UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

January 28, 2004

GUY SANTIGLIA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 03B00008
	)	
SUN MICROSYSTEMS, INC.,	)	
Respondent.	)	
	)	

ORDER DENYING COMPLAINANT'S MOTION TO EXCLUDE OPPOSING COUNSEL

I. PROCEDURAL HISTORY

Guy Santiglia filed a pro se complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) in which he alleged that by eliminating his job in the course of a reduction in force (RIF), Sun Microsystems, Inc. (Sun) discriminated against him in violation of the nondiscrimination provisions of the Immigration and Nationality Act as amended, 8 U.S.C. § 1324b, and that Sun subsequently retaliated against him as well. Sun denied all the material allegations of the complaint. Discovery and extensive motion practice followed. Currently pending is Santiglia's "Motion to Exclude Respondent's Counsel Roxana Bacon and Littler Mendelson Bacon & Dear, PLLC, from Representing the Respondent." Sun filed a response to the motion and Santiglia filed a reply to Sun's response. The motion is ripe for resolution.

II. THE INSTANT MOTION

Santiglia's motion asserts that Sun's counsel engaged in conduct "which is in direct violation of Rule 11 of the Federal Rules of Civil Procedure (FRCP) and the standards of conduct specified in 28 C.F.R. § 68.35,"[1] and that he seeks to exclude Bacon and her firm from further participation in the case for that reason. The motion also requests on the same authority that monetary penalties in unspecified amounts be imposed upon Bacon. It is accompanied by four attachments: A) pages 197-212 of the transcript of testimony in Department of Labor Case 2003-

[1] *See* Rules of Practice and Procedure, 28 C.F.R. Pt. 68 (2003)

LCA-00002; B) a letter from the Office of Special Counsel to Gerald Barnes dated February 13, 2003; C) a list of Labor Condition Applications (LCAs) purporting to have been compiled from "DOL H-1B Disclosure info, www.flcdatacenter.com;" and D) a Labor Condition Application for H-1B worker, Form ETA 9035. Sun filed a response in opposition which did not include evidentiary materials.

III. APPLICABLE STANDARDS

A. Authority of the Forum to Grant the Relief Sought

Santiglia cites no authority for the use of Rule 11 of the FRCP to impose monetary penalties on attorneys for misconduct in the course of OCAHO proceedings, and relevant case law makes clear that there is no such authority to be cited: as explained in *United States v. Nu Look Cleaners of Pembroke Pines, Inc.*, 1 OCAHO no. 274, 1771, 1780 (1990) (Action by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge's Decision and Order),[2] while 28 C.F.R. § 68.1 acknowledges the FRCP as a useful guideline to supplement OCAHO's procedural rules, that provision does not purport to clothe an administrative law judge with the authority to impose monetary penalties on attorneys. Accord, *United States v. Park Sunset Hotel*, 3 OCAHO no. 525, 1266, 1269 (1993) (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decision and Order) (procedural sanctions in ongoing OCAHO proceedings are limited to those in 28 C.F.R. Pt. 68 and do not include those in Rule 11 or Rule 37 of the FRCP). To the extent *United States v. Arnold*, 1 OCAHO no. 119, 782, 799-803 (1989) may suggest otherwise, it appears to have been superseded by *Nu Look*.[3]

Santiglia also refers to "the standards of conduct specified in 28 C.F.R. § 68.35," but that section does not purport to specify standards of conduct or to confer authority on administrative law judges to assess monetary penalties in the course of OCAHO proceedings either. *Id.* It provides in relevant part,

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[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation.

[3] While *Nu Look* and *Park Sunset* both involved cases arising under § 1324a, I have no reason to believe that the procedural rules set out at 28 C.F.R. Pt. 68 have one meaning for cases arising under § 1324a and another meaning for those arising under § 1324b.

> (a) All persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity, and in an ethical manner.
>
> (b) The Administrative Law Judge may exclude from proceedings parties, witnesses, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications.

The motion does not contend that Sun's counsel refused to comply with directions, used dilatory tactics or engaged in ex parte communication, and the only questions posed relate to refusal to adhere to unidentified standards of orderly and ethical conduct and failure to act in good faith. Santiglia's motion did not identify any specific "standards of orderly and ethical conduct" and *Nu Look* makes clear that OCAHO rules nowhere set out or establish explicit standards or rules of conduct for attorneys beyond the general aspirational goals articulated in § 68.35. Nowhere do those rules authorize a system of monetary penalties against counsel or punishment for misconduct either. *Nu Look*, 1 OCAHO at 1779. I am accordingly unaware of any authority for the monetary penalties requested here, and both *Nu Look* and *Park Sunset* expressly prohibit such an award. *Cf. Toussaint v. Tekwood Assocs., Inc.,* 6 OCAHO no. 892, 784, 808 (1996), *aff'd Touissant v. OCAHO*, 127 F.3d 1097 (3d Cir. 1997) (table); *United States v. McDonnell Douglas Corp.*, 2 OCAHO no. 351, 361, 376 (1991) (regulations do not authorize the imposition of monetary sanctions against counsel). Sanctions may ordinarily be imposed only where specifically authorized by regulation or by statute. *Cf. Roginsky v. DOD*, 2 OCAHO no. 341, 329, 333-34 (1991) (acknowledging doubt as to any power to impose fees or costs except as expressly authorized by 8 U.S.C. § 1324b(h)). The monetary penalties Santiglia seeks are thus not only unavailable under applicable OCAHO rules, they are also directly contrary to OCAHO case law. The motion will accordingly be summarily denied as to the issue of monetary sanctions; it will be considered only as one to exclude counsel pursuant to 28 C.F.R. § 68.35(b).

The authority for an administrative law judge to exclude or recuse counsel is, on the other hand, derived from OCAHO's own rule 28 C.F.R. § 68.35(b), and the authority of an adjudicator to supervise the conduct of persons appearing before the forum. *McNier v. San Francisco State Univ.,* 8 OCAHO no. 1034, 524, 532 (1999). OCAHO adjudicators have not hesitated to exclude representatives sua sponte under appropriate circumstances. *Lee v. AT&T*, 7 OCAHO no. 924, 1, 5 (1997) (representative excluded for submitting repetitive and unresponsive filings, failing to comply with pre-hearing orders of the administrative law judge and failing to attend pre-hearing conference). Such a harsh result is not lightly undertaken however, and occurs only in the most egregious of circumstances. *See Hsieh v. PMC-Sierra, Inc.*, 9 OCAHO no. 1100, 41 (2003) (reprimanding but not excluding counsel, despite numerous instances of disobedience of orders, unsupported pleadings, frivolous assertions of privilege and other obstructions of discovery).

Notwithstanding the express authority granted in OCAHO's Rule 68.35(b), an agency's right to exclude an attorney in administrative proceedings must be exercised in the context of the right to counsel provided under the Administrative Procedure Act, 5 U.S.C. § 555(b), which has been construed to mean the right to counsel of one's choice. *Securities & Exch. Comm'n v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966). A litigant's freedom to choose his own counsel is so fundamental to the adversary system that disqualification is imposed only in the most extreme of circumstances; because it is a drastic measure, courts hesitate to impose disqualification except when required by absolute necessity. *Richards v. Jain*, 168 F.Supp.2d 1195, 1200 (W.D. Wash. 2001); *In re Marvel*, 251 B.R. 869, 871 (N.D. Cal. 2000), *aff'd* 265 B.R. 605 (N.D. Cal. 2001). Disqualification of counsel imposes a hardship on an arguably innocent client who then bears the burden of finding replacement counsel. *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 264 F.Supp.2d 914, 918 (N.D. Cal. 2003). *Cf. Smith, Smith & Kring v. Superior Court (Oliver)*, 60 Cal.App.4th 573, 581, 70 Cal.Rptr. 2d 507, 511 (1997).

B. Law Applicable to an Opposing Party's Motion to Exclude Counsel

Because motions to disqualify opposing counsel are susceptible to use as procedural weapons for strategic or tactical advantage, they are viewed with extreme caution. *Cf. Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424, 441 (1985) ("the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation") (concurring opinion); *Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100, 1104 (N.D. Cal. 2003) (motions to disqualify counsel are "strongly disfavored"). In recognition of their potential for abuse, such motions are subjected to particularly strict judicial scrutiny. *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985). The moving party carries a heavy burden and must satisfy a high standard of proof. *Marvel*, 251 B.R. at 871. Factual allegations made in a motion to disqualify must be supported by proper evidence. *Colyer v. Smith*, 50 F.Supp.2d 966, 967 (C.D. Cal. 1999). Accordingly, a motion to disqualify opposing counsel should be accompanied by declarations and admissible evidence sufficient to establish the factual predicate upon which the motion depends. *Yagman v. Republic Ins.*, 136 F.R.D. 652, 655 (C.D. Cal. 1991), *aff'd*, 987 F.2d 622 (9th Cir. 1993).

With narrow exceptions, the general rule is that an attorney may be disqualified on the grounds of conflict of interest in a civil case only where a current or former client moves for such disqualification. *Kasza v. Browner*, 133 F.3d 1159, 1171 (9th Cir. 1998); *United States v. Rogers*, 9 F.3d 1025, 1031 (9th Cir. 1993). *See generally* Douglas R. Richmond, *The Rude Question of Standing*[4] *in Attorney Disqualification Disputes*, 25 Am. J. Trial Advoc. 17 (2001). As pointed out in a leading case, *In re Yarn Processing Patent Validity Litig.,* 530 F.2d 83, 90

[4] The "rude question" is that once posed by Justice Scalia, "What's it to you?" Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881, 882 (1983).

(5th Cir. 1976),

> To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist. It would place in the hands of the unauthorized surrogate powerful presumptions which are inappropriate in his hands.

The same standing requirement applies as well to motions to disqualify opposing counsel for reasons other than conflict of interest. Some jurisdictions have found the ABA's Model Code or Model Rules to confer standing on an attorney to challenge an opposing party's representation based on the command in those rules that an attorney has the right and obligation to bring alleged rule violations to the court's attention. *Black v. Missouri*, 492 F.Supp. 848, 861-62 (W.D. Mo. 1980). *See generally* Mark J. Fucile, *Disqualification Motions and the RPC's: Recent Decisions Using Ethics Rules as the Basis for Disqualification*, 1999 Prof. Law. 9 (1999). Here, however, the complainant is not an attorney and California has not adopted the ABA Model Rules, *Hetos Invs. Ltd. v. Kurtin*, 110 Cal.App.4th 36, 46, 1 Cal.Rptr. 3d 472, 479 (2003) (ABA Model Rules "do not establish ethical standards in California, as they have not been adopted in California and have no legal force of their own"), *Decaview Distribution Co., Inc. v. Decaview Asia Corp.*, 2000 WL 1175583 (N.D. Cal.), *Colyer*, 50 F.Supp.2d at 971, so no standing derives from the Model Rules either.

It has generally been found appropriate where ethical issues are raised in OCAHO proceedings to look to the ethical rules applicable to the bar in the state where the events in question occurred. *Avila v. Select Temporaries, Inc.*, 9 OCAHO no. 1079, 8 (2002). Despite the fact that neither of the parties has made reference to them, here that authority would be the California Rules of Professional Conduct (CRPC).[5] Although these rules are designed to guide lawyers and regulate their conduct through disciplinary agencies, they nevertheless provide the most objective and appropriate standard for determining whether an ethical violation has actually occurred. Federal courts in the circuit similarly defer to relevant state law standards of conduct for attorneys in order to determine whether there has been an ethical violation. *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1122 (9th Cir. 2001) (California law governs whether an attorney committed an ethical violation in a California federal case); *Palmer v. Pioneer Inn Assocs., Ltd.*, 257 F.3d 999, 1003 (9th Cir. 2001) (certifying to Nevada Supreme Court question of appropriate standard to be applied to question of propriety of ex parte contact with former employee). *Cf. United States v. Davila*, 6 OCAHO no. 895, 837, 841 (1996) (referring parties in Texas case to that state's Northern District Guidelines of Professional Courtesy).

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[5] These rules do not impose upon attorneys a duty to report comparable to that in the Model Code or the Model Rules. *See Colyer*, 50 F.Supp.2d at 972.

California courts, however, have concurred in the view that standing to challenge an opposing party's choice of counsel is ordinarily limited to clients or former clients. *See* Paul W. Vapnek, Mark L. Tuft, Ellen R. Peck and Justice Howard B. Wiener (Ret.), Cal. Prac. Guide Prof. Resp. Ch. 4-G(2)(c) (only a client or former client has personal stake sufficient to satisfy requirement of injury in fact; litigants generally do not have standing to raise the rights of others). Because violations of ethical rules ordinarily do not create any cause of action for a third party or any presumption that a legal duty to such a party has been breached, Fucile, 1999 Prof. Law. 9, it does not appear that a nonclient can derive any standing from the CRPC either. As Fucile cautioned with respect to the Model Rules, the purpose of any rule can be subverted when it is invoked by an opponent as a procedural weapon. *Id.* A standing requirement provides some protection against such use.

While the Ninth Circuit does not appear to have addressed the question directly, federal district courts in California have suggested that the "narrow exceptions" under which a nonclient can raise an objection to opposing counsel are restricted to those instances in which an alleged ethical breach "so infects the litigation as to impact upon the ability of the forum to reach a just and lawful determination of the claim." *Colyer*, 50 F.Supp.2d at 971. *See also Decaview*, 2000 WL 1175583 *10, adopting the *Colyer* analysis. California courts too, noting the balancing of interests required, suggest that disqualification is warranted only where an attorney "wrongfully acquired an unfair advantage[6] that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court." *Responsible Citizens v. Superior Court (Askins)*, 16 Cal.App.4th, 1717, 1725, 20 Cal.Rptr. 756, 761 (1993), citing *Gregori v. Bank of America*, 207 Cal.App.3d 291, 309, 254 Cal.Rptr. 853 (1989). This is because the state courts view the purpose of a disqualification order as being prophylactic, not punitive; unless there is a genuine likelihood that the outcome of the proceedings will be affected, disqualification is inappropriate. *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.*, 52 Cal.App.4th 1, 11, 60 Cal.Rptr.2d 207, 213 (1997).

IV. DISCUSSION AND ANALYSIS

It is the nonclient litigant who bears the burden of establishing the narrowly defined exceptional circumstances which prove he has a personal stake or legally cognizable interest sufficient to outweigh the opposing party's interest in selecting its own attorney. Santiglia's motion founders at the threshold because he is not a current or former client of Sun's counsel and he has otherwise shown no personal stake in Sun's choice of representative. *Cf. McNier*, 8 OCAHO at 528-30 (1999) (granting complainant's motion to recuse defense counsel on the grounds that a member of his firm had served as a mediator and heard confidences in a related action between the same

[6] The requirement of obtaining an "unfair advantage" evidently constitutes an injury in fact sufficiently concrete and particularized to provide standing.

parties); *Poly Software Int'l Inc. v. Su*, 880 F.Supp. 1487, 1494 (D. Utah 1995) (former mediator who received confidential information from parties during mediation could not, under Utah Professional Conduct Rules, represent anyone in substantially related litigation without the consent of all parties).

Unlike the complainant in *McNier*, Santiglia identified no injury to himself or to the integrity of the judicial process. Neither did he allege or show any advantage, unfair or otherwise, which Sun obtained in this proceeding, or articulate any other basis which would satisfy the exacting standards articulated by the courts. Far from meeting the *Colyer* requirement that the matters complained of "so infect[s] the litigation as to impact upon the ability of the forum to reach a just and lawful determination of the claim," the matters Santiglia complains of have had no discernable impact on these proceedings; there appears to be no realistic prospect that they ever will and Santiglia makes no claim that they did or are likely to. As the tone of the motion makes clear, its purpose is punitive, not prophylactic.

Neither the CRPC nor 28 C.F.R. § 68.35(b) was designed as a vehicle for a party to create ancillary satellite litigation which in no way addresses the merits or substance of the underlying cause. This is why the principal enforcement mechanism for the CRPC lies with the disciplinary authority rather than the courts. This is also why *Colyer* requires a showing, before exclusion can be considered, that there has been or is likely to be some substantial impact upon the ability of the forum to reach a just and lawful determination of the claim. Assessed in light of the CRPC and governing case law, there is less to Santiglia's motion than meets the eye.

Santiglia says he believes two separate conflicts exist between Sun's interests and those of Bacon and her law firm, and that Bacon misrepresented material facts on five specific occasions. Sun denies all those allegations.

A. Alleged Conflicts of Interest

Far from alleging that he has himself any tangible or legally cognizable interest in Sun's choice of counsel or that the conflict he alleges adversely affects him, Santiglia predicates his claim of conflict of interest upon some hypothetical injury to Sun, concluding with respect to Bacon's firm, "I don't think they can fairly represent the client."

Even assuming arguendo that Santiglia had standing to raise the conflicts issue, he offered no evidence which demonstrates either a legally cognizable conflict of interest or a factual predicate for disqualification on that basis. His motion is distinguished by a total absence of citation to any supporting authority, as well as the total absence of reference to any objective standard to be applied. Santiglia appears, moreover, to misunderstand both the legal meaning of the term conflict of interest and the showing required to establish such a conflict. An allegation of conflict of interest must be assessed in accordance with applicable rules defining when a conflict occurs as well as in light of the governing case law. Examined in light of the CRPC and case law

in the circuit, Santiglia's allegations of conflict of interest are patent nonsense. *See also* Restatement (Third)[7] of the Law Governing Lawyers, Proposed Final Draft No. 1, American Law Institute 1996, Ch. 8 - Conflicts of Interest.

Santiglia suggests two purported conflicts between Bacon and Sun: 1) Bacon "may actually be representing the interests of her own law firm or the interests of her foreign worker clients who may be working at Sun," because the more H-1B applications the firm files the more legal fees her firm can collect, and 2) Bacon also represents Sun in "a closely related matter regarding violations of federal regulations governing the H-1B visa program."

1. Bacon's Financial Interest and the Alleged Representation of H-1B Visa Holders

As to Santiglia's view that the Bacon firm has a financial interest simply because it receives compensation for its work, this is not the type of interest which ordinarily gives rise to a conflict of interest. Unless representation is undertaken on a pro bono basis, a lawyer's self-interest is, in theory, inherent in any case in which she participates. A legally cognizable financial conflict is not created simply because an attorney receives payment, but only where a particular financial arrangement itself creates a conflict, for example, media or literary rights as a method of payment in a criminal case, *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981). *See generally* William J. Gamble, Jr., *Cash Conflicts: Reconciling Conflicts of Interest Between Attorneys' Fees and the Needs of the Client*, 23 J. Legal Prof. 347 (1998-99) (citing as other examples a lawyer's participation in a business transaction or partnership with a client, a contingency fee agreement in a criminal or divorce case or the payment of attorney's fees by a third party such as an insurer with a different interest). *See also* Restatement (Third) of the Law Governing Lawyers, Proposed Final Draft No. 1, American Law Institute 1996, Ch. 3 - The Financial and Property Relationship. Of course a lawyer's personal self interest may diverge from a client's in a non-financial way as well, for example, *United States v. Hanoum*, 33 F.3d 1128, 1130-32 (9th Cir. 1994), *cert. denied*, 514 U.S.1068 (1995) (criminal defense attorney's affair with defendant's wife was motive to want defendant to be convicted), but no such showing has been made here either.

Santiglia alleges without evidentiary support that Bacon represents the ultimate recipients of H-1B visas at Sun. His theory is that Bacon and her "foreign worker clients" benefit from Sun's

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[7] There has never been a First or Second Restatement of the Law Governing Lawyers. ALI has called this Restatement the "Third" because it is working on the third series of Restatements. Ronald D. Rotunda, *Gauging the Impact of the Proposed Restatement of the Law Governing Lawyers*, 9 No. 2 Prof. Law. 2. The Restatement is not binding on California lawyers, but is considered one of several persuasive sources where no specific California standard exists. *Dieter v. Regents of Univ. of Cal.*, 963 F.Supp. 908, 910-11 (E.D. Cal. 1997).

hiring of foreign workers but that such practices "might not be in Sun's best interest." (Bacon and her firm benefit, according to Santiglia, because the more H-1B visas that are needed by Sun, the more legal fees the firm receives.) But Santiglia has shown no factual predicate for his assertion that Bacon represents any "foreign worker clients." The question of whether an attorney-client relationship exists is a mixed question of law and fact. *In re Grand Jury Subpoenas*, 803 F.2d 493, 496 (9th Cir. 1986), *opin'n corrected by* 817 F.2d 64 (9th Cir. 1987). *But see Responsible Citizens*, 16 Cal.App.4th at 1734, 20 Cal.Rptr.2d at 766 (whether attorney-client relationship exists is question of law but may require the resolution of factual issues as well). Santiglia presented no evidence at all showing that Bacon was retained by any "foreign worker clients" to file LCAs; indeed he could not, because prospective H-1B workers are not eligible to file those applications on their own behalf. *See* 20 C.F.R. §§ 655.700 et sequitur. It can only have been Sun itself which filed the applications because an employer is the only entity permitted to file an LCA. *Id.* The materials submitted by Santiglia in support of this allegation (Attachments C and D)[8] do not contain the name of a single "foreign worker client" whom Bacon allegedly represents or represented in the labor condition application process. If Bacon or her firm signed applications of any character as the agent or attorney for alien workers, those applications have not been made a part of this record. Santiglia thus provided neither law nor facts to show that an attorney-client relationship existed between Bacon and any foreign worker, and the relationship cannot be established by unsupported accusations in a pleading.

A conflict of interest is not established, moreover, simply by a party's pronouncement that the opposing party's own voluntary conduct is not in its best interest. It is Sun which hired Bacon and her firm to defend this case. It is Sun which hired Bacon and her firm to assist in the filing of LCAs. Sun presumably knows where its own interest lies and there is no evidence which suggests otherwise. While representation of multiple parties in the same case may under some circumstances risk adverse consequences, *Unified Sewerage Agency of Washington County, Or. v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981), Bacon and her firm represent only one client in this case: there is no dual representation or conflict.

2. Bacon's Representation of Sun in the DOL Matter

Neither does Santiglia cite any authority for the novel proposition that a conflict of interest is created when an attorney represents the same client in more than one matter. Santiglia alleges that Bacon's actions in DOL case 2003-LCA-00002 "appear to cause conflict with her interest to

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[8] Attachment C is not authenticated and lacks foundation. In the absence of objection, I have nevertheless considered it. The document contains no signatures but lists Bacon as the "contact" for 35 LCAs dated from May 9, 2001 to February 28, 2002. Nowhere on the exhibit does the name of any particular alien worker appear. Bacon is also listed as the "contact" on Attachment D, but the person signing that LCA on behalf of Sun was Heidi Wilson, Sun's Corporate Immigration Manager, not Bacon.

fairly represent Sun in this matter now before OCAHO." While representation of a single client in two different proceedings may "appear" to Santiglia to cause conflict, this can only be because he misapprehends the nature of a legally cognizable conflict. Law firms can and do represent the same client in multiple proceedings as a routine matter every day; nothing in such a scenario remotely suggests any impropriety.

Santiglia contends that the DOL case is a "closely related matter" and that Bacon misrepresented the address of Sun's official corporate headquarters in that case and does the same in this case. (This is the same allegation as is made with respect to Incident no. 4 infra). Other than Santiglia's bald conclusion, there is no showing that the DOL case is "closely related" to this one because the question of whether Sun complied with all the DOL regulations governing the H-1B visa program, at issue in DOL case no. 2003-LCA-00002, has minimal, if any, prima facie relevance to the issues in this case. *Cf. McDonnell Douglas*, 2 OCAHO at 374 (respondent's use of the H-2B process and the process itself "really have very little to do with this action"). Even if the cases were related, that fact would not establish a conflict under any known standard or definition of the term and Santiglia cites no case or precedent which supports such an interpretation. Research discloses none either.

Whatever complaints Santiglia has about what Bacon did or said in the DOL proceedings must be addressed in that forum, not this. Inasmuch as the decision in the DOL case has evidently been appealed to the department's Administrative Review Board (ARB), Santiglia is free to address his concerns about the DOL proceedings in that forum. This is not the appropriate venue in which to attack the findings of a different government agency. *Cf. Trulis v. Barton*, 107 F.3d 685, 694 (9th Cir. 1995) (no power to sanction conduct that occurred in a different forum in a different case). The location of Sun's corporate headquarters is not even an issue in this case; it is a fortiori not a material issue.

Conclusory allegations do not constitute a showing, and nothing in this record supports Santiglia's claim of a conflict of interest. His allegations are drawn from speculation coupled with a fundamental misunderstanding of the legal significance of the term conflict of interest. Notwithstanding Santiglia's professed concerns as to whether Sun can "fairly" be represented by Bacon and her firm, his allegations of conflict are not only conclusory, they are wholly unsupported by evidence. The motion is in this respect devoid of reasonable foundation either in law or in fact.

B. Other Alleged Violations or Lack of Good Faith

Santiglia's motion alleges further that Bacon "intentionally misrepresented material facts to this Court" and therefore violated unidentified standards of conduct and failed to act in good faith pursuant to 28 C.F.R. § 68.35. It is unclear what meaning Santiglia attaches to the term "failure to act in good faith" or what specific set of "standards" he believes have been violated. The definitions section of OCAHO rules, 28 C.F.R. § 68.1, does not itself purport to define good faith

and the term is far from self-explanatory. The command of 28 C.F.R. § 68.35(b), moreover, is hortatory, not prescriptive. Again, the motion provides no specific authority or explanation as to the source of Santiglia's interpretation of those terms. Again, the particular authorities to which I look, although neither party has chosen to reference them, are the CRPC and the case law in the circuit.

For purposes of this inquiry, the applicable standard is that set forth at Cal. R. Prof. Cond. 5-200(B), which states that in representing a matter to a tribunal, an attorney "shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law." California's Business and Professional Code § 6068(d) similarly requires that an attorney use only such means as are consistent with the truth. An attorney does not act only as an advocate for a client; he or she is also an officer of the court and as such has a duty of candor in dealing with the judiciary. *United States v. Associated Convalescent Enters., Inc.*, 766 F.2d 1342 (9th Cir. 1985), citing *Van Bourg, Allen, Weinburg & Roger v. NLRB*, 762 F.2d 831 (9th Cir. 1985).

Disciplinary cases arising under the rule of candor address patterns of serious misconduct resulting in substantial harm. *See, e.g., Lebbos v. State Bar*, 53 Cal.3d 37, 44-45, 278 Cal.Rptr. 845, 849 (1991), *cert. denied*, 502 U.S. 932 (1991) (attorney served altered copy of court order on counsel and filed it with the court, concealed assets, unilaterally altered and filed stipulation, lied to client about court order and named a person as plaintiff in a lawsuit without the person's knowledge or consent); *In re Valinoti*, 4 Cal. State Bar Ct. Rptr. 498, 2002 WL 31907361 at *54-55 (attorney made numerous false statements directly to Immigration Judge about contacts with clients, as well as making false statements under oath in response to inquiry by State Bar investigator); *In re Dixon*, 4 Cal. State Bar Ct. Rptr. 23, 1999 WL 562767 at *4 (attorney falsely represented to court that she had not received deposition notice, also made numerous false statements in various pleadings that opposing counsel was a "well known racist" and "champion of the Emeryville pedophile ring," that he was motivated by racial hatred and that he had used various ethnic slurs in describing children).

The particular statements Santiglia challenges, in contrast, are isolated sentences derived from various materials filed in this matter and from responses to his discovery requests. Most do not involve representations made directly to the adjudicator, and their significance or potential impact on the proceeding is nowhere apparent. Santiglia points to no "unfair advantage" Sun gained in this case by any of the "incidents" he complains of, and suggests no reason to fear that the integrity of the judicial process has been compromised. He presented no evidence bearing on the issue of intent to mislead, and no authority which suggests that every error in a discovery response, brief or memorandum necessarily merits sanctions.

Whether an isolated sentence in a pleading or brief consists of argument or fact is not always easy to discern, and case law makes clear that Cal. R. Prof. Cond. 5-200(B) is not intended to impose upon an adjudicator the burden of evaluating the technical accuracy of every sentence in a pleading, brief, memorandum or discovery response, regardless of the significance of its

content. In order to establish a showing that an attorney knowingly made a false statement of material fact, it must first be shown that the statement challenged is material to the issues before the tribunal. *Matter of Farrell*, 1991 WL 84191 *3, 1 Cal. State Bar Ct. Rptr. 490, 497 (1991). There must be a showing that the statement is deliberately made with intent to mislead the tribunal. *Id.*, *Matter of Conroy*, 1990 WL 95660 at *7-8, 1 Cal State Bar Ct. Rptr. 86 (1990), modified in other respects, *Conroy v. State Bar*, 53 Cal.3d 495, 280 Cal.Rptr. 100 (Cal.App. 1991). The statement must be one of actual fact, capable of being proved true or false, and not just rhetorical hyperbole, argument or opinion. *Standing Comm. v. Yagman*, 55 F.3d 1430, 1438-39 (9th Cir. 1995). Common sense requires, moreover, that some distinction be recognized between ordinary negligence and intentional bad faith conduct which challenges the institutional integrity of a proceeding. Sanctions are generally neither appropriate nor permissible when the problem complained of is as consistent with negligence as it is with bad faith. *Cf. MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991).

In light of these principles, Santiglia's submission does not begin to satisfy the "heavy burden" needed to disqualify an attorney. The allegation he identified as Incident 4 is the same dubious claim he made as to Sun's alleged misrepresentation of its corporate address in DOL case no. 2003-LCA-2. The two allegations denominated as Incidents 3 and 5 relate to two statements made in Sun's response to Santiglia's first set of discovery requests. The remaining incidents, Incidents 1 and 2, challenge the accuracy of statements made in Sun's response to Santiglia's motion to compel. Except for Incident no. 4, these matters have previously been considered incident to ruling on Santiglia's motion to compel (Incidents 1, 2, and 3), and in ruling on two motions by Santiglia seeking leave to amend his complaint (Incident no. 5). None of the "incidents" remotely supports disqualification of an attorney.

1. Alleged Misrepresentation of Sun's Corporate Address

Sun previously filed a pleading captioned "Confirmation of Sun Microsystem's Address," in which it requested that Santiglia send documents to it at 7788 Gateway Blvd., Building 18, NS: UNWK 18-303, Newark, CA. 94560, instead of to the Santa Clara address he had been using. Santiglia filed a responsive pleading in which he argued that counsel was misrepresenting Sun's corporate address. Attached to his response were documents showing that Sun had previously used at least two different addresses, 901 San Antonio Rd., Palo Alto, CA., and 4120 Network Circle, Santa Clara, CA. as its corporate address.

Santiglia contends that those documents demonstrate that Sun is seeking to conceal its real corporate address. No showing was made that the location of Sun's corporate address is in any way material to any of the issues in this case, that Sun is not legally free to change its corporate address if and when it chooses, or that there is otherwise something sinister in Sun's request that Santiglia send the company's copies of pleadings to a location more convenient to it. Santiglia argues that the location of Sun's corporate headquarters was critical to the ALJ's decision in the DOL proceedings, that Sun gained an advantage in those proceedings by misrepresenting its

address, and that it is attempting to "perpetuate this misrepresentation in these proceedings as well." As previously observed, whatever complaints Santiglia has about the DOL proceedings must be addressed in that forum, not this.

Sun's corporate address is not an issue in this proceeding at all, much less a material issue. Sun gained neither an "unfair advantage" nor any advantage at all in this case by the pleading Santiglia challenged, beyond the "advantage" of possibly persuading Santiglia to mail the company's copies of pleadings to a particular address to ensure that they reach the correct recipient.[9] Santiglia made no showing of a material misrepresentation of fact as to Sun's corporate address on the basis of this record.

2. Alleged Misrepresentations in Sun's Discovery Responses

Sanctions for discovery abuses in OCAHO proceedings are governed by the provisions of 28 C.F.R. § 68.23(c), which spells out the specific sanctions available for a party's noncompliance with discovery rules. It is not at all clear whether, when such a specific governing provision is available, resort to sanctioning counsel under the CRPC or § 68.35 would be necessary in order to address alleged errors in discovery responses, which are not ordinarily filed with the administrative law judge and are not usually part of the record. 28 C.F.R. § 68.6(b). Cal. R. Prof. Cond. 5-200(B) appears to be addressed to representations made to a tribunal, not to erroneous discovery responses made to an opposing party. In addition, erroneous discovery responses are usually more likely to be the fault of the client than that of the attorney; counsel seldom has personal knowledge of the facts of the case and usually must rely on the client to provide the information to respond to discovery requests. *See generally Iron Workers Local 455 v. Lake Construction & Dev. Corp.*, 7 OCAHO no. 964, 632, 673-76 (1997) (sanctioning the party, not the attorney, and explaining that the range of sanctions available under 28 C.F.R. § 68.23(c) for discovery abuses is considerably narrower than under the federal rules), accord, *United States v. Ulysses, Inc.*, 2 OCAHO no. 390, 732, 735-36 (1991).

I need not resolve this question because each of the issues Santiglia raised with respect to his alleged Incidents 3 and 5 involves an ongoing dispute which has previously been addressed in connection with other motions; neither of the issues is material, neither has any bearing on the merits of this case and neither is susceptible to resolution on the present record. While the Office of Special Counsel (OSC) could doubtless provide a definitive answer to both questions, soliciting that information would be pointless because the answers to those questions are irrelevant.

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[9] Judging from the certificates of service attached to his recent pleadings, that advantage was not obtained. Santiglia's response evidently was not to extend this courtesy, but instead to stop sending copies to the company at all. Only counsel's address appears on the recent certificates.

a. The Number of OSC Charges Sun Received

Incident 3 is based on the fact that Santiglia doesn't believe certain of Sun's answers to his first document requests. Sun said in response to one of his requests that the only citizenship-based discrimination charge against it which was investigated by a federal agency was Santiglia's own charge, and that his charge was the only one of which it was aware. Santiglia says, "I don't believe either of those statements is true." He contends that his Attachment B, a letter dated February 13, 2003 from Ginette Milanes to Gerald Barnes, demonstrates the falsity of Sun's response. The letter says that OSC investigated a charge filed by Gerald Barnes, Charge No. 197-11-522, and determined that no violation of 8 U.S.C. § 1324b had occurred.

Santiglia insists that this letter proves that Sun was notified of the Barnes charge. But the Milanes letter says nothing at all about whether service of the Barnes charge was ever effected upon Sun. While it is true that ordinarily OSC is charged with the responsibility of serving a company with a copy of a charge against it, 28 C.F.R. § 44.301(e), there are other plausible explanations for why this might not have happened. First, the United States mail is dependable, but errors in delivery have been known to occur. Second, and more likely, the Barnes charge appears to have been untimely filed, so that OSC might well have elected not to notify Sun, but simply to make its determination about the same RIF or layoff based on the investigation of Santiglia's charge.

Charges are timely only if filed within 180 days of the alleged violation. 28 C.F.R. § 44.300(b). Since the RIF at issue in this case occurred on or about November 1, 2001, charges relating to it had to be received by OSC prior to April 30, 2002 in order to be timely. OSC's notification letter to Barnes is dated almost ten months later, on February 13, 2003. Unlike the standard OSC notification letter, the Barnes letter does not contain the language, "we are notifying you that the initial 120-day period for this Office to investigate your charge has expired." It simply says, "The Office of Special Counsel has investigated the charge you filed against Sun Microsystems." Even if OSC had delayed issuing the letter for the whole 120 day investigative period after receiving the charge, which appears doubtful in light of the letter itself, the charge would have been filed at the earliest in October of 2002, almost six months after the expiration of the 180 day filing period following the RIF. It would certainly have been reasonable for OSC to rely on the investigation of Santiglia's charge to make its determination as to the merits of an untimely charge complaining of the same RIF, and that may well have happened.

Contrary to Santiglia's assertion, Attachment B does not "confirm" that the Barnes charge was ever served on Sun. The fact that Santiglia doesn't believe the discovery response doesn't "confirm" it either. As the moving party, it is Santiglia's burden to provide evidentiary support for his assertion that Sun actually received the Barnes charge, and he has not done so. Santiglia's conclusion that Sun is just lying about the number of charges it received is not the only inference which may be drawn from the circumstances presented here; it is simply the inference Santiglia has chosen to draw. On the basis of this record, I see no compelling reason to draw the same

inference or to conclude that any misrepresentation of fact has been shown.

b. The Scope of OSC's Investigation of Sun

Santiglia contends as to Incident 5 that Bacon's response to his first interrogatories misrepresented the scope of OSC's investigation of his charge. In support of this allegation he cites to his Attachments A-E accompanying his motion for leave to amend his complaint. Those documents reflect requests OSC made to Sun for information and documents. Sun contends that the scope and focus of the investigation was narrowed as it progressed; Santiglia's reply acknowledged that the scope of the investigation was narrowed, but says it was not narrowed as much as Bacon suggests.

The parties have been arguing about the scope of OSC's investigation of Santiglia's charge for months now, and the issue has previously been addressed at length in two prior orders dealing with the question of the appropriate scope of this case. The first such order was that issued as *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097 (2003); the second order was unpublished. That latter order stated:

> To the extent that either party reads the discussion in the May 1 Order regarding the scope of OSC's investigation as having been dispositive of the motion to amend which was under consideration there, let me clarify that it was not. Providing more details about the scope of OSC's investigation has no effect upon the outcome of this motion because the principal reason for denying leave to amend had to do with manageability of the case. My conclusion was that a determination on the merits would be impeded rather than facilitated by expanding this case to include the pattern and practice allegations as proposed. 9 OCAHO no. 1097 at 6. This is no less true today than it was on May 1, and that conclusion is not affected by the scope of the OSC investigation.

Allegations about the scope of OSC's investigation were once again addressed in an Order Granting in Part and Denying in Part Santiglia's Motion to Compel (unpub.), which stated at 9, "I reiterate once again that the scope of OSC's investigation is not the proper focus of this case."

As I thought I had previously made clear more than once, the scope of OSC's investigation has had and will have no impact whatsoever upon the scope of this action. I reiterate yet again that the scope of OSC's investigation is immaterial to the issues in this case. While the parties continue to argue about this question, I did not before and do not now seek information from OSC, the most authoritative source of a definitive answer, because the answer is wholly irrelevant.

Santiglia alleges that Bacon misrepresented the scope of the investigation "in an effort to mislead the court" and that the purpose was "to limit the scope of these proceedings and relevant discovery." But as previously explained, I am the one who chose to limit the scope of this case as well as the scope of discovery, and I did so notwithstanding the breadth of Santiglia's original charge and notwithstanding the scope of OSC's investigation, simply as a concession to the shortness of life. Santiglia's request to expand this case into a nationwide class action was denied because the expansion he proposed would make the case unmanageable. No matter how many attempts are made to resurrect this issue there are no circumstances under which that decision will be reconsidered. Even if OSC's investigation had encompassed all of Sun's world-wide employment practices of whatsoever nature since the company's founding, the scope of the OSC investigation would still have no effect on this case. The question presented is simply not material.

3. Alleged Misrepresentations in Sun's Response to Santiglia's Motion to Compel

Santiglia's alleged Incidents 1 and 2 both deal with statements made in Sun's response to his motion to compel, and address counsel's characterization in that document of testimony given by certain witnesses in the DOL hearing. Santiglia first asserts that Bacon's response to his motion misrepresented "material facts regarding the testimony given by Fred Peters and Heidi Wilson in the DOL hearing." Second, he disputes a statement made in the document as to whether there was testimony about an alien named Raghava Karumanchi. In support of these allegations Santiglia relies upon Attachment A, a transcript of the testimony of Fred Peters in DOL case no 2003-LCA-00002, and on the ALJ's decision in the same case (Attachment H accompanying Sun's motion to dismiss).

Both these allegations were previously made in a document Santiglia captioned as "Reply to 'Reply to Sun's Response to Complainant's Motion to Compel Answers to His First Set of Interrogatories and First Request to Produce Documents'. " This pleading too, sought to disqualify Bacon and her firm, and concluded with the statement, "I hope the Court will impose the appropriate sanctions on the Respondent's counsel by the Court's own initiative." Because the request was made in a counter-reply and not in the original motion, I did not address it in the order which granted in part and denied in part Santiglia's motion to compel. The instant motion was evidently filed because I did not impose the requested sanctions on my "own initiative" or reference the request in that order.

a. What Fred Peters and Heidi Wilson Testified To in the DOL Case

The first sentence Santiglia characterizes as a misrepresentation is,

> "As has been explained repeatedly to Complainant, and has been testified to under oath in the DOL hearing by Fred Peters and Heidi

> Wilson, the Sun manager of immigration, no H-1Bs were hired in that department during the time of Complainant's tenure with Sun or after, including through today."

Santiglia contends that there was no such testimony by Peters or Wilson given in the DOL hearing. He says that Peters did not testify about hiring during the time period of Complainant's tenure at Sun, and in addition that Peters did not testify about the hiring of H-1Bs in the department "as a whole," but only as to his own small group. He says that Bacon failed to act in good faith because she "deceptively refers to Fred Peters' small work group as the 'department'."

Sun answered by stating that a response to a motion to compel is not testimony, that in the context of the motion to compel the word "department" was a reasonable synonym for "group," that there was no intent to mislead anyone, that the appropriate scope of discovery had not yet been decided at the time the response was made, that whether the reference was to the group or the department is in any event irrelevant, and that no deception or subterfuge was involved. Sun continued to assert that the transcript "makes clear that Peters did not hire any H-1Bs during the time Complainant was a Sun employee," but did not cite to any particular page where such testimony occurred.

Attachment A does not appear to contain the whole of Peters' testimony. Rather, it appears that the testimony is cut off at p. 212 while cross examination was still in progress. There was no evidence at all presented as to what Heidi Wilson's testimony was; the assertion about Wilson is not further developed in the motion and the portion of the transcript submitted as Attachment A contains none of her testimony,[10] so Santiglia's allegations about Wilson's testimony will not be considered further.

In the portion of Peters' testimony submitted, he said that during his own eight-year tenure as an area support manager in the IT department that he had hired a total of three H-1B employees (pp. 198-99, 202-03). No specific time frames were given for these hires. Peters testified further that he had hired no one in his group since the layoff in November, 2001 and that in fact there had been another layoff after that (pp. 208-09). In the portion of Peters' testimony which was submitted I could find no testimony which was specifically addressed to whether there was any hiring done during the period of Santiglia's tenure, and Sun has not directed my attention to any such testimony. It appears that Sun's statement that Peters testified under oath that no H-1Bs were hired in the department during Complainant's tenure is incorrect.

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[10] A portion of Wilson's testimony, pp. 145-148 of the transcript, appears in the record as Attachment G to Santiglia's "Response to Respondent's Confirmation of Sun's Address." This testimony, however, relates to the posting of LCAs and does not address the question of hiring.

As to the question of referring to "the work group" as "the department", there was no evidentiary support tendered for Santiglia's claim that the use of the word "department" was otherwise deceptive. As the moving party, Santiglia has the burden of furnishing admissible evidence sufficient to establish the factual predicate for his motion. Unsupported allegations in a pleading do not satisfy this standard. While numerous factual assertions have been made about the group and the department by both parties in various pleadings, these do not constitute evidence. Absent adequate evidentiary support, factual contentions made in the moving papers must be disregarded in ruling on a motion to disqualify. *Colyer*, 50 F.Supp.2d at 968, *Smith, Smith & Kring*, 60 Cal.App.4th at 577-78, 70 Cal.Rptr.2d at 509. Accordingly, I find as to this question that there is insufficient evidentiary support to make specific findings.[11]

b. What Complainant Heard "under oath" about Raghava Karumanchi

As to the allegation regarding Raghava Karumanchi, the text Santiglia complained of is,

> "His concern about Raghava Karumanchi is misplaced. As Complainant heard under oath at the DOL hearing, Raghava was hired long before Complainant was hired, but was not able to begin his employment until his actual visa was issued many months later."

Santiglia suggests that the ALJ decision in DOL case no. 2003-LCA-00002 states that "there is no evidence that Andre Bashkin and Raghava Karumanchi are employees of the Respondent or that they are H-1B employees," and this shows that, contrary to the statement, he did not hear any such testimony under oath in that proceeding.

Sun responded by saying again that pleadings are not testimony, that all the comments about Karumanchi are correct, that "Sun's pleadings and motions did reference Karumanchi, they were discussed at the hearing, they are part of the record, and they are under oath," that Santiglia engaged in no discovery in the DOL case, that no one was misled about Karumanchi and that his data would be included in discovery responses. No copies were furnished of any such "pleadings and motions," whether "under oath" or otherwise, and no explanation was provided as to how Santiglia could have "heard" those pleadings and motions. Sun's statement that Complainant heard any information under oath in the DOL proceeding about Karumanchi's hiring appears to be incorrect.

There are accordingly at least two incorrect statements of fact made in Sun's response to

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[11] I do not necessarily mean to imply that I agree that in the context of the disputed discovery that the term "group" was a reasonable synonym for "department," or that the difference between them was irrelevant.

Santiglia's motion to compel; both relate to the question of whether particular testimony was actually presented in the DOL hearing. The significance of these errors is nowhere apparent and as far as can be determined on this record, there is none. What testimony was or was not presented to DOL is not at issue in this proceeding.

While it is true, as Sun asserts, that a response to a motion to compel is not testimony, it is nevertheless expected that factual statements made in such a response as well as in other pleadings will be accurate, whether or not they are made with respect to material issues. While scrupulous accuracy is always to be desired in pleadings, this does not, however, mean that it is always obtained. Misstatements in briefs, pleadings or memoranda result from a variety of causes including faulty recollection, hyperbole or inattention as well as from the base motives Santiglia alleges here. While erroneous statements contained in such documents may not reflect the highest level of advocacy, neither do they necessarily constitute the type of conduct warranting the imposition of "death penalty" sanctions where they relate to peripheral questions or have no discernable effect on the proceeding.

Careless errors or misstatements in pleadings and memoranda undermine the confidence of an adjudicator in other representations made by the party. They also diminish the persuasive value of the pleading itself. If errors occur with any degree of frequency, the party's other submissions are likely to be discounted as well. The influence or impact a party's pleadings is likely to attain is thus directly proportional to the confidence an adjudicator can place in the accuracy of the presentation; this is true whether the pleader is an attorney or a pro se litigant. In this respect, such errors contain their own built-in penalties. No further penalty is warranted based on this record, which does not support a finding of bad faith or intentional misrepresentation in violation of Cal R. Prof. Cond. 5-200(B).

V. THE REQUEST MADE IN SANTIGLIA'S REPLY BRIEF

Although not mentioned in his original motion, Santiglia's reply brief requests[12] that in the event Bacon is permitted to continue representing Sun that I issue "a court order telling Ms. Bacon that all statements regarding the 'date of hire' of employees must conform to the legal definition established in the regulations." The definition to which Santiglia refers is one he evidently gleaned from *United States v. McDougal*, 4 OCAHO 687, 862, 868 (1994), wherein Judge

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[12] A request made only in a reply brief and nowhere in the original motion will ordinarily be ignored. See discussion supra regarding the request for sanctions made in Santiglia's reply brief in connection with the motion to compel. Issues cannot be raised for the first time in a reply brief. *See Alaska Center for Environment v. United States Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999). I nevertheless address this request now in the interest of moving the case forward by avoiding the inevitable follow-up motion.

Schneider noted that 8 C.F.R. § 274a(1)(c) (1994) prescribes the time when an employer and a new employee must complete their respective portions of the INS I-9 Form. Santiglia asserts that under this regulation an employee "is not considered hired until he starts his first day on the employer's pay roll."

I decline to issue the order requested. The regulation Santiglia cited has no bearing on this proceeding because this case arises under 8 U.S.C. § 1324b, not § 1324a. The regulations promulgated pursuant to § 1324b are found at 28 C.F.R. Pt. 44; these are the applicable regulations for cases arising under § 1324b. The definitions section of those regulations, 28 C.F.R. § 44.101, does not purport to define either the term "hire" or "date of hire." Section 1324a of the Act, on the other hand, deals with the unlawful employment of aliens; the regulation cited by Santiglia is specific to that section and circumscribes its own applicability.

> The term hire means the actual commencement of employment of an employee for wages or other remuneration. For purposes of section 274A(a)(4) of the Act and § 274(a)(5) of this part, a hire occurs when a person or other entity uses a contract, subcontract or exchange entered into, renegotiated or extended after November 6, 1986, to obtain the labor of an alien in the United States, knowing the alien is an unauthorized alien.

This regulation does not purport either to provide a global definition of the term "hire" for all contexts or purposes, or to define the term "date of hire" for cases arising under § 1324b.

Black's Law Dictionary (7th ed., 1999), defines the verb "hire" as meaning "to engage the labor or services of another for wages or other payment." Popular dictionaries give similar meanings. The American Heritage Dictionary of the English Language, Houghton Mifflin Co. (4th ed., 2000) says it means "to engage the services of a person for a fee, employ," while the Cambridge Advanced Learner's Dictionary, Cambridge University Press (2003) says it means "to employ someone or pay them to do a particular job." *Cf.* Merriam-Webster Online Dictionary, Merriam-Webster, Inc. (2002) ("to engage the personal services of for a set sum"); Encarta World English Dictionary, North American Edition (2003) ("to give somebody work: to employ somebody to work for you, or pay somebody to do a job for you"). Each of these is an acceptable definition; none suggests, as Santiglia insists, that an employee "is not considered hired until he starts his first day on the employer's pay roll." There are doubtless other acceptable definitions as well.

It is not, in any event, the function of an adjudicator to micromanage a party's use of the English language or to dictate how each word is to be used in a pleading or memorandum, just as it is not the role of an adjudicator to grade the accuracy of every sentence in every piece of paper generated in the course of a lawsuit, regardless of its significance. As observed in *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986), "Asking judges to grade

accuracy of advocacy in connection with every piece of paper filed in federal court multiplies the decisions which the court must make as well as the costs for litigants."

VI. CONCLUSION

This case has become unduly personalized. I remind both parties that this is an administrative lawsuit, not a blood feud. Gratuitous personal comments in pleadings are unnecessary and counterproductive. All participants in OCAHO proceedings are expected to conform to standards of civility which includes the extension to the opposing party of basic courtesies. Conduct such as refusing another party a short extension of time without substantive justification, opposing every request or statement made by the other party regardless of its significance, or offering personal insults in pleadings does not meet these standards. Disrespectful, vituperative or repetitive pleadings are not acceptable from attorneys, and they are not acceptable from lay representatives or pro se litigants either. *Lee*, 7 OCAHO at 11-12.

While Santiglia has heretofore received considerable indulgence as a pro se litigant, it should not be expected that this indulgence will be further extended to encompass any additional satellite litigation having nothing to do with the merits of the case, or to the relitigation of issues already determined. This order is intended to resolve all the issues raised by the instant motion; none of these issues will be revisited in the future under the guise of a motion to reconsider or some other motion under whatever nomenclature.

That the pleadings of a pro se party are somewhat more leniently regarded than those of counsel, *United States v. Union Lakeville Corp.*, 8 OCAHO no. 1019, 277, 280 (1998), does not mean that a party can invent his own rules or definitions of legal terms. In this respect, pro se litigants are not treated any more favorably than represented parties. *Cf. Simon v. Ingram Micro, Inc.*, 9 OCAHO no. 1088, 5 (2003), citing *Jacobsen v. Filler*, 790 F.2d 1362, 1364-65 (9th Cir. 1986). The right of self-representation is not a license to disregard the governing case law of the forum or to pursue desired remedies armed with no greater support than conjecture and wishful thinking. Future pleadings are expected to be based on and conform to applicable law.

ORDER

The motion to exclude Respondent's counsel is denied.

SO ORDERED.

Dated and entered this 28th day of January, 2004.

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Ellen K. Thomas
Administrative Law Judge