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

JENLIH JOHN HSIEH, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 02B00005
PMC - SIERRA, INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER RULING ON RESPONDENT'S MOTION TO MODIFY ORDER SETTING REVISED PROCEDURAL SCHEDULE

(January 28, 2003)

On December 24, 2002, I issued an Order setting a revised procedural schedule, which provides that dispositive motions shall be served and filed not later than January 27, 2003, and that the parties shall serve and file a Joint Proposed Final Prehearing Order (JPFPO) by February 24, 2003.

On January 2, 2003, I received a letter addressed to me from one of Respondent's attorneys, Marina C. Tsatalis, with a copy to Complainant's counsel, informing me that she was lead counsel and that she would be out of the country from February 10, 2003, to February 28, 2003, on her honeymoon. In the letter she requests that no filings be due, or any hearings be held, during that period. Attached to the letter was a Notice of Unavailability of Counsel, which Ms. Tsatalis represented had been served on Complainant's counsel (but not this tribunal) in early December 2002.

Complainant's counsel responded by a letter dated January 6, 2003, in which he states that he has no objection to moving the due date for the JPFPO beyond February 24, 2003, provided that the two remaining associate attorneys who have been actively litigating this matter on behalf of Respondent, diligently cooperate with Complainant's counsel, to prepare a draft JPFPO.

Initially, I would note that Ms. Tsatalis' letter of January 2, 2003, was improper. As provided by both the OCAHO rules of practice and my orders, requests for relief must be submitted in the form of a motion, not a letter. The Rules of Practice provide, in pertinent part, that any application for an order or <u>any other request shall be made by motion</u>. 28 C.F.R. § 68.11 (2002). Further, the rules further instruct

as to the form of all pleadings, including the requirement that a pleading shall include a proper caption. Respondent's letter of January 2, 2003,clearly was not a pleading or motion. Moreover, in the very first order I issued in this case, on December 6, 2001, I instructed the parties that all requests for relief, including requests for an extension of time, should be submitted in the form of a written motion, not a letter.

This requirement is not unique to OCAHO. While the practice among the courts is not uniform on the subject of submitting letters to the court, many federal courts discourage, and some even prohibit, the practice. Indeed, the United States District Court for the Central District of California states in no uncertain terms that attorneys or parties to any action or proceeding shall refrain from writing letters to the judge, and states that all matters shall be called to a judge's attention by appropriate application or motion. See Local Rule 83-2.11, West's California Local Rules of Court. (The Central District also prohibits telephone calls to chambers). The United States District Court for the Southern District of California also prohibits seeking relief by means of a letter. The local rules provide, in pertinent part, that attorneys or parties to any action or proceeding shall refrain from writing letters to the judge. See Civil Rule 83.9, Correspondence and Communications with the Judge, West's California Local Rules of Court.

There are federal courts in other parts of the nation that follow the same practice. For example, the United States District Court for the Southern District of Florida explicitly provides that unless invited or directed by the presiding judge, an attorney or party shall not address or present to the Court in the form of a letter or the like any application requesting relief in any form. See Rule 7.7, West's Florida Rules of Court of the United States District Court for the Southern District of Florida. Similarly, the United States Eleventh Circuit Court of Appeals states that lawyers shall not write a letter to the court in connection with a pending action, unless invited or permitted by the court. ¶ 6 Lawyers' Duties to the Court, Standards for Professional Conduct within the 7th Federal Judicial Circuit.

Therefore, to reiterate once again, all requests for relief shall be submitted in the form of a motion, not a letter. I will not consider requests for relief submitted in the form of a letter. Moreover, a party or counsel's failure to comply with the Rules and my orders in this regard may be grounds for sanctions. Counsel also are reminded that it is improper to attempt to contact my office by telephone without the opposing party or counsel on the telephone, unless the telephone call is for the purpose of requesting a conference or requesting an extension of time. See 28 C.F.R. § 68.36(a) (2002). Parties and counsel specifically are instructed not to call my office with questions that could be answered by reading the OCAHO Rules of Practice, 28 C.F.R. Part 68 (2002), or by my orders. Both parties are represented by counsel, and they are expected carefully to read and obey the rules of practice and my orders. Therefore, in the future, my staff will not respond to or answer telephone inquiries that raise questions answered by the rules or my orders.

Because the request to modify the schedule was framed in the form of a letter, I did not issue any ruling. On January 10, 2003, my office received a telephone call from a person at Wilson, Sonsini,

Goodrich & Rosati (Wilson Sonsini) inquiring as to whether the procedural dates had been changed in response to Ms. Tsatalis' letter. My law clerk informed the caller that no motion had been filed, and therefore no ruling had been issued. Subsequently, on January 14, 2003, Respondent filed a motion, with attachments, to modify the order setting a revised procedural schedule. On January 22, 2003, Complainant filed a pleading stating that it had no objection to modifying the order setting the revised procedural schedule, provided that no reply brief should be filed unless ordered by the Court pursuant to 28 C.F.R. § 68.11(b).

Counsel's letter of January 2, 2003, the memorandum supporting the current motion, and the declaration of Marina Tsatalis state that Respondent's counsel served the Notice of Unavailability of Counsel (Notice) on Complainant's counsel on December 10, 2002. However, Respondent's counsel did not file this Notice with the Court, or otherwise request that no procedural dates be set during the time period when counsel would be out of the country. Clearly, counsel has been remiss in her duties to this tribunal.

Moreover, in her letter and motion, Respondent's counsel failed to provide a compelling reason why the procedural schedule should be modified to provide that no filings would be due, nor hearings or other proceedings held, during the two week period Ms. Tsatalis is away. No hearings or conferences presently have been set for the two week period of time she will be out of the country. Although I have set a deadline of February 24, 2003, for filing the JPFPO, the parties could file earlier than that date if they wished. Alternatively, even if they did not file early, Respondent's attorneys could obtain Ms. Tsatalis' input for the matters required for the JPFPO before Ms. Tsatalis leaves.

In her Notice, Respondent's counsel cites a state court case, Tenderloin Housing Clinic v. Sparks, 8 Cal.App.4th 299 (1992), in which the court imposed monetary sanctions on plaintiff's counsel. However, that case has no applicability here. Initially, in Tenderloin, the actions which caused the conflict were set by plaintiff's counsel, not by a court, and counsel knew at that time that opposing counsel would be out of the country.

Moreover, as the court in Tenderloin noted, respondents' counsel was a sole practitioner and the only lawyer with sufficient knowledge of respondents' case. That is hardly the situation here. Ms. Tsatalis is not a sole practitioner, and it can hardly be said here that she is the only lawyer representing Respondent "with sufficient knowledge of the case." Although Ms. Tsatalis asserts that she is lead counsel, two other attorneys from Wilson Sonsini, Susan Parent and Jennifer Mathe, entered their appearances in this case before Ms. Tsatalis did so, and have been actively involved in the litigation. Indeed, Ms. Mathe has been particularly active, signing pleadings and taking and defending several depositions. See Declaration of Jennifer K. Mathe in Support of Respondent's Motion for Summary Decision. Ms. Tsatalis only entered an appearance in this case on September 17, 2002, less than six months ago, and almost a year after the Complaint was filed on October 23, 2001. Many of the pleadings have been signed by either Ms. Parent

or Ms. Mathe. Two prehearing conferences have been held since Ms. Tsatalis entered her appearance. In the first, held on October 9, 2002, Ms. Tsatalis did not even appear for Respondent. Respondent was represented by Ms. Mathe and Ms. Parent, and it was the former who spoke for Respondent during the conference. PHC Tr. 3. During the most recent conference on December 11, 2002, both Ms. Mathe and Ms. Tsatalis appeared, but again Ms. Mathe was the spokesperson. PHC Tr. 3. Thus, in both instances, Ms. Mathe represented Respondent. Finally, I note that Respondent's motion for summary decision, filed on January 27, 2003, the memorandum supporting the same, and the statement of undisputed facts, are signed only by Jennifer Mathe. Ms. Tsatalis's name does not even appear on the signature block of any of these pleadings.

Tenderloin is inapposite for other reasons as well. In Tenderloin, the conflicting dates were not set by the court, but rather by opposing counsel, who had been informed and knew Respondent's counsel would be unavailable. Plaintiff's counsel in Tenderloin set three discovery motions for hearing during the time respondent's counsel would be away. He then served two clients of respondent's counsel with subpoenas requiring them to appear in unrelated third party actions. Plaintiff's counsel also scheduled three depositions for the time respondents' counsel was away and then refused opposing counsel's request that he postpone any of the depositions. Respondents' counsel was forced to return to the United States and when she arrived, she learned that the key deposition had been canceled. For these reasons, the court concluded that plaintiff's counsel had acted in bad faith, and must pay monetary sanctions to respondents. Therefore, the Tenderloin case does not support Respondent's motion to modify the order setting a revised procedural schedule.

However, for the reasons stated below, I am vacating the February 24, 2003, date to file the JPFPO. Respondent has now filed a motion for summary decision. Because the motion was served on Complainant by overnight mail, his response is due within ten days. It would be unfair to the parties to require them to begin preparing the JPFPO until I rule on the motion for summary decision. Until I receive Complainant's response to the motion, and carefully review the parties' submissions, it is difficult to predict when I will be able to issue a ruling. Therefore, I am vacating the date of February 24, 2003, for the filing of the JPFPO. If the motion for summary decision is denied, I will then issue a new date for filing the JPFPO.

In the Notice of Unavailability of Counsel Ms. Tsatalis states that during her absence from February 10, to February 28, 2003, Wilson Sonsini will receive facsimile transmissions, but they will not be reviewed or acted upon during that period. Even though I am vacating the February 24 date, this case will not go into hibernation on February 10, only to emerge when Ms. Tsatalis returns. This case will proceed, and any and all procedural deadlines, including filing deadlines, will have to be met. If necessary, conferences will be scheduled during that time. Respondent may designate another attorney to act as temporary lead counsel during that two week time period, but if it does not, Complainant's counsel may contact either Ms. Parent or Ms. Mathe, and they will be expected to respond to such inquiries. If they

do not respond, Complainant may seek prompt relief from the Court. Further, with respect to the motion for summary decision, after Complainant files its response to the motion, Respondent may not file a reply brief unless it first requests and is granted permission to do so.

As to future unavailability of counsel, if counsel for either party promptly notifies the Court and the other party of dates when they will be unavailable due to conflicts with their business or personal schedule, I will attempt, and I expect opposing party to attempt, to schedule matters so they do not create a direct conflict. See ¶¶ 8-9, 37 Federal Bar Association Standards for Civility in Professional Conduct (adopted by OCAHO).

I would remind both parties that when they file pleadings with the Court which contain attachments, such as a memorandum or exhibits, it is the responsibility of the party and counsel to file the documents as an original set and two sets of copies. It is not the responsibility of the Court to determine how a pleading and the attachments should be put together for filing purposes. As an example, in the most recent filing, Respondent filed a notice of motion and motion for summary decision; a separate statement of undisputed material facts in support of motion; a memorandum of points and authorities; four separate declarations; and a certificate of service. The original and copies were not filed as a complete sets but were separate. My staff then must put the package together, which creates additional and unnecessary work for them. At times this has been a problem with filings by both parties. In the future, such documents must be submitted as three sets. If a party fails to follow this procedure, I may reject the filing.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE