



## AMERICAN IMMIGRATION LAW FOUNDATION

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### Summary of *Matter of Compean* (Attorney General Decision on Claims Regarding Counsel in Removal Proceedings)

The following is a summary of the Attorney General's decision in *Matter of Compean*, 24 I & N Dec. 710 (A.G. 2009), the decision overruling *Matter of Lozada*, 19 I & N Dec. 637 (BIA 1988) and *Matter of Assaad*, 23 I & N Dec. 553 (BIA 2003). This is a summary, not a critique or an analysis. Readers are cautioned to read the entire *Compean* opinion, as there are details not covered here.

#### Constitutional and legal conclusions

In *Compean*, the Attorney General (AG) said that people in removal proceedings have no Constitutional right to counsel in such proceedings. In the AG's view, they have only a statutory privilege to retain counsel of their own choosing. Therefore, he held, people have no right to have their cases reopened when counsel was ineffective.

First, the AG said, there is no Sixth Amendment right because removal proceedings are civil, not criminal proceedings. Second, the AG believes that, although the Fifth Amendment's Due Process Clause applies in removal proceedings, it "does not entitle an alien<sup>2</sup> to effective assistance of counsel, much less the specific remedy of a second bite at the apple based on the mistakes of his own lawyer." 24 I & N Dec. 710, 714. This is because, the AG says, the Fifth Amendment's due process guarantee only applies against the government, not against "a privately retained lawyer in removal proceedings." *Id.* at 720-21. Thus, even if counsel is incompetent, fraudulent, or entirely fails to appear to represent the person, the AG does not believe that such a hearing would be fundamentally unfair.

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<sup>2</sup> Throughout, the *Compean* opinion uses the term "alien." We do not use that term for several reasons, including that not all persons in removal proceedings are noncitizens. Some are U.S. citizens attempting to establish that fact.

According to the AG, the fact that immigration laws are so complex, respondents so ill equipped, and the stakes in removal proceedings so high, has no bearing on whether the Due Process Clause requires competent counsel. *Id.* at 724-25. He also does not believe that the government’s expansive and expanding regulation of the immigration bar has any effect on this analysis. *Id.* at 721.

That respondents have the “statutory privilege” of being represented by counsel does not change the constitutional analysis, the AG says, or give the person the right to complain or have the proceedings reopened if the lawyer was ineffective. *Id.* at 726. There is no constitutional, statutory or regulatory entitlement to have the proceedings reopened based on the lawyer’s deficient performance, the AG believes. *Id.*

Nevertheless, the AG says, the Board of Immigration Appeals (BIA) and immigration judges (IJs) *may*, “as a matter of sound discretion” reopen removal proceedings in “extraordinary cases” based on lawyer error. *Id.* at 727, 732.<sup>3</sup> This discretion, however, does not extend to reopening cases based on the conduct of people who are not lawyers or accredited representatives, that is, “immigration consultants” or “notarios” unless the person “reasonably but erroneously believed” the person was a lawyer. *Id.* at 729, n. 7. Therefore, a person who is defrauded by a non-attorney immigration consultant, whom the person did not reasonably believe to be a lawyer, has no possibility of having the removal order reopened based on a claim of ineffective assistance.

### **Framework for consideration of “deficient performance” claims**

The AG provides a “framework” for the BIA and IJs to apply for consideration of what he calls “deficient performance claims.” *Id.* at 730-31. This framework “supersedes” the *Lozada* framework. To prevail on a claim of “deficient performance of counsel,” the person bears the burden of establishing three elements:

1 – The person must show the lawyer’s failings were “egregious.” It is not sufficient to demonstrate that the lawyer made “an ordinary mistake.” There is “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 732.

2 – If the motion to reopen is filed after the applicable time limit – typically 90 days from the date of the removal order – the BIA or IJ may “toll” the time-period, but only if the person affirmatively shows that he or she exercised “due diligence” in discovering and seeking to cure the alleged deficient performance. *Id.* at 732. Also, the determination whether to toll, the AG says, like the decision

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<sup>3</sup> There are nine summary points preceding the AG’s opinion, sometimes known as “headnotes.” Summary point 4 refers to this point as “administrative grace.” However, that phrase does not appear in the opinion itself.

whether to reopen, is “committed in all instances to the discretion of the Board [and the IJ].”<sup>4</sup>

3 – The person must establish prejudice arising from the lawyer’s errors. *Id.* at 733. Specifically, the person must show that “but for” the lawyer’s deficient performance, “it is more likely than not that the [person] would have been entitled to the ultimate relief he was seeking.” *Id.* at 733-34. Where the person seeks discretionary relief, he or she also must present evidence that would have led to a favorable exercise of discretion. *Id.* at 734-35.

### **Document requirements:**

The AG’s decision says that a person who seeks reopening of removal proceedings based on deficient performance must submit the following documents in support of the motion. *Id.* at 735-39. These requirements are “mandatory,” the AG says, criticizing courts for deeming “substantial compliance” to be adequate. *Id.* at 739. Even if the person complies with all requirements, reopening is still discretionary. *Id.*

- a) A detailed affidavit setting forth the facts, explaining specifically what the lawyer did or did not do and why the person was harmed. *Id.* at 735
- b) Five documents or sets of documents. If documents are unavailable, the person must explain why. If documents are missing, the affidavit must specify the contents. *Id.*
  - 1) A copy of the agreement, if any, with the former lawyer. If there was no agreement, the affidavit must specify what the lawyer agreed to do, *id.* at 736;
  - 2) A copy of a letter to the former lawyer setting forth the deficient performance and response, if any. If there was no response from the former lawyer, the affidavit must note when the letter was mailed and whether the person made other efforts to notify the former lawyer, *id.* at 736;
  - 3) A completed and signed complaint addressed to the appropriate State bar or disciplinary authorities. The person need not file this complaint with the authorities but must submit it to the BIA. The BIA will determine whether to refer the complaint to the State bar or EOIR disciplinary counsel or neither,<sup>5</sup> *id.* at 737;
  - 4) If the person’s claim is that the former lawyer failed to submit something to the IJ or the BIA, he or she must attach it to the motion. Examples: a BIA

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<sup>4</sup> The AG said this decision applies equally to motions to reopen filed with IJs. *Id.* at 728, n. 6.

<sup>5</sup> Complaints against accredited representatives are to be addressed to EOIR. *Id.* at 737, n. 10.

brief or the actual physical or documentary evidence that should have been submitted, *id.* at 738;

5) A statement signed by new counsel, if any, that the performance of former counsel fell below minimal standards of professional competence, *Id.* at 738.

### **Post BIA order deficiencies**

The AG said the BIA’s discretion to reopen on the basis of a lawyer’s deficient performance is not limited to conduct that occurred during the agency proceedings, but also includes deficient performance that occurred subsequent to the entry of a final order of removal, i.e., after the BIA issued its decision. *Id.* at 740.

### **Application to pending matters**

The AG said that the BIA and IJs “should apply the substantive standards” regardless of when such motions were filed. That is, the AG’s opinion about the constitutional and legal standards applies immediately. The new filing requirements apply only to motions filed after January 7, 2009. *Id.* at 741.