate freely.

In sum, Amici submit that the Attorney General must give real effect to the laudable goals of protecting the integrity of the immigration court system and the vulnerable people who are in removal proceedings. To do so, the ineffective assistance complaint requirements must be made more flexible, rather than less. If the Attorney General makes the *Lozada* standards even more unattainable, there will be more victims and fewer disciplinary actions.

V. The Fifth Amendment Due Process Clause Guarantees a Fair Proceeding, and Also Guarantees that the Statutory Right to a Fair Hearing Is Protected.

Removal proceedings, just as state criminal trials, are proceedings initiated and conducted by the government within the meaning of the Constitution. *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Therefore, the Fifth Amendment applies to removal hearings. If the government obtains a removal order in

violation of the respondent's rights, it is the government that has unconstitutionally deprived the respondent of liberty and property. *See Cuyler v. Sullivan*, 446 U.S. 335, 432 (1980).[6]

The right to counsel – appointed or retained -- means nothing if that counsel is incompetent. The Supreme Court has long recognized that the trial level right to counsel encompasses the right to effective assistance of counsel. *Evitts v. Lucey*, 469 U.S. 387, 392

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[6] Although the right to appointed counsel is usually applied in the criminal context or in hybrid contexts, such as juvenile adjudications, the concept of deportation as being purely civil may be eroding. For example, the Third Circuit recently noted that, although the Sixth Amendment does not apply in immigration proceedings, "[n]evertheless, we cannot treat immigration proceedings like everyday civil proceedings, despite their formally civil character, because unlike in everyday civil proceedings, the liberty of an individual is at stake in deportation proceedings." *Fadiga v. Att'y Gen.*, 488 F.3d 142, 157 n. 23 (3d Cir. 2007) (citations and internal quotations omitted).

The Sixth Circuit presciently observed more than twenty years ago, that the distinction between criminal cases and civil proceedings such as deportation is outmoded. The court reasoned that where an unrepresented indigent noncitizen would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the government's expense, otherwise "fundamental fairness" would be violated. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975). *See also, Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376-77 (C. D. Cal. 1982) (although deportation proceedings are civil in nature, the stakes are more akin to those in the criminal process); further proceedings, *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), aff'd sub nom *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

The case usually cited in this context for the assertion that deportation is civil, not criminal, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), was decided before IIRAIRA adopted the current requirements for mandatory and indefinite detention, and even detention of asylum-seekers who pass a credible-fear interview, INA §§ 236(c), 241(a)(2), 235(b)(1)(B)(iii)(IV), and before the expanded reach of aggravated felony and narrowing of relief made deportation essentially inevitable even for people with minor infractions.

See also, Recommendation, American Bar Association, Feb. 13, 2006 at 5 (attached hereto) ("Although viewed as 'civil' in nature, removal proceedings largely mirror criminal trials. Attorneys … must contest the government's charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that an adverse decision will result in their client's banishment and, in some cases, significant peril."

(1985), citing *Douglas v. California*, 372 U.S. 353 (1963) and *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980).

Despite the government's frequent urgings otherwise based on *Coleman* (discussed *infra* § VII), lower federal courts continue to affirm that noncitizens have the constitutional right under the Fifth Amendment Due Process Clause to fundamentally fair removal proceedings. *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2004) (It is well established in this Circuit that an alien in deportation proceedings has the constitutional right under the Fifth Amendment Due Process Clause to a fundamentally fair hearing, including *effective* assistance of counsel.) (emphasis in original); *Jezierski v. Mukasey*, ___F.3d ___, 2008 US. App. Lexis 19279, *8 (7th Cir., Sept. 10, 2008) (The complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the noncitizen to proceed without a competent lawyer would deny him due process of law)[7]; citing *Kay v. Ashcroft*, 387 F.3d 664, 676 (7th Cir. 2004), where "the panel

[7] The Seventh Circuit has not rejected the constitutional basis for ineffective assistance claims, despite some confusing *dicta* in some cases. A careful analysis of the court's latest decision, *Jezierski v. Mukasey* is helpful. The opinion, by Judge Posner, acknowledges that noncitizens have a liberty interest in remaining in the U.S., that they are entitled to due process to protect that interest, and that forcing a noncitizen to proceed without the assistance of a competent lawyer can deny due process. 2008 U.S. App. LEXIS 19279, *8 (Sept. 10, 2008). The opinion also extends that protected liberty interest to discretionary relief cases. *Id*. at *9. However, because the petitioner in *Jezierski* had not alleged an infringement of a constitutional right, the court's review was limited to rulings of law. *Id*. at *10. Because the BIA made a *factual* determination, rather than a *legal* determination on the ineffectiveness question, the court said, that decision does not confer jurisdiction on the court (the court only having jurisdiction over legal and constitutional questions). For this reason, the court dismissed the petition for review. Id. at *3-6 (first conceding that the circuit's cases "had not given consistent answers" to the question of the court's power in this situation, listing cases on both sides of the question).

Other Seventh Circuit panels have issued various opinions on the constitutional and other questions. *Compare Stroe v. INS*, 256 F.3d 498, 501 (7th Cir. 2001) (Posner) (the question whether there is a constitutional right to counsel in immigration cases is ripe for

determined that the denial of effective assistance of counsel in the circumstances violated the Fifth Amendment; and *Sanchez v. Keisler*, 505 F.3d 641, 647 (7th Cir. 2007) (the substantive standard for assessing effectiveness of counsel is derived ultimately from the Fifth Amendment Due Process Clause); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007) (A claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment as a violation of the guarantee of due process), citing *Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005) (noncitizens in removal proceedings have a Fifth Amendment right to due process, which entails a right to be represented by counsel. Ineffective assistance of counsel may constitute a denial of due process if the noncitizen was prevented from reasonably presenting his case.) (internal quotations omitted; citing *Lozada v. INS*, 857 F.2d 10, 13-14 (1st Cir. 1988); *Sako v. Gonzales*, 434 F.3d 857, 863-64 (6th Cir. 2006) (the noncitizen can establish that ineffective assistance of counsel prejudiced him or denied him fundamental fairness to prove that he has suffered a denial of due process); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (as an "integral part" of procedural due process, noncitizens in deportation proceedings have a statutory right to be represented by counsel) (quoting *Saakian v. INS*, 252 F.3d 21, 25 (1st Cir. 2001), itself quoting *Batanic v. INS*, 12

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reconsideration, but not in this case) *with Stroe v. INS*, 256 F.3d 498, 504 (7th Cir. 2001) (Wood, dissenting) ("the majority's dicta with respect to the due process dimension of the right to counsel in immigration proceedings"); *Magala v. Gonzales*, 434 F3d 523, 525-27 (7th Cir. 2005) (declaring, in a comment, that because removal proceedings are not criminal proceedings, there is no constitutional ineffective-assistance doctrine, but granting the petition for review, holding that "woeful legal 'assistance' that undermines an alien's rights" may satisfy the definition of "exceptional circumstances"); *Sanchez v. Keisler*, 505 F.3d 641, 647 (7th Cir. 2007) (the standard for assessing effectiveness of counsel in immigration cases is derived from the Fifth Amendment Due Process Clause).

Jezierski reflects that Judge Posner apparently has satisfied his earlier question about the constitutional basis for ineffective assistance claims. Further, *Sanchez* and *Jezierski* were decided after *Magala* and did not repeat or expand the *dicta* in that case questioning a constitutional ineffective-assistance doctrine.

F.3d 662, 667 (7th Cir. 1993); *Omar v. Mukasey*, 517 F.3d 647, 650 (2d Cir. 2008) (A claim of ineffective assistance of counsel is a constitutional claim under the Fifth Amendment Due Process Clause); *Aris v. Mukasey*, 517 F. 3d 595, 600-601 (2d. Cir. 2008) (the Fifth Amendment requires that deportation proceedings comport with due process; due process concerns may arise when retained counsel provides immigration representation that falls so short of professional duties as to impinge upon the fundamental fairness of the hearing); *Guerrero-Santana v. Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007) (ineffective assistance of counsel in a removal proceeding may constitute a denial of due process if (and to the extent that) the proceeding is thereby rendered fundamentally unfair), citing *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988).

Lozada itself cited prior circuit court cases that grounded the right to competent counsel in the Fifth Amendment. *See Lozada*, 19 I & N Dec. at 638, citing *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975) and *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986) (for the principle that ineffective assistance of counsel impinges upon fundamental fairness of the hearing in violation of the Fifth Amendment Due Process Clause).

VI. A Very Recent Fourth Circuit Decision Disregarded Prior Precedent and Held that there is no Constitutional Basis for an Ineffectiveness Claim

Recently, a Fourth Circuit panel disregarded that circuit's precedent and held that, because the petitioner's lawyer – whatever his level of incompetence -- was not a "state actor," there was no deprivation of the petitioner's Fifth Amendment rights. *Afanwi v. Mukasey*, 526 F.3d 788, 799 (4th Cir. 2008). In a cursory footnote, *Id*. at n. 48, the panel acknowledged the circuit's almost 20-year old prior precedent, *Figeroa v. U.S. INS*, 886 F.2d 76 (4th Cir. 1989). *Figeroa* applied pre-*Lozada* law, and considered whether the ineffective assistance in that case arose to the level of a due process violation. *Id.* at 78.

The *Afanwi* panel conceded that it was bound by *Figeroa* but said that case had "assumed, without squarely addressing, the Fifth Amendment issue we resolve here." 526 F.3d at 799, n. 48.[8]

Moreover, the *Afanwi* panel's decision is fundamentally inconsistent with Supreme Court law identifying the source of the error in ineffective assistance cases. There is no question that retained attorneys, and even public defenders, are not state actors. *See Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981). Yet, the ineffectiveness of these non-state actors in criminal proceedings nevertheless is a constitutional violation. *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). In *Cuyler*, the Supreme Court explained that a trial is "a proceeding initiated and conducted by the State itself," and thus itself "is an action of the State within the meaning of the Fourteenth Amendment." *Id.* Accordingly, "[s]ince the State's conduct of a criminal trial itself implicates the State in the defendant's conviction," when that conviction occurs in a trial tainted by ineffective assistance of counsel, "it is the state that unconstitutionally deprives the defendants of his liberty," even as to "defendants who must choose their own lawyers." *Id*.

Similarly, here, the entire removal apparatus was created by the government; removal proceedings are initiated and conducted by the government; the government detains removable noncitizens until they can be removed, often throughout their proceedings; and removal is executed by the government. Further, as discussed *supra*, the Attorney General exercises considerable control over the authorization for and conduct of representatives in

[8] The Attorney General had urged the panel to adopt its *Coleman* argument (Supplemental Brief for Respondent, Jan. 17, 2008). The panel decision did not mention *Coleman* or the government's argument.

removal proceedings, and recently has proposed expanding that control. When a removal order is obtained in a process tainted by ineffective assistance of counsel, it is the government's proceedings that have denied the respondent of constitutional rights.

VII. Coleman and Wainwright do not Apply to Ineffective Assistance of Counsel Cases in Removal Proceedings.

The government has not succeeded in its attempts to reverse the many years of BIA and federal court case law on ineffective assistance of counsel with its creative application of the 1991 case, *Coleman v. Thompson*, 501 U.S. 722, or the 1982 case *Wainwright v. Torna*, 455 U.S. 586. These cases do not support – and certainly do not require – a reversal of *Lozada* or the BIA's other cases regarding ineffective assistance. Nor do they affect the numerous federal court decisions on ineffective assistance.

The BIA and the courts have not simply missed the proffered *Coleman/ Wainwright* argument since 1991. There are several reasons why, individually and collectively, those cases are wholly inapplicable.

a. *Coleman* and *Wainwright* Also do not Apply to Proceedings Involving an Appeal as of Right or to Proceedings that are the Original Forum in Which a Person can Present his or her Claim.

The *Coleman* "rule" by its own terms does not apply to IJ hearings or to appeals before the BIA involving removal proceedings under the INA. Specifically, *Coleman* applies only to state collateral proceedings, that is, "state *discretionary* [meaning, not "as of right"] appeals where defendants already had one appeal as of right." Id. at 756 (emphasis and bracketed material added). Coleman already had fully exhausted all avenues of direct appeal as of right. He also had had a state court habeas corpus hearing, itself a collateral proceeding. His counsel's ineffectiveness did not arise until *after* that collateral proceeding,

when he sought appeal of the state habeas court decision dismissing his post-appeal habeas claims. *Id.* It was that incident of ineffective assistance that gave rise to the *Coleman* case.

The *Coleman* Court itself distinguished the situation where the ineffective assistance occurs during proceedings for which the petitioner has a claim as of right. There may be an exception to the rule that there is no right to counsel in state collateral proceedings, the *Coleman* Court said, "*where state collateral review is the first place a prisoner can present a challenge to his conviction."* 501 U.S. at 755 (emphasis added), citing *Douglas v. California*, 372 U.S. 353, 357 ("where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor").

Similarly, *Wainwright*, concerned a discretionary state court petition for certiorari. Torna already had exhausted his as-of-right appeal. 455 U.S. 586. The Supreme Court explicitly said that the Florida Supreme Court had only a limited mandatory appellate jurisdiction, and whether the Florida Supreme Court was willing to accept Torna's certiorari petition was entirely within its discretion. *Id*. at 587, n. 3.

Further, as the dissent in *Wainwright* points out, the majority decision is inconsistent with *Cuyler v. Sullivan*, 446 U.S. 335 (1980), where the Court held that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. *Wainwright*, 455 U.S. at 590 (Marshall dissenting).

Here, in contrast, ineffectiveness claims arise in IJ or BIA proceedings, not in post-appeal collateral proceedings. Proceedings before the IJ, of course, are trial proceedings, and respondents are entitled to a full hearing. INA § 240(a) and (b), 8 U.S.C. § 1229a(a) and (b). The BIA reviews any claims of ineffectiveness that arose in the IJ proceedings de

novo. Before the BIA, respondents have an unquestionable right to appeal the IJ's decision and to full consideration of that appeal. 8 C.F.R. 3.1(b).

Although the BIA's decision may involve it in exercising discretion, it is not discretionary *whether* the BIA considers the appeal – it is an appeal as of right, and the BIA must rule on it. Therefore, cases concerning appeals not as-of-right have no application here.

b. In *Coleman,* The State Did Not Assume Responsibility for and Had No Significant Interest in Assuring That Counsel was Competent.

In *Coleman,* the Court's analysis was based on its finding that the State had "no responsibility to ensure that the petitioner was represented by competent counsel." 501 U.S. at 754. There was no State statute providing the right to counsel, no State involvement in permitting counsel to appear or facilitating the finding of pro bono counsel, no State procedure to authorize particular counsel to appear, no State involvement in monitoring the conduct of counsel. Where there is no State responsibility, the error cannot be imputed to the State. Hence, as between the State and the petitioner, it was the petitioner who had to bear the burden of counsel's ineffectiveness.

Here, in sharp contrast, the Attorney General has manifested a keen interest in assuring that respondents may be afforded the right to counsel in these proceedings, and more particularly, that counsel is not ineffective. Unlike in *Coleman*, the government has not only acknowledged "the magnitude of interests to be affected" by the government's decisions, but also has created for itself the obligation to assure that practitioners "secure proper service to their clients" so that those interests are protected. Professional Conduct for Practitioners -- Rules and Procedures, 65 Fed. Reg. at 39519.

That counsel in removal proceedings are not paid by the government is irrelevant; payment is only one indicia of government involvement and interest. Even if the Attorney General had not taken it upon herself or himself to admit practitioners to practice, and to regulate, censure, and expel them, the INA and other regulations evince sufficient government interest and involvement that respondents be afforded the right to counsel to distinguish this situation from *Coleman* and *Wainwright.*[9]

c. **In Deportation Proceedings, the Due Process Clause of the Fifth Amendment is Implicated if the Statutory Right to Counsel is Violated.**

As discussed above, the BIA and reviewing courts repeatedly have held that respondents in immigration proceedings may assert a constitutional claim of ineffective assistance of counsel through the Fifth Amendment. The *Coleman* and *Wainwright* cases and the various civil cases from other contexts the INS cites are irrelevant to this principle and do nothing to disturb the Board's and the courts' reasoning or rationale.

Underlying the *Coleman* decision is the premise that there is no Sixth Amendment right to effective counsel in discretionary (not "as of right") post-appellate habeas proceedings. Be that as it may, in removal proceedings, the Due Process Clause of the Fifth Amendment applies, and is violated if counsel's ineffectiveness interferes with a respondent's right to a fair proceeding, right to appeal. Whether there is any Sixth Amendment right to counsel in removal proceedings is irrelevant. The Constitution protects respondents in removal proceedings through the Fifth Amendment.[10]

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[9] In addition, *Coleman* was grounded in concerns of comity and federalism that have no application here. 501 U.S. at 726. There are no concerns of federalism and comity in removal proceedings. There is no state court to which these claims must be or can be submitted.

[10] Similarly, the Due Process Clause protects respondents from egregious violations of the Fourth Amendment, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

In conclusion, the Fifth Amendment Due Process Clause protects the right to competent counsel in removal hearings. The actions or inactions of incompetent counsel can violate a person's due process rights and can make their proceedings fundamentally unfair. Removal hearings are hearings initiated, conducted, and enforced by the Attorney General. The Attorney General also has acknowledged the magnitude of the interests to be affected, and has created the obligation and mechanisms for assuring that counsel are not ineffective. Thus, the *Coleman* rationale does not apply in the removal proceedings context. For similar reasons, the Fourth Circuit's recent articulation, in *Afanwi*, of the "state actor" rationale does not apply here. The *Afanwi* decision was is incorrect on the law, was poorly reasoned, and ignored Circuit precedent. The Attorney General should not attempt to contradict decades of relevant BIA and federal court case law, to articulate a different interpretation of the statute or Due Process Clause.

VIII. There are Many Non-Constitutional Bases for the Attorney General to Grant Relief to Victims of Ineffective Assistance

The INA, applicable regulations and BIA and circuit case law provide a full measure of non-constitutional law regarding the central role of counsel and the proper remedy if counsel is ineffective. This body of law provides a remedy for ineffective counsel independent of any constitutional right to such a remedy.

The INA and regulations contain a detailed, extensive scheme guaranteeing the right to counsel.[11] The necessity that counsel be competent flows from this detailed statutory and

[11] First, of course, is the statutory right to counsel. INA § 292, 8 U.S.C. § 1362 and INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A). In addition, at the time of arrest, the government must inform the person of the right to counsel and provide a list of free legal services, 8 C.F.R. § 287.3(c); the charging document must inform the person of the right to counsel, INA § 239(a)(1)(E), 8 U.S.C. § 1229(a)(1)(E); the government must provide a pro bono list and update the list quarterly, INA § 239(a)(1)(E)(ii), 8 U.S.C. § 1229(a)(1)(E)(ii)

regulatory scheme, emphasizing counsel's central role in providing a fair hearing. The specific statutory guarantees of a fair hearing include the right to a reasonable opportunity to examine the evidence; the right to present evidence on the respondent's own behalf; the right to cross-examine witnesses; the right to an administrative appeal of adverse decisions; and the right to seek judicial review. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 3.1(b); INA § 101(a)(47)(B), 8 U.S.C. § 1101(a)(47)(B); INA § 242(a), 8 U.S.C. § 1252(a).

When counsel is incompetent, all these rights are abrogated. *See Sanchez v. Keisler*, 505 F.3d 641, 649 (7th Cir. 2007) (the attorney's performance was so deficient that Sanchez did not have the fair hearing to which the immigration statutes entitle her); *Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) (because the attorney's conduct so clearly ran afoul of the standard embodied in *Matter of Grijalva*, 21 I & N Dec. 472 (BIA 1996), the court need not pursue the issue of due process); *Matter of Grijalva*, 21 I & N Dec. 472 (BIA 1996) (because counsel blatantly misled Grijalva regarding his need to appear for his hearing, Grijalva's failure to appear was the result of "exceptional circumstances" pursuant to [then] § 242(B)(c)(3) of the INA).

Further, the errors of incompetent counsel have the effect of waiving a client's statutory rights without a knowing relinquishment of the rights. These rights are personal to

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and INA § 239(b)(2), 8 U.S.C. § 1229(b)(2); the hearing must be scheduled to allow time to secure counsel, INA § 239(b)(1), 8 U.S.C. § 1229(b)(1); at the immigration hearing, the IJ must advise the person of the right to counsel, require the individual to state whether he or she desires representation, and provide the individual with the list of free legal services, 8 C.F.R. §§ 1240.10(a)(1) and (a)(2); if DHS lodges additional charges, the IJ must advise the person of the right to counsel and to a continuance to respond to the new charges, 8 C.F.R. § 1240.10(e); the IJ must inform the person's counsel of the new time and place of the hearing, INA § 239(a)(2), 8 U.S.C. § 1229(a)(2); and the Attorney General must advise all asylum applicants of the right to counsel and provide a list of pro bono resources, INA § 208(d)(4), 8 U.S.C. § 1158(d)(4).

the client; they are not the representative's rights. When an incompetent representative waives, relinquishes or voids these rights, the respondent has not knowingly and intelligently waived his or her rights.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Walters v. Reno*, 145 F.3d 1032, 1037-1038 (9th Cir. 1998), *cert. denied* 119 S.Ct. 1140 (1999). There is a presumption against such an abandonment of rights in the civil as well as in the criminal context. *See Fuentes v. Shevin*, 407 U.S. 67, 94, n.31 (1972); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 376-77 and n. 31 (C.D. Cal. 1982) (for the purposes of applying the presumption against waiver, the civil character of deportation proceedings makes no difference, and statutory rights as well as constitutional rights are protected against unknowing waiver); further proceedings, *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd sub nom Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

In *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987), the government did not dispute "that respondents' rights to due process were violated by the failure of the Immigration Judge to explain adequately their right to suspension of deportation or their right to appeal." The Court observed that the IJ permitted waivers of the right to appeal that were not the result of considered or intelligent judgments by the respondents. *Id*. at 840.

In *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1085 (9th Cir. 1996), one attorney represented four unrelated respondents in deportation proceedings. When the IJ asked if "either side" wanted to appeal the judge's order of deportation, the attorney stated that they did not wish to appeal. The government argued that this waiver of the right to appeal was made by counsel and should be presumed to be knowing and intelligent. *Id*. at

1085. The court held to the contrary, citing *Mendoza-Lopez* and *United States v. Proa-Tovar*, 975 F.2d 592, 593 (9th Cir. 1992) (*en banc*).

Similarly, when, through counsel's ineffectiveness, the client loses his or her rights to appear, to present evidence, to apply for relief, to appeal, or any of the other statutory or regulatory rights essential to a fair proceeding, the client has not knowingly and intelligently waived those rights. If these rights are sacrificed without a knowing and voluntary waiver, the removal proceedings violate due process. *Mendoza-Lopez*, 481 U.S. at 839-40.

In summary, there indeed are statutory and regulatory guarantees for the right to competent counsel. As described above, these guarantees form a separate non-constitutional basis for fashioning remedies for incompetent counsel.[12] Violation by incompetent counsel of these independent statutory and regulatory rights can constitute a separate due process violation, without regard to whether there is a *per se* constitutional right to effective counsel.

IX. The Statutory and Regulatory Basis for Relief from Incompetent Counsel Applies to All Circumstances and Parts of Removal Proceedings

The Attorney General's question, we respectfully submit, reveals a basic misunderstanding of a distinction some courts have made for discretionary relief. As discussed *infra*, only a few cases have carved an exception for discretionary relief in the ineffectiveness context. Those few cases said that there was no *constitutional* right to complain about the deprivation of discretionary relief. The majority of cases, including some in those same circuits, have not accepted this limitation even when basing their decision on a *constitutional* right.

[12] It is, of course, within the BIA's authority to reopen cases based on ineffective assistance, even if neither a statute nor the Constitution requires the BIA to do so. *See Stroe v. INS*, 256 F.3d 498, 501 (7th Cir. 2001).

Amici is aware of no case authorizing the deprivation of *statutory* rights to fair proceedings because the underlying relief may be discretionary. Of course, the INA makes no such distinction; as discussed, *supra* and *infra*, statutory rights to fair proceedings apply without limitation.

Most courts have rejected a distinction between non-discretionary matters and discretionary relief, or ignored the distinction, when considering ineffectiveness claims. When ruling on ineffective assistance constitutional claims, most courts, correctly, either have not been concerned that the underlying relief sought was discretionary or have expressly rejected any distinction. Two very recent examples of the latter are *Omar v. Mukasey*, 517 F.3d 647, 650 (2d Cir. 2008) and *Jezierski v. Mukasey*, ___F.3d ___, 2008 US. App. Lexis 19279, *8 (7th Cir., Sept. 10, 2008).

In *Jezierski*, the court rejected as "cutting things too fine" the government's argument that if the noncitizen "is seeking merely discretionary relief he has no entitlement to remain in the United States and therefore a denial of relief does not invade his liberty." 2008 US. App. Lexis at *9.

In *Omar*, the petitioner had applied for cancellation of removal. The alleged incompetence occurred during the application process and as a result, the applicant was unable to demonstrate the requisite hardship. The Second Circuit explicitly rejected the government's argument that, because the underlying relief was discretionary, the court lacked jurisdiction to review the BIA's denial of the motion to reopen alleging ineffectiveness: "Ruling on an ineffective assistance of counsel claim does not require us to

substitute our discretion for that of the agency; it is simply a determination that the alien was not given a fair hearing because of counsel's errors."[13]

Most courts have not hesitated to rule on ineffectiveness claims when petitioner sought discretionary relief *See, e.g., Sanchez v. Keisler*, 505 F.3d 641 (7th Cir. 2007) (alleged ineffectiveness was counsel's failure to pursue a form of discretionary relief, VAWA cancellation; petition granted and reversed; no discussion about discretionary relief); *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2004) (asylum application; alleged ineffectiveness was failure to file appeal brief; no discussion about effectiveness claim and discretionary relief); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) (same); *Zheng v. Gonzales*, 422 F.3d 98, 106 (3d Cir. 2005) (same); *Sako v. Gonzales*, 434 F.3d 857 (6th Cir. 2006) (same).

A small minority of decisions have focused on the discretionary nature of the underlying relief and held that because the relief sought by the petitioner was discretionary, the failure to receive the relief did not deprive the petitioner of a *constitutionally*-protected liberty interest. *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999); *Nativi-Gomez v. Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003); *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004).

Among other errors in reasoning, these decisions confused procedural due process with substantive due process. Even if the individual has no substantive due process right to the underlying relief, that is, is not *entitled* as a constitutional matter to it, the individual

[13] This would be the correct ruling even if the ineffective assistance of counsel right were guaranteed only by law and not by the Constitution. The INA and applicable regulations guarantee a fair hearing. REAL ID confirmed that courts can review constitutional *and* legal issues that arise in matters involving discretionary relief. INA § 242(a)(2)(D); 8 U.S.C. § 1252(a)(2)(D).

nevertheless is entitled to a fair hearing and a fair application process. Whatever the constitutional entitlement to the underlying relief, due process requires compliance with statutory and regulatory rights. *See* §§ V,VIII *supra.* Individuals in removal proceedings have the right to contest removability and apply for relief – discretionary relief or not. When counsel's incompetence interferes with the ability of the client to fully exercise these statutory and regulatory rights, not only those rights but also due process may be violated. *See* § VIII, *supra.*

Subsequent to *Mejia-Rodriguez* and *Nativi-Gomez*, both the Eighth and the Eleventh Circuits have expressed views contrary to those cases and in line with the majority of courts. For example, another panel of the Eleventh Circuit noted in a 2004 case that:

> It is well established in this Circuit that an alien in civil deportation proceedings, while not entitled to a Sixth Amendment right to counsel, has the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to *effective* assistance of counsel where counsel has been obtained.

Dakane v. U.S. AG, 399 F.3d 1269, 1273-74 (11th Cir. 2004) (emphasis in original).

The year following *Nativi-Gomez* , the Eighth Circuit decided *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004), and said that it is "well-settled" that noncitizens have a statutory right to counsel, are entitled to the Fifth Amendment's guarantee of due process of law in deportation proceedings, and that "depriving an alien of the right to counsel may rise to the level of a due process violation." The following year, the court said the question whether ineffective assistance of counsel violated due process rights was still open in that circuit. *Jamieson v. Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005).

The issue can be seen another way: there is no support for the notion that protection against incompetent counsel only should apply to part of removal proceedings. The INA contains no such limitation or distinction. INA §240(b)(4)(A), 8 U.S.C. §1229a(b)(4)(A);

INA §292, 8 U.S.C. §1362 (the right to counsel in removal proceedings). The INA guarantees rights to a fair hearing. INA § 240, 8 U.S.C. § 1229a; *see also* discussion *supra* VIII. These rights are not limited just to the deportability portion of the proceedings. The statute also guarantees the right to *apply* for discretionary relief. INA § 240A, 8 U.S.C. § 1229b (cancellation of removal); INA § 240B, 8 U.S.C. § 1229c (voluntary departure); INA § 245(a), 8 U.S.C. § 1255(a) (adjustment of status); INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (asylum).

There is no proper distinction between the difference phases of removal proceedings when considering either IJ errors or counsel's alleged ineffectiveness. Courts and the BIA could not say, for example, that IJ errors during the relief phase do not matter, or that it would not be ineffective assistance if counsel fails to appear for the relief hearing.

It is instructive that the Attorney General's current and proposed professional responsibility regulations make no exception for the representatives' handling of discretionary relief. It would be odd indeed if the Attorney General could sanction an attorney for incompetence in the deportability phase of a case but not in the relief phase, based on an argument that the client was not entitled to the relief in any event.

For all these reasons, Amici submit that if the Attorney General should make any ruling in these or any other ineffective assistance cases, it should be irrelevant whether the case concerns an application for discretionary relief.

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X. Any Prejudice Standard Must Acknowledge the Inherent Challenges of Establishing Specific Harm and the Likelihood that the Outcome Might have been Different.

a. It May Be Impossible to Document The Prejudice the Person Suffered From An Incompetent Counsel.

Prejudice may be impossible to demonstrate or see from the record, precisely because counsel was ineffective. There is, in fact, an inherent conflict in applying a prejudice standard in ineffective assistance cases. As one commentator cogently said about a related problem, access to counsel for detainees: "The problem with applying a prejudice requirement, of course, is that it is impossible to know what the record would show if counsel had been retained." *See* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L.Rev. 1647, at n. 122 (1997).[14]

Federal courts and the BIA sometimes have recognized this dilemma expressly. As the Seventh Circuit recently said: "The record on which the BIA would have assessed its discretionary ruling would have been quite different had the lawyer performed adequately." *Sanchez v. Keisler*, 505 F3d 641, 643, 649 (7th Cir 2007). The court observed that the

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[14] *Pro se* individuals may have even more difficulty establishing prejudice. As Taylor says:

> Few pro se litigants can successfully challenge any governmental interference with their right to retain counsel in immigration proceedings. In general, only detainees who later obtain representation are able to identify this defect in their original proceeding. ... In virtually every reported opinion that I read adjudicating an alleged interference with the right to legal representation, the alien had retained a lawyer to appeal the removal order… the later intervention of counsel is essential to challenge successfully an earlier denial of the right to legal representation.

Taylor, *Promoting Legal Representation* at 1685, and at n 132. *See also*, *Lopez v. INS*, 184 F.3d 1097, 1099 (9th Cir. 1999) (after hiring separate counsel, Lopez learned that that his prior "attorney" was a notary public and filed a motion to reopen his deportation proceedings based on exceptional circumstances); *Molaire v. Smith*, 743 F. Supp. 839, 841-42, 845 (S.D. Fla. 1990) (Upon being released from isolation at the Krome and Metro Correctional Center, the 16-year old Haitian respondent retained free counsel and contested the denial of his rights).

BIA's decision to deny the motion to reopen necessarily rested on the flawed record that was prepared before the IJ. *Id.*

Courts have acknowledged that ineffective assistance of counsel denies "the basic opportunity to create a full and complete record susceptible of appeal and review," *Cano-Merida v. INS*, 311 F.3d 960, 965 (9th Cir. 2002), and puts a person seeking such review in the impossible position of having to "produce a record that does not exist." *Perez-Lastor v. INS*, 208 F.3d 773, 782 (9th Cir. 2000). S*ee also*; *Al Khouri v. Ashcroft*, 362 F.3d 461, 467 (8th Cir. 2004) (inferring prejudice because Mr. Al Khouri cannot produce a record that does not exist).

Where a lawyer has been incompetent by failing to appear and represent the respondent, the record will not reflect what a competent lawyer would have done, or the research a competent lawyer would have performed to demonstrate that the respondent is not deportable as charged. *Saba v. INS*, 52 F. Supp. 2d 1117, 1123 (N.D. Cal. 1999). Prejudice also may be impossible to demonstrate from the record where counsel's malfeasance or nonfeasance deprived the individual of his own right to appear. In such a case, there may be no record at all. *See Matter of Grijalva*, Int. Dec. 3284 (BIA 1996) (attorney erroneously told client that he did not have to attend hearing).

In some instances, the law has changed after counsel has been ineffective, and under the amended law, noncitizens have been ineligible for relief. In those cases, courts have noted that unless they ordered the government to apply the law as it existed previously, it might be impossible for the person to demonstrate prejudice. *See Castillo-Perez v. INS*, 212 F.3d 518, 528 (9th Cir. 2000); *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993).

In sum, any prejudice standard must take into account the inherent challenges of establishing what would, or might, have been, had counsel's ineffectiveness not interfered with the course of the proceedings. Requiring conclusive proof that the hearing or the result would have been different, is unreasonable in this context.

b. Current Prejudice Standards Articulated by the Courts of Appeals Vary; the Proper Test is Whether the Claim Merits Further Consideration.

Appropriately, the federal courts do not require the individual to demonstrate she *would have* been successful with effective counsel. The courts have articulated the standard in various ways.[15]

For example, even the Eleventh Circuit, not always the most hospitable to ineffective assistance of counsel petitions, has held: "Prejudice exists when the performance of counsel is so inadequate that there is a *reasonable* probability that but for the attorney's error, the outcome of the proceedings would have been different." *Dakane v. U.S. AG*, 399 F.3d 1269, 1274 (11th Cir. 2004) (emphasis added). *Accord*, *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 154 (3d Cir. 2007) (concluding that BIA erred in requiring Fadiga to show a "clear probability" that the result would have been different).

In *Dakane*, the Eleventh Circuit also said that where counsel fails to file any appeal brief, "effectively depriving the client of an appellate proceeding entirely, there is a rebuttable *presumption* of prejudice." *Id*. at 1274-75 (emphasis added), citing *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003) and *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1045 (9th Cir. 2000).

[15] The courts have not always heard about or sufficiently appreciated the difficulties of proving prejudice.

The Ninth Circuit has established an appropriately flexible standard. The adjudicator need not conclude that the individual would win or lose on any claim, only that the claim merits full consideration, or that prior counsel failed to present *plausible* claims for relief. *Mohammed v. Gonzales*¸400 F.3d 785, 794 (9th Cir. 2005) (emphasis in original), citing *Lin v. Ashcroft*, 377 F.3d 104 (9th Cir. 2004) at 1027. Prejudice results, the court said, when the performance of counsel was so inadequate that it *may* have affected the outcome of the proceedings. *Id.* at 793-94 (emphasis in original), quoting *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999). *Accord, Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004). When a noncitizen is prevented from filing an appeal due to counsel's error, the error deprives the person of the appellate proceeding entirely, and prejudice is presumed. It is the government's burden to rebut this presumption. *Ray v. Gonzales*, 439 F.3d 582, 587, 589 (9th Cir. 2006).

A recent Fifth Circuit decision illustrates how prejudice evaluations properly may be made. *See, Mai v. Gonzales*, 473 F.3d 162 (5th Cir. 2006). The lawyer had admitted all of the Notice to Appear allegations, including that the client had made a false claim to U.S. citizenship. *Id*. at 163-64. On appeal, the BIA held that because counsel had told the IJ that the admission was his tactic, the decision by counsel to admit all allegations was "strategic" and not ineffective assistance. *Id.* at 165. On review, the Fifth Circuit said that the admission of the false claim charge – which Mr. Mai subsequently and vehemently denied – "ensured that he was deprived of all possibility for relief from deportation" without any apparent counter-advantage. *Id.* at 166-67. The court reversed the BIA, and remanded for it to determine whether Mr. Mai had been prejudiced. *Id.* at 167.

In conclusion, when considering ineffective assistance claims, rather than requiring proof that the result would have been different, adjudicators should determine whether the claim appears to merit further consideration or documentation, as the Fifth Circuit did in *Mai*. Any doubts should be resolved in favor of the victim of counsel's ineffectiveness, because of the inherent proof difficulties in ineffectiveness cases.

XI. The Attorney General Should Not Make the *Lozada* Requirements Even More Demanding; Courts Have Found it Necessary to Relax the Standards Because They are So Inflexible.

a. Courts have not Required Strict Compliance With *Lozada*.

The policy goals motivating the BIA's *Lozada* rule –to ensure that ineffective assistance claims are valid and not filed to create delay – are laudatory, but the BIA sometimes has applied *Lozada* inflexibly and mechanistically to defeat claims that should have been granted. As a result, many courts have attempted to avoid injustice and deprivation of rights, and have achieved *Lozada*'s underlying goals without requiring strict compliance with its procedural mandates. *See Dakane v. U.S. Att'y Gen*., 399 F.3d 1269, 1274 (11th Cir. 2004) ("exact" compliance with the procedural requirements of *Lozada* is not required to demonstrate ineffective assistance); *Zheng v. Gonzales*, 422 F.3d 98 (3d 2005) ("only in rare circumstances have courts refused to reopen immigration proceedings solely because a petitioner failed to file a bar complaint") (citations omitted); *Ray v. Gonzales*, 439 F.3d 582, 588 (9th Cir. 2006) ("…we have not hesitated to address ineffective assistance of counsel claims even when an alien fails to comply strictly with *Lozada*"); *Saakian v. INS*, 252 F.3d 21, 26 (1st Cir. 2001) (finding that the *Lozada* requirements should not be applied arbitrarily without providing pro se respondent an opportunity to remedy deficiencies), citing *In re Rivera-Claros*, 21 I & N Dec. 599 (BIA

1996); *Castillo-Perez v. INS*, 212 F.3d 518, 525, 526 (9th Cir. 2000) ("the *Lozada* requirements are not sacrosanct" and "need not be rigidly enforced where their purpose is fully served by other means") (citations omitted).

The Fourth Circuit also has held that "strict compliance with *Lozada* is not always required." *Barry v. Gonzales*, 445 F.3d 741, 746 (4th Cir. 2006), citing *Jian Yun Zheng v. U.S. DOJ*, 409 F.3d 43, 46 (2d Cir. 2005), and there are "inherent dangers" "in applying a strict, formulaic interpretation" of the requirements. *Barry*, 445 F.3d at 746 (citations omitted). Failure to satisfy all three requirements does not preclude appellate court review; the court will reach the merits of an IAC case if the individual "substantially complies" with the *Lozada* requirements. *Id.* The *Lozada* requirements need not be rigidly enforced where their purpose is fully served by other means. *Barry*, 445 F.3d at 746, quoting *Castillo-Perez*, 212 F.3d at 526.

Courts also have found that the record itself amply demonstrates ineffective assistance of counsel, making compliance with Lozada unnecessary. *See Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 826 (9th Cir. 2003) (because the face of the administrative record demonstrates the ineffective assistance of counsel claim, failure to completely satisfy *Lozada* was not fatal to claim); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) ("…the record itself demonstrates the legitimacy of petitioners' ineffective assistance complaint- relieving them of the need technically to comply with *Lozada*…"); *Castillo-Perez*, 212 F.3d at 525-26 (although respondent did not comply with any of *Lozada*'s formal requirements, the hearing record and briefing before the BIA showed "a clear and obvious case of ineffective assistance of counsel").

Further, courts have recognized circumstances when it is not reasonable to expect compliance with the *Lozada* requirements because the individual's energies are more properly directed elsewhere. For example, in *Figeroa v. U.S. INS*, 886 F.2d 76, 78-79 (4th Cir. 1989), the fact that the aggrieved individual took "no action" against his former counsel did not indicate that the 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 directly at stopping the deportation, rather than pursuing Tellez.

886 F.2d at 79.[16]

Parties appealing to the BIA may be indigent and may be unable to speak or understand English. They, even more than most litigants, are dependent upon the actions of counsel on their behalf. *See Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) (many immigrants "arrive unfamiliar with our language and culture, in economic deprivation and fear," and have "so much at stake – the right to remain in this country, to reunite a family, or to work."). When their counsel fails them, for whatever reason, the consequences may be a rapid deportation that affords no opportunity to secure other counsel or to seek any remedies against defaulting counsel. *Escobar-Ramos v. INS*, 927 F.2d 482, 485 (9th Cir. 1991); *Apolinar v. Mukasey*, 514 F.3d 893 (9th Cir. 2008) ("…vulnerable immigrants are preyed

[16] A malpractice suit against incompetent counsel is not an adequate remedy. Even a successful malpractice award does not enable the victim of malpractice to remain or be brought back to the U.S. Nor are malpractice lawsuits a realistic remedy for the great majority of immigration ineffectiveness victims. When the result of counsel's ineffectiveness is deportation, an aggrieved person must contemplate a legal malpractice action from outside the United States. This type of suit would present, in almost all cases, insuperable logistical, legal, and practical problems. The very fact that such a lawsuit is extremely unlikely makes immigrants even more vulnerable to unethical practitioners.

upon by unlicensed notarios and unscrupulous attorneys…the BIA's insistence upon strict compliance with *Lozada* where such compliance would clearly be futile, only worsens the plight of the immigrant.").

Determining that counsel has provided ineffective assistance is the immigrant's first obstacle. In many cases, this realization takes place only after years of inadequate representation. See e.g., *Piranej v. Mukasey*, 516 F.3d 137, 139-140 (2d Cir. 2008) (describing deficient performance of attorney over a four-year period before person sought out new attorney and filed ineffective assistance claim). The Ninth Circuit described the odyssey of one asylum applicant who suffered ineffective assistance from two lawyers:

> There is no question that these two attorneys have provided assistance so poor that Ray has been "prevented from reasonably presenting his case." *Lopez, 775 F.2d at 1017*. The former dallied for several months before missing filing deadlines, neglecting filing requirements, and ultimately costing Ray the opportunity to have his first motion to reopen heard on the merits. The latter took from Ray $ 10,000 in fees, and the record indicates that he provided no substantive legal assistance whatsoever; in doing nothing, he condemned to failure Ray's second motion to reopen. Indeed, these attorneys have prevented Ray not only from "reasonably presenting his case," but from presenting his case *at all*.

Ray v. Gonzales, 439 F.3d 582, 588 (9th Cir. 2006).

When a person determines that their counsel has failed to represent them adequately, they encounter a new set of difficulties. They must seek out new counsel who then must uncover and document prior counsel's deficient performance.[17]

The process of documenting ineffectiveness may be time-consuming, with bureaucratic delays beyond the control of the individual. For example, new counsel may

[17] *See e.g.*, *Ray*, declaration from attorney stating that it took nearly two months to track down the former lawyer's files from the "erstwhile attorneys" who had moved and left no forwarding address, 439 F.3d at 584; reasonable to infer that person first had reason to know of counsel's ineffectiveness after 90-day motion to reopen filing deadline passed, at which point person retained new lawyer who had to perform certain tasks to meet the *Lozada* requirements, 439 F.3d at 589, n. 5.

have to submit a request for information under the Freedom of Information Act (FOIA) related to the ineffective assistance claim and may not receive a response for several months. *See Zheng v. Gonzales,* 422 F.3d 98, 107 (3d Cir. 2005) (acknowledging that bar complaint requirement of *Lozada* was not met because new counsel had not yet received response to FOIA request and could not verify information related to prior counsel's performance in absence of response).

With these realities, courts have found exceptions to each of *Lozada*'s procedural requirements. Imposing additional requirements would be unnecessary, onerous and counter-productive.

b. Requiring an ineffectiveness victim, in every case, to attach to a motion to reopen a copy of a letter to counsel alleging deficient performance and counsel's response (or an affidavit that no response was received) would be overly restrictive.

Lozada requires that a person inform prior counsel of allegations leveled against him or her and that counsel be given an opportunity to respond to the allegations. *Lozada*, 19 I & N Dec. at 639. However, courts have found exceptions to this requirement. For example, when a respondent's efforts to inform prior counsel of the accusations against him would be futile, courts have held that strict compliance with this *Lozada* requirement is unnecessary. *Apolinar v. Mukasey*, 514 F.3d. 893, 897 (9th Cir. 2008) (complying with the reporting requirements under *Lozada* would be futile where prior counsel had already been suspended for failing to respond to prior charges of ineffective assistance).

It may not be possible for the individual to locate and obtain a response from former counsel, particularly within the narrow time frame for preparing a filing a motion to reopen. An inflexible modification to the *Lozada* requirements that would oblige all ineffective assistance victims to attach a copy of both the letter sent by a person informing counsel of

the allegations of deficient performance and counsel's response, would place an even greater, and possibly unachievable, burden on the individual.

c. Requiring that the ineffectiveness victim, in every case, attach to a motion to reopen a copy of the complaint filed with the appropriate disciplinary authorities along with an acknowledgment of receipt by the disciplinary board would be overly restrictive.

A person alleging ineffective assistance of counsel also must file a complaint with the appropriate disciplinary authorities or explain why no complaint was filed and if not, why not. *Lozada*, 19 I & N Dec. at 639. Courts have held that in certain circumstances, an aggrieved person's failure to file a complaint is not fatal to an ineffective assistance claim.

For example in *Lu v. Ashcroft*, 259 F.3d 127, 133-35 (3d Cir. 2001), the Third Circuit spoke of the "inherent dangers" in "applying a strict, formulaic interpretation of *Lozada*" that would require all petitioners claiming ineffective assistance to file a bar complaint. The person's ability to provide a "reasonable explanation" for failing to file a complaint could excuse the bar complaint requirement. *Id.* at 134. The court declined to define "reasonable explanation," because the explanation would depend on "the unique and highly variable factual circumstances" surrounding a person's immigration case. *Id*. at 134, n. 4; citing *Esposito v. INS*, 987 F.2d 108, 111 (2d Cir. 1993) (bar complaint excused because petitioner thought attorney had previously been suspended).

In a later case, the Third Circuit found that an affidavit filed by former counsel detailing counsel's errors and problems with the representation constituted a "reasonable explanation" for respondent's failure to file a bar complaint. *Fadiga v. Att'y Gen.*, 488 F.3d 142 (3d Cir. 2007). The court concluded that the majority of the *Lozada* policy interests

were met without filing a bar complaint. *Id*. at 156. Further, the court held that the counsel's affidavit made the possibility of "collusion" unlikely, where counsel would have to commit perjury in support of any collusion with respondent. *Id*. *See also Lo v. Ashcroft*, 431 F. 3d 934 (9th Cir. 2003) (finding the bar complaint unnecessary when there was "no suggestion of collusion" to create delay and petitioners did "all they reasonably could to have their cases heard promptly").

Further, the bar complaint requirement cannot defeat valid claims of ineffective assistance by non-attorney actors. At least where the individual is defrauded or reasonably relies on a non-attorney for advice or representation, adjudicators must recognize ineffectiveness claims against non-attorneys. *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1099 (9th Cir. 2005) and cases collected therein; *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227(9th Cir. 2002) (strict compliance with *Lozada* not necessary when non-attorney missed deadlines for filing applications, lied about missed deadlines, and advised filing a motion for reconsideration that prejudiced petitioners' claims); *Lopez v. INS*, 184 F.3d 1097, 1099 (9th Cir. 1999) (excusing the requirement for a formal complaint when notary public posed as attorney). *Cf. Hernandez v. Mukasey*, 524 F.3d 1014, 1020 (9th Cir. 2008) (no denial of due process where petitioners affirmative chose to rely on a non-attorney for several years, knowing she was an immigration consultant and not an attorney, and declined repeated inquires from the IJ about whether they wished to obtain counsel).

In addition, when a respondent's efforts to report prior counsel's misconduct to a disciplinary authority would be futile, courts have also found strict compliance with *Lozada* is unnecessary. *Apolinar v. Mukasey*, 514 F.3d. 893, 897 (9th Cir. 2008) (futile where prior

counsel had already been suspended for failing to respond to prior charges of ineffective assistance).

d. Requiring that an ineffectiveness victim, in every case, attach to a motion to reopen an affidavit describing precisely what counsel's failings were, submit any necessary evidence in admissible form to the Board (or immigration judge, if applicable), and explain how the alien suffered prejudice resulting from his or her counsel's alleged deficient performance would be overly restrictive.

Courts also have recognized the need for flexibility in interpreting the *Lozada* requirement that a respondent provide an affidavit with a detailed summary of the agreement entered into with his or her attorney. *Piranej v. Mukasey*, 516 F.3d 137, 144 (2d Cir. 2008). Mr. Piranej did not describe with specificity "what actions [respondent's] counsel promised to undertake." *Id*. at 141. However, the court reasoned that the BIA should not have "mechanically" applied the framework for evaluating the attorney-client relationship in *Lozada* and required respondent to supply this level of detail. *Id*. at 144. Instead, the BIA should have considered the specific nature of the attorney-client relationship. *Id*. at 144-45. If, for example, Mr. Piranej and his counsel had a general retainer agreement, Mr. Piranej's affidavit would have been sufficient. *Id*. at 144.

XII. The Need To Demonstrate Due Diligence Arises Only Where a Filing Deadline Must be Equitably Tolled; Due Diligence is not Appropriately a Threshold Requirement.

The need to demonstrate "due diligence" only arises when the person pursuing an ineffective assistance claim seeks to have a deadline equitably tolled, for example, when a motion to reopen was not filed within the statutory 90-day period. *See Patel v. Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006) (distinguishing the substantive criteria for succeeding on an ineffective assistance of counsel claim from the procedural rules, including the rules

governing the time for filing motions). "With an untimely motion . . . the alien must first show that her situation warrants equitable tolling of the time limits, and equitable tolling in turn requires a showing of due diligence." *Id*. (citations omitted). *See also Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005) (the 180-period for reopening an *in absentia* removal order is subject to equitable tolling); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (same).

The Attorney General's question appears to propose adding "due diligence" as a new, baseline requirement for all ineffectiveness cases. Such a requirement would be unnecessary, inappropriate, and unsupported by the case law. As the Seventh Circuit noted in *Patel*, if a motion to reopen is filed within 90 days of the BIA's order, the BIA properly considers the timely motion and the ineffective assistance claim without imposing a "due diligence" requirement. *Patel*, 442 F.3d at 1016.

It would be appropriate for the Attorney General to endorse a "due diligence" requirement in the ineffective assistance of counsel context, if at all, only if he also endorses the concept of "equitable tolling" for motions and filing deadlines. There is considerable case law support for equitable tolling in this context. *Pervaiz*, 405 F.3d at 491; *Patel*, 442 F.3d at 106-07; *Borges*, 402 F. 3d 406-07; *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Aris v. Mukasey*, 517 F.3d 595, 599 n.7 (2d Cir. 2008), following *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000); S*ocop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001).

There is "no magic period of time," no "per se rule" for equitable tolling premised on ineffective assistance of counsel. *Wang v. BIA*, 508 F.3d 710, 715 (2d Cir. 2007). The test for due diligence and equitable tolling "is not the length of the delay," but rather, "whether the claimant could reasonably have been expected to have filed earlier." *Pervaiz*, 405 F.3d

at 490. Deadlines may be equitably tolled "until the ineffective assistance of counsel is, or should have been, discovered by a reasonable person in the situation." *Aris*, 517 F.3d at 599, n.7. The adjudicator must look at considerations other than time; a cursory comparison of the date of filing and the statutory or regulatory time line for filing motions is not enough. *Riley*, 310 F.3d at 1258. In *Borges*, for example, even though Borges' 2003 motion to reopen was well outside the 180-day window for seeking rescission of his February 1998 *in absentia* removal order, the Third Circuit agreed to equitably toll the filing deadline, rejecting the government's argument that Borges had not exercised due diligence. 402 F.3d at 404, 407.

In sum, due diligence is relevant only when it is necessary to equitably toll a filing deadline. Due diligence has no application, and adjudicators should not impose a "due diligence" requirement, in any other context.

The real-life situations in which immigrants attempt to remedy ineffective assistance of counsel demonstrate the importance of flexibility in the application of the *Lozada* requirements. Modification of the *Lozada* to impose more onerous standards and to construct additional and unrealistic proof requirements will not give effect to the goals of protecting the integrity of the immigration court system, will result in unnecessary expenditure of resources by EOIR and by individuals, and will produce unjust results for victims of ineffective assistance of counsel. For the mandated procedures to comply with the due process clause and the statutory and regulatory right to counsel and fair hearings, and to achieve the goals for improving representation, the Attorney General must, in fact, ease procedures for respondents to remedy past mistakes by counsel. A more flexible

application of *Lozada*, consistent with the interpretation of many circuit courts, will allow victims of ineffective assistance to satisfy the policy considerations behind *Lozada.*

XIII. EOIR Should Institute a System for Remedying *De Minimus Errors*

Amici Curiae submit that there also must be an accessible system for remedying simple errors - less serious mistakes that fallible people make. The multiplicity of *pro forma*, obligatory bar complaints against lawyers who have not committed malpractice and who have not been ineffective or unethical, serves no one's interest, certainly not the public interest. Nor is it sensible to obligate clients to hire new counsel to hurriedly satisfy onerous and unrealistic requirements to remedy inadvertent, *de minimus* errors. It is unjust to allow people to lose valuable claims and to be deported away from family and home because of such small errors. And certainly the EOIR should not use its limited resources to adjudicate thousands of ineffective assistance claims based on small procedural mistakes.

Other court systems have such provisions.[18] The EOIR could eliminate significant amounts of litigation for itself, for the courts, and for all parties if it instituted and consistently applied such a system.

The harsh consequences of and waste of resources following an inadvertent error are evident in the recent Fifth Circuit case, *Ramos-Bonilla v. Mukasey*, _F.3d_ , 2008 U.S. App. LEXIS 20067 (5th Cir. Sept. 18, 2008). Mr. Ramos came to the United States from El Salvador in 1986. His lawyer submitted a completed application for adjustment of status under § 203 of the Nicaraguan Adjustment and Central American Relief Act ("NACARA")

[18] For example, Rule 60 (b)(1) of the Federal Rules of Civil Procedure provides: b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect.

on Mr. Ramos' behalf before the November 1999 deadline. *Id*. at *2-3. However, the lawyer mistakenly filed the application at the INS Vermont Service Center instead of filing it with the Immigration Court. *Id*. at *3. Despite the lawyer's attempts to correct the misfiling by communicating his mistake to the Immigration Court and requesting that Mr. Ramos be allowed to pursue his NACARA application, the judge denied the motion to reopen on the basis that the NACARA application was not timely filed at the Immigration Court. *Id*. at *4. The BIA dismissed Mr. Ramos's appeal. A new lawyer filed a motion to reopen with the BIA, alleging ineffective assistance of former counsel and that Mr. Ramos was "prima facie eligible" for NACARA relief. *Id.* at *5. The BIA denied this motion, holding that it was time and number-barred and refusing equitable tolling. *Id*. Mr. Ramos then filed a "motion to reconsider" with the BIA, attaching an affidavit recounting his diligent attempts over the course of several years - with an apparent immigration consultant, and the second of his three lawyers - to remedy the initial filing error. *Id. at *6.* The BIA considered this motion to be a third motion to reopen, and denied it. *Id*. at 8. Eventually, the Fifth Circuit considered the most recent two BIA decisions denying relief. *Id*. at *9.

Unfortunately for Mr. Ramos, the court found that "the failure to meet the regulatory deadline under NACARA [was] a failure to exhaust administrative remedies" that stripped the Fifth Circuit of jurisdiction to review the BIA's dismissal of the ineffective assistance claim. *Id*. at *9. Hence, one minor filing error in 1999 resulted in years of litigation, an unsuccessful ineffective assistance of counsel claim, and denial of relief for which Mr. Ramos – a 20-year resident of the United States - was prima facie eligible and for which his lawyer submitted a timely application.

The facts of a recent Seventh Circuit ineffectiveness case are equally compelling. *See Pervaiz v. Gonzales*, 405 F.3d 488 (7th Cir. 2005). Abida Pervaiz was from Pakistan and sought asylum and withholding of removal. On January 31, 2002, the government informed her lawyer that the hearing on her applications would be held almost a year later, on January 24, 2003, at 1 p.m. *Id*. at 489. Five months later, on May 15, 2002, the government sent the lawyer a letter stating that the time of the hearing had been changed from 1 p.m. to 9 a.m. *Id.* The lawyer never received the letter. On January 24, 2003, both Ms. Pervaiz and her lawyer appeared for the hearing at 1 p.m., "only to be told that because she had failed to appear at 9, her claim for asylum had been deemed abandoned and she had been ordered, *in absentia*, removed." *Id.*

The lawyer filed a motion to open, which the IJ denied, stating "cryptically" that "counsel for [Pervaiz] has failed to establish that notice upon her was defective… " *Id.* Ms. Pervaiz hired a new lawyer who filed another motion to reopen, this one with the BIA, claiming the first lawyer had been ineffective. *Id*. The Board denied both the appeal of the IJ's denial of the first motion to reopen, and the second motion to reopen because it had been filed more than 180-days after the deadline for motions to reopen *in absentia* orders. *Id.* at 490.

The Seventh Circuit, in an opinion by Judge Posner, reversed and remanded, noting:

> "Bearing in mind the sheer injustice, as least as it would seem to a layman, of the immigration judge's denying a claim of asylum merely because the claimant showed up four hours late for a hearing, when it seems that the only reason for her tardiness was that she hadn't learned of the time change, Pervaiz could reasonably expect that the first motion to reopen would be granted." *Id*. at 490-91.

Based in part on this "reasonable expectation," the court equitably tolled the 180-day deadline for filing the second motion to reopen, granted the petition for review, and remanded the case to the BIA. *Id.* at 491.

Rather than instituting a more realistic, responsive structure to remedy *de minimus* errors, the new EOIR Practice Manual and a memorandum interpreting it for the Immigration Court Clerk's offices move in the opposite direction. *See* Immigration Court Practice Manual, *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm [hereinafter *Practice Manual*]; Memorandum from Mark Pasierb, Chief Clerk of the Immigration Court, to All Immigration Judges, et al. (June 17, 2008) [hereafter *Pasierb Memo*]. The EOIR Manual outlines situations in which filings by attorneys should be considered "defective" and rejected. *Practice Manual,* 3.1(d); The manual states that filings should be rejected outright if they are not accompanied by proper proof of service, for example, or if a signature is missing or improper. *Id.* Even more demanding, the Manual states that filings by an attorney that do not have a cover page, are not two-hole punched, are not paginated, properly tabbed, or do not have a proposed order, will be rejected. *Id.*; *Pasierb Memo,* Part II(A). In any of these situations, the Immigration Court "should reject filings upon receipt and return filings to the party." *Pasierb Memo,* Part II(A). If counsel is not able to correct the error and resubmit the filing before the deadline, the filing may be considered untimely. *Practice Manual,* 3.1(b). Although an IJ may still accept an untimely filing, it is within the judge's discretion to accept the filing. *Practice Manual,* 3.1(d)(ii); Memorandum from David L. Neal, Chief Immigration Judge, to All Immigration Judges, et al. (April 23, 2008)

(filings may not be rejected upon receipt for untimeliness; only a judge has the authority to make determinations regarding timeliness).

If the IJ does not exercise discretion to accept the untimely filing, a *de minimus* error, such as the failure to two-hole punch a document, may form the basis of a future ineffective assistance of counsel claim. Of course, as such discussion is said to be in the IJ's discretion, the government likely would argue that the decision is beyond judicial review.

The BIA Practice Manual likewise provides very little flexibility for addressing *de minimus* errors related to filing. For example, the failure to provide proof of service on the opposing party is a "common" reason for the Board to reject a filing. BIA Practice Manual, 3.1(c). If the Board rejects a filing and the corrected filing is not made within the original deadline, the filing is "defective." *Id*. at 3.1(c)(ii) (parties who wish to "correct" a defect and "refile after a rejection must do so by the original deadline")

An untimely appeal will be dismissed and an untimely motion will be denied. *Id*. A party submitting an untimely filing must file a motion asking the Board to accept the filing with documentary evidence to support the motion, including evidence such as affidavits and declarations under penalty of perjury. *Id*. at 3.1(c)(iii). The Board has discretion whether to accept late filings and the Manual advises that the BIA "rarely" accepts and considers untimely briefs. *Id*. at 4.7(d). Here too, the government likely would argue that any BIA decision refusing to accept such "late" filings is beyond judicial review.

Minor errors in the filing process are just one example of the type of mistake that EOIR should allow attorneys to correct.[19] If remedies for these *de minimus* mistakes are not available, the result will be even more bar complaints against lawyers who failed to properly

[19] Of course, any ameliorative rules should apply to *pro se* filers, who typically will have even more difficulty complying with demanding and inflexible requirements.

paginate a document, for instance, and expenditure by all parties of valuable time and resources on so-called ineffective assistance claims.

In sum, EOIR should develop and institute mechanisms to properly address small errors that occur during immigration proceedings. The agency should draft rules that outline and implement these mechanisms and submit them for notice and comment.

Conclusion

For the reasons discussed above, Amici submit that the Attorney General should take no action at this time or through this process. If the Attorney General does issue a decision in these three certified cases relevant to ineffective assistance of counsel, he should reiterate that the Fifth Amendment Due Process Clause does protect people in immigration proceedings against incompetent counsel; that there are, in addition, statutory and regulatory rights to fair proceedings, and that to guarantee these rights, counsel must not be incompetent; and that filing deadlines may be equitably tolled when counsel has been incompetent.

The *Lozada* standards, however well-intentioned, have proved to be unwieldy and impractical New, more realistic standards should be enacted to encourage the filing of complaints against representatives who truly are incompetent or fraudulent, and new, ameliorative mechanisms should be instituted to ameliorate *de minimus* errors and to avoid unnecessary ineffectiveness claims.

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Respectfully submitted this 6th day of October, 2008.

___/s/_____

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 13, 2006

RECOMMENDATION

RESOLVED, that the American Bar Association supports the due process right to counsel for all persons in removal proceedings, and the availability of legal representation to all non-citizens in immigration-related matters.

FURTHER RESOLVED, that the American Bar Association supports:

(a) expansion of the federal "legal orientation program" to all detained and non-detained persons in removal proceedings;

(b) establishment of a system to screen and to refer indigent persons with potential relief from removal - as identified in the expanded "legal orientation program" - to pro bono attorneys, Legal Services Corporation sub-grantees, charitable legal immigration programs, and government-funded counsel;

(c) establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to mentally ill and disabled persons in all immigration processes and procedures, whether or not potential relief may be available to them; and

(d) legislation to overturn the "no cost to the government" restriction on representation in removal proceedings.

REPORT

The Quest to Fulfill Our Nation's Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees

As the national voice of the legal community, the ABA has long championed the principles that America is built on as a nation of laws and a nation of immigrants—liberty and justice for all. This is underscored by the ABA adopting the theme of "Defending Liberty, Pursuing Justice" as its guiding vision. Unfortunately, for immigrants and refugees in America today, these principles more often represent unfulfilled promise than reality. Our immigration laws bear little relation to our country's fundamental principles, our economic needs, or our national security interests. In short, our nation's immigration system today is broken. Comprehensive and real solutions are needed, and the ABA's leadership in developing those solutions is essential.

Consistent with the ABA's overarching goals of defending liberty and pursuing justice, the ABA has adopted a number of substantive goals to carry out its mission of promoting justice, professional excellence, and respect for the law that are relevant in this context. These goals include, among others, promoting improvements in our system of justice; promoting meaningful access to legal representation and to the American system of justice for all persons; increasing respect for the law and legal process; advancing the rule of law in the world; and preserving the independence of the legal profession and the judiciary.

These ABA goals are particularly important for immigrants and refugees, who face unique challenges under our laws and justice system. Our immigration laws today are extremely complex, disjointed and often counterintuitive, particularly for people who often are just becoming familiar with our language, culture, and legal system. Moreover, despite the fact that immigration matters routinely involve issues of life and liberty, the administrative system of justice that exists for immigration matters lacks some of the most basic due process protections and checks and balances that we take for granted in our American system of justice.

For all of these reasons, the ABA's leadership on issues relating to immigrants and refugees is absolutely essential, and for years the Association consistently has taken that role to heart. While these issues affect all members of the ABA in some way, the ABA has charged its Commission on Immigration to direct the Association's efforts to ensure fair and unbiased treatment, and full due process rights, for immigrants and refugees within the United States.

Over a period spanning dozens of years, the ABA has adopted policies on a wide range of legal issues affecting immigrants and refugees. Many of these policies represent overarching principles that still hold true today. Other policies were adopted in piecemeal fashion in response to circumstances or events at a particular time. Finally, a number of changes in our country's laws and policies governing immigrants and refugees in recent years are not adequately addressed by current ABA policies.

With the ABA's overall goals as a guide, the ABA Commission on Immigration has

embarked on a comprehensive project to develop additional, up-to-date immigration policies that supplement and expand upon our existing policies. The Commission is therefore proposing a series of seven resolutions that address the following issues:

- Right to Counsel
- Immigration Reform
- Due Process & Judicial Review
- Administration of U.S. Immigration Laws
- Immigration Detention
- Asylum and Refugee Procedures
- Protections for Immigrant Victims of Crime

The resolutions address issues not already covered within existing Association policies, and are therefore not intended to supersede, restate, or reaffirm existing policies. Rather, the Commission firmly believes that with these proposed additions, ABA policies on issues involving immigrants and refugees will be fully consistent with the ABA's mission and goals and will be a vastly improved resource for ABA members, Congress, relevant government agencies, and other interested parties.

*Below is the report regarding the first resolution in the series, on "Right to Counsel."

I. Introduction

A hallmark of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. Immigration law is extremely complex, removal (deportation) proceedings are adversarial, and they can have very severe consequences. Deportation can separate immigrants from their families, can impoverish them, can return them to countries in which they have no functional ties, and can lead to their persecution. In recent years, the grounds for removal have expanded, the available relief from removal has been restricted, and the use of detention (which impedes the ability of immigrants to obtain counsel) has skyrocketed. Justice Brandeis wrote more than 80 years ago that removal can result "in loss of both property and life; or of all that makes life worth living.[1] This is particularly true for persons who may qualify for relief from removal under strict U.S. immigration standards.

By statute, persons in removal proceedings have "the privilege of being represented," but "at no expense to the Government."[2] As a result, most immigrants must negotiate this process without counsel. Not surprisingly, *pro se* immigrants fare far more poorly in these proceedings than do those with legal representation. Put differently, removal cases too often turn on an immigrant's income, rather than on the merits of his or her claim.

This resolution supports the provision of legal information to all persons in removal

[1] *Ng Fung Ho v. White*, 259 U.S. 276, 284, 42 S. Ct. 492, 495, 66 L.Ed. 938, 943 (1921).
[2] Immigration and Nationality Act (INA) § 292.

proceedings, referral to counsel of indigent immigrants who have potential relief from removal, and government-appointed counsel in cases where it is needed. The resolution would advance the interests of the government and protect the rights of non-citizens facing removal.

II. Relevant ABA Policies

The right to legal representation represents a core concern of the American Bar Association ("ABA" or "Association"), as reflected in the Association's goals. The ABA's second goal speaks directly to this priority: "to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." Expanding legal representation to the indigent also improves the U.S. system of justice (Goal I), promotes standards of professionalism (Goal V) and enhances public service (Goal X).

Consistent with its commitment to legal representation, the ABA has adopted several "right to counsel" policies in the immigration field. These policies seek to expand access to retained and pro bono legal representation for persons in removal proceedings, to protect existing attorney-client relationships, and to extend representation to certain vulnerable populations. Populations of particular concern include persons in removal proceedings (formerly called "exclusion" and "deportation" proceedings), political asylum seekers, unaccompanied minors, non-citizens whose removal cannot be effected, detainees, and those held in incommunicado detention. A brief summary of its policies follows.

- In 1983, the ABA opposed legislative initiatives to limit the right to retain counsel in removal proceedings and in political asylum proceedings.

- In 1990, the ABA supported "effective" access to legal representation by asylum seekers in removal proceedings. In particular, it supported improved telephonic access between detained asylum seekers and legal representatives; dissemination of accurate lists of legal service providers; and legal orientation programs and materials for detainees.

- In 2001, the ABA supported government-appointed counsel for unaccompanied minors in all immigration processes and proceedings. Likewise in 2001, the ABA opposed the involuntary transfer of detained immigrants and asylum seekers to detention facilities when this would undermine an existing attorney-client relationship. It also opposed the construction and use by the Immigration and Naturalization Service (INS) of detention facilities in areas that do not have sufficient, qualified attorneys to represent detainees.

- In 2002, in response to the post-September 11th arrest and detention of several hundred non-citizens, the ABA opposed the incommunicado detention of foreign nationals in undisclosed facilities. It also supported the promulgation in the form of federal regulations of federal detention standards (originally developed by the ABA) related to access to counsel, provision of legal information and independent monitoring for compliance with these standards.

- In 2004, the ABA adopted its own *Standards for the Custody, Placement and Care; Legal*

Representation; and Adjudication of Unaccompanied Alien Children in the United States. These standards call for timely legal rights presentations for all unaccompanied children, the opportunity to consult with an attorney, the right to have an attorney present in all proceedings affecting a child's immigration status, and (if necessary) the right to government-appointed counsel.

These policies recognize the crucial importance of legal representation in immigration proceedings. However, they do not offer a comprehensive solution to the immense unmet need for legal representation in immigration proceedings.

III. The Issue

Although viewed as "civil" in nature, removal proceedings largely mirror criminal trials.[3] Attorneys must identify, corroborate, and argue complex claims before a presiding judge. They must master a complex area of the law. They must develop and argue factually and legally complex claims for relief. They must contest the government's charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that an adverse decision will result in their client's banishment and, in some cases, significant peril.

In 2004, the ABA's Commission on Immigration released a ground-breaking report, *American Justice Through Immigrants' Eyes*, that details recent changes in the law that increase the need for legal representation in removal proceedings. These include expanded grounds for removal, diminished relief from removal, severe limitations on administrative and judicial review, the increased use of detention, and video-conference hearings. As the report demonstrates, fewer persons in removal proceedings now have viable claims for relief, and persons who can legally contest removal typically have extremely strong humanitarian or equitable claims to remain.

A. The Right to Counsel in Removal Proceedings

A 2004 report of the ABA's Standing Committee on Legal Aid and Indigent Defendants titled *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* harshly criticized the U.S. criminal justice system for spending roughly two-times more on criminal prosecutions than on indigent defense. The report called for "equivalent funding and other resources" for these essential, interdependent elements of the criminal justice system. In contrast, the government devotes no resources to the representation of immigrants in removal proceedings. Yet these proceedings are similarly complex, adversarial, and consequential.

As stated, non-citizens have a right to counsel in removal proceedings, but at "no expense to the government."[4] This provision does not necessarily preclude government-funded counsel; it merely affirms that counsel need not be provided. In fact, courts have recognized that due process might necessitate the appointment of counsel in particular cases.[5] Typically, however, they have

[3] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 4 L.Ed.2d 668 (1984).
[4] INA § 292.
[5] *See Aguilera-Enriquez v. INS*, 516 F. 2d 565, 568 (5th Cir. 1975), *cert denied* 423 U.S. 1050, 96 S. Ct. 776, 46 L.Ed.2d 638 (1976).

denied appointed counsel, reasoning that counsel would have produced no different result.[6] This reasoning neglects to recognize the crucial role that counsel plays in making the record in a case. The case-by-case approach is unworkable because, as a practical matter, there is no way to know if the absence of counsel has been harmless or not.

In addition, the statute refers to the provision of "counsel," not to activities that supplement or promote legal representation. In 1995, the INS Office of General Counsel drew this distinction in concluding that the "no expense" language did not bar the government from funding activities that "facilitate" representation.[7]

This opinion paved the way for a federally-funded "legal orientation program" that, at present, operates in six detention facilities. In 2002, modest federal funding of $1 million supported "legal orientation" presentations to 17,041 detainees.[8] Under the program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings in order to educate them on the law and to explain the removal process. Based on the orientation, a detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the overwhelming majority – typically submit to removal. According to the Executive Office for Immigration Review (EOIR), roughly 10 percent of all individuals who receive "legal orientation" presentations potentially qualify for relief from removal. While the program does not fund legal representation, participating non-profit agencies refer many of these cases to pro bono attorneys. Others with potential relief obtain legal counsel on their own. A very small percentage cannot secure counsel and, under this proposal, would be eligible for appointed counsel.

The ABA played a lead role in the creation of this program, and its ProBAR program in South Texas receives funding under it. U.S. Department of Justice evaluations of the program have found that these presentations improve the administration of justice and save the government money by expediting case completions and leading detainees to spend less time in detention.[9] Conversely, the lack of representation for asylum-seekers (and others) creates significant systemic costs:

> First and foremost, cases are delayed for considerable periods of time as asylum seekers search for counsel. When Immigration Judges realize that a respondent is asserting an asylum claim, they prefer to proceed when the claim can be presented with the assistance of counsel. For this reason, they often grant continuances giving the asylum seeker time to locate representation. Second, when competent representation is involved, the cases are presented more effectively and efficiently from the Immigration Judge's perspective. Finally, there is some evidence to suggest that the significant number of cases where asylum seekers do not show up for their hearings are closely related to lack of representation, thus

[6]B. Werlin, "Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings," 20 *B.C. Third World L.J.* 393, 404 (Spring 2000).
[7]INS Office of General Counsel, "Funding of a Pilot Project for the Representation of Aliens in Immigration Proceedings" (Dec. 21, 1995).
[8]D. Kerwin, "Revisiting the Need for Appointed Counsel," *MPI Insight*, No. 4 (Apr. 2005) at 15 [hereinafter "Revisiting the Need for Appointed Counsel"].
[9]U.S. Department of Justice, Board of Immigration Appeals, "The BIA Pro Bono Project is Successful" (Oct. 2004); U.S. Department of Justice, Executive Office for Immigration Review, "Evaluation of the Rights Presentation" (Jan. 2000).

adding to the overall inefficiency of the system (citations omitted).[10]

While the federal legal orientation program has not been extended to non-detained persons, a similar program has long been in place in New York Immigration Courts. The Immigration Representation Program ("IRP") screens non-detainees for financial need and availability of legal relief prior to their initial court hearing. It then refers qualifying cases to charitable legal programs or pro bono attorneys. Like the federal program, the IRP has received broad support from Immigration Judges and other government officials for improving the administration of justice.[11]

B. The Legal Services Crisis

The "no expense" restriction has led to low rates of legal representation in removal proceedings. More than one-half of non-citizens whose removal cases were completed in 2003 – 130,730 persons in total – lacked counsel.[12] Unrepresented immigrants frequently turn to unauthorized and often predatory non-attorneys for legal advice and representation.[13] These so-called "notarios" or "visa consultants" often collect high fees for services they do not provide and fraudulently guarantee that legal benefits will be obtained.

Not surprisingly, persons with qualified and competent legal representation secure relief at far higher rates than pro se litigants.[14] Disparities in case outcomes are particularly dramatic in political asylum cases. In 2003, 39 percent of non-detained, represented asylum-seekers received political asylum, in contrast to 14 percent of non-detained, unrepresented asylum-seekers.[15] Eighteen (18) percent of represented, detained asylum-seekers were granted asylum, compared to 3 percent of detained asylum-seekers who did not have counsel.

The U.S. Commission on International Religious Freedom found success rates of 25 percent in cases of asylum seekers with legal representation who were initially caught at a port-of-entry without proper documents, compared to 2 percent approval rates for those without representation.[16] This disparity could not be explained by attorneys selecting the strongest cases.[17] Representation rates, it concluded, turned more on the availability of counsel, than on the strength of the cases. As evidence, the Committee found that approval rates remained comparable between areas with the lowest and the highest rates of representation

[10]A. Schoenholtz and J. Jacobs, "The State of Asylum Representation: Ideas for Change," 16 *G'town. Immig. L.J.* 739, 746 (Summer 2002) [hereinafter "The State of Asylum Representation."]
[11]*See* "Revisiting the Need for Appointed Counsel," *supra* note 8 at 13-14.
[12]U.S. Department of Justice, Executive Office for Immigration Review, "FY 2003 Statistical Yearbook" (Apr. 2004).
[13]*See generally* A. Moore, "Fraud, The Unauthorized Practice of Law and Unmet Needs: A Look at State Laws Regulating Immigration Assistants," 19 *Geo. Immigr. L.J.* 1 (Fall 2004).
[14]*See* "The State of Asylum Representation: Ideas for Change," *supra* note 10, at 739-740 ("... represented asylum cases are four to six times more likely to succeed than pro se ones.")
[15]D. Kerwin, Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded," *Immigration Briefings*, No. 04-06 (June 2004) at 11-12 [hereinafter "Charitable Legal Programs."]
[16]U.S. Commission on International Religious Freedom, "Report on Asylum Seekers in Expedited Removal," Vol. II (Feb. 2005) at 239 [hereinafter "Report on Asylum Seekers."].
[17]*Id*.

The unrepresented include thousands of indigent persons, many in detention, with viable claims to remain in the United States based on a fear of persecution, likelihood of torture, long-term lawful permanent residence in the United States, and family ties. As the ABA has recognized in developing immigration detention standards and in its past immigration resolutions, detention significantly impedes access to legal representation, making it far difficult for attorneys to offer representation, for immigrants to obtain counsel, and for pro se litigants to prepare their own cases. *American Justice Through Immigrants' Eyes* describes some of the impediments as follows:

> The government's detention practices make it exceedingly difficult for detained persons to secure and communicate with counsel and pursue relief. Immigration authorities frequently transfer detainees to distant locations, often without notifying their lawyers and without regard for their need to prepare for a hearing or to be close to their families and support systems. Many of the more than 900 facilities used for immigration detention are in rural locations, far from private and pro bono lawyers and non-profit legal programs, making access to lawyers, families, and legal materials even more difficult. Without representation, detained persons often cannot access the extensive documentation and other information necessary to meet their burden of proof and apply for most forms of relief, including asylum.[18]

It should be emphasized that the number of persons who are potentially eligible for relief from removal is limited. Significant categories of persons are excluded. For example, a person (even a lawful permanent resident) who committed an "aggravated felony" – an expansive category of crimes particular to U.S. immigration law that includes relatively minor offenses and misdemeanors – is not eligible for relief.[19] This is true notwithstanding an immigrant's long tenure in the country, U.S. citizen family members, the lack of severity of his or her offense, the time elapsed since its commission, and evidence of rehabilitation.

Undocumented persons qualify for relief from removal only in extremely narrow circumstances. "Cancellation of removal" – an equitable form of relief – can be granted to undocumented persons of good moral character who have been continuously present in the United States for at least 10 years, if their removal would work an "exceptional and extremely unusual" hardship on a U.S. citizen parent or a U.S. citizen or lawful permanent resident spouse or child. The undocumented can also receive political asylum, adjustment of status to permanent residence (if they have a family-based visa immediately available), temporary protected status (if they fall within a group designated as eligible for this relief due to armed conflict, natural disaster or other extraordinary conditions in their home nation), and certain other population-specific forms of relief.

Beyond the obvious interest of affected non-citizens, legal representation also benefits the government and the administration of justice. As stated, it leads to improved appearance rates in court, fewer requests for continuances, and shorter periods in detention at significant financial savings.[20] It also deters frivolous claims. Above all, increased representation serves the

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[18]American Bar Association, Commission on Immigration, "American Justice Through Immigrants' Eyes" (2004) at 68.
[19]*Id*. at 23-26.
[20]*See* "Report on Asylum Seekers," *supra* note 16 at 243; U.S. Department of Justice, Executive Office for Immigration

government's interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit, and not on a litigant's income.

IV. ABA Resolution

In its policy resolutions and its pro bono programs, the ABA has consistently recognized the crucial importance of: (1) legal orientation presentations to non-citizens (particularly detainees) in removal proceeding; and (2) representation of particularly vulnerable populations like political asylum seekers, unaccompanied minors and detainees. The proposed resolution builds on existing ABA policies to offer a comprehensive framework for representation of immigrants in removal proceedings.

First, it supports expansion of the federally-funded legal orientation program to all persons in removal proceedings, both those in detention and those not in custody. Given the severe consequences of removal, due process demands that all immigrants facing removal receive a minimal level of information on immigration law, removal proceedings, and their potential eligibility for relief. For a relatively small investment of $1 million annually, the federal "legal orientation program" currently serves 20 percent of the non-citizen detainees whose removal proceedings are completed each year.[21] Expansion of this program to other large detention facilities and to Immigration Courts would be feasible.

The resolution also supports referral of indigent persons with potential relief from removal to legal counsel. A legal rights presentation allows an immigrant to make an educated judgment on the availability of relief from removal in his or her case. In an ideal system, all immigrants would enjoy the benefit of representation in making this judgment. However, because such a system would be extremely expensive, the resolution opts for a more modest approach. It supports referral to counsel of indigent immigrants who have determined, based on a legal orientation, that relief from removal may be available in their cases. As stated, roughly 10 percent of those who receive legal orientation presentations have viable claims for relief. Of this figure, many secure pro bono counsel and others obtain paid counsel (typically upon release). A very small percentage – those eligible for relief from removal who cannot otherwise obtain legal counsel – would be eligible for appointed counsel under the resolution.

In addition, the resolution supports legal representation for mentally ill and disabled persons for the duration of their cases. Due process demands that these vulnerable persons receive legal representation throughout the immigration process. In particular, they should not have to determine (on their own) whether or not they might qualify for relief.

Finally, the resolution recognizes the limited pool of pro bono attorneys, Legal Services Corporation-funded agencies, and charitable legal immigration programs who accept representation in removal cases. These traditional sources cannot meet the demand for representation on their own. For this reason, the resolution supports a system of appointed counsel for indigent persons who

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Review, "Evaluation of the Rights Presentation" (Jan. 2000) at 1, 3-9, 11-12.

[21] *See* "Revisiting the Need for Appointed Counsel," *supra* note 8 at 15.

cannot otherwise secure representation. While the "no cost to the government" restriction does not preclude appointed counsel in select cases, the resolution proposes a system that may conflict with this restriction. Thus, it supports legislation to overturn the restriction and to allow appointed counsel in cases where it is necessary.

V. Conclusion

The resolution supports a national system that would: (1) provide legal orientation presentations to all persons in removal proceedings; (2) refer unrepresented persons for whom relief might be available to counsel; (3) provide government-appointed counsel for indigent persons who cannot otherwise secure pro bono representation; and (4) assure that two particularly needy populations – mentally ill and disabled persons – receive legal representation in all immigration processes or procedures, whether or not relief might be available to them.

Such a system would assure a minimal level of legal information and screening for all persons in removal proceedings, and would guarantee representation for those who might be eligible for relief from removal under U.S. law. It would also guarantee representation for mentally ill and disabled persons throughout the immigration process. The resolution would benefit the affected non-citizens, improve the administration of justice, and increase the efficiency of the removal process.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
February 2006

CERTIFICATE OF SERVICE

On October 6, 2008 I, Brian Yourish, served the original copy of this Brief of Amici Curiae electronically to AGCertification@usdoj.gov, and in triplicate to

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