FILED November 22, 2013 08:06 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

In re: Complaint as to the Conduct of BARNES H. ELLIS, Accused.	OSB Case No. 09-54 SC S061385
In re: Complaint as to the Conduct of LOIS 0. ROSENBAUM, Accused.	OSB Case No. 09-55 SC S061385

OREGON STATE BAR'S RESPONDENT'S BRIEF

Mary A. Cooper, Bar No. 910013
Martha M. Hicks, Bar No. 751674
Oregon State Bar
16037 SW Upper Boones Ferry Road
Post Office Box 231935
Tigard, OR 97281-1935
Telephone: (503) 620-0222, Ext. 321
Email: mcooper@osbar.org
Email: mhicks@osbar.org

Eric J. Neiman, Bar No. 823513
Williams Kastner
888 SW 5th Avenue, Suite 600
Portland, OR 97204
Telephone: (503) 944-6943
Email: eneiman@williamskastner.com

Attorneys for Oregon State Bar

W. Michael Gillette, Bar No. 660458
Schwabe Williamson & Wyatt PC
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204
Telephone: (503) 796-2927
Email: wmgillette@schwabe.com

Nathan R. Christensen
Bar No. 093129
Perkins Coie LLP
1120 NW Couch, 1Oth Floor
Portland, OR 97209
Telephone: {503) 727-2172
Email: nchristensen@perkinscoie.com

Counsel for the Accused

November 2013

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

I. Statutory Provisions

II. Rules of Procedure

III. Disciplinary Rules

IV. Case Law

V. ABA Standards for Imposing Lawyer Sanctions

VI. Federal Rules of Criminal Procedure

VII. ABA Formal Ethics Opinion

VIII. Other

INDEX OF EXCERPT OF RECORD

INDEX OF APPENDIX

I. STATEMENT OF THE CASE

The Oregon State Bar accepts the Statement of the Case offered by Appellants Barnes H. Ellis and Lois O. Rosenbaum, collectively "the Accused."

II. RESPONSE TO ACCUSED'S QUESTIONS ON REVIEW

A. Re: First Question on Review: The Amended Complaints adequately alleged the misconduct found by the trial panel.

B. Re: Second and Third Questions on Review: The trial panel correctly found that the Accused's representation of FUR in the Department of Justice (DOJ) matter involved a former client conflict of interest that was not waived by client consent after full disclosure, and therefore violated DR 5-105(C).

C. Re: Fourth Question on Review: The trial panel correctly found that when the Accused asked former clients Robert Daltry and Mark Samper to consent to the Accused's representation of FUR in the DOJ matter, they knowingly withheld material information, and therefore violated DR 1-102(A)(3).

D. Re: Fifth and Sixth Questions on Review: The trial panel correctly found that by simultaneously representing FUR, Samper, Daltry, Steven Eagleburger, and James Fitzhenry during the Securities and Exchange Commission (SEC) Wells submission and settlement process, the Accused engaged in a current conflict of interest in violation of DR 5-105(E).

III. BAR'S ADDITIONAL QUESTIONS ON REVIEW[1]

A. Additional Question #1: During the SEC investigation, did the Accused's simultaneous representation of FUR, Samper, Daltry, Eagleburger, and Fitzhenry involve a likely current client conflict of interest that was not waived after full disclosure, in violation of DR 5-105(E), as alleged in the First Cause of the Amended Complaints?

B. Additional Question #2: (As to Ellis only) By representing Fitzhenry in a lawyer disciplinary matter, did Ellis engage in a former client conflict of interest, in violation of DR 5-105(C), as alleged in the Tenth Cause of the Amended Complaint against Ellis?

C. Additional Question #3: Does the Accused's misconduct warrant a suspension of at least four months?

IV. SUMMARY OF BAR'S ARGUMENTS

The Accused represented many clients, but ultimately acted for the benefit of only one: FUR Systems, Inc. ("FUR").

For two years, the Accused represented FUR and over forty of its officers, directors, and employees during an SEC investigation. The interests of these clients were objectively adverse but the Accused did not obtain their informed consent to the likely conflict of interest. The SEC eventually brought civil enforcement proceedings against FUR and several of its former officers who were represented by the Accused, creating an actual conflict. The Accused did not withdraw from the joint representation and eventually sacrificed the interests of their individual clients to achieve a favorable settlement for FUR. Not long afterwards,

---

[1] BR 10.5(c) allows the respondent in Bar disciplinary matters to address issues not raised by appellant.

the Accused began helping FUR "cooperate" with the DOJ by helping it build a criminal case against some of the Accused's now-former clients.

On *de novo* review, the Bar asks the court to address only those allegations arising from the Accused's representation of FUR and four individual clients: Samper, Daltry, Eagleburger, and Fitzhenry. [2]

The Bar has organized its case and this brief into four parts, corresponding to chronological phases of the Accused's representation.

A. Part 1: the SEC investigation, from April 2000 to January 2002, during which the SEC subpoenaed documents and conducted sworn interviews of FLIR personnel (First Cause of both Amended Complaints; Additional Question on Review #1).

During the SEC investigation, the Accused represented FLIR, Samper, Daltry, Eagleburger, and Fitzhenry – clients whose interests were objectively adverse – without obtaining their consent after full disclosure. The Accused thereby violated DR 5-105(E) [current client conflict of interest).

B. Part 2: the SEC Wells and settlement process, from January to October 2002, during which the SEC and its prospective targets discussed potential charges and negotiated settlement (Second Cause of both Amended Complaints; Accused's First, Fifth, and Sixth Questions on Review).

After the SEC announced its intent to bring a civil enforcement action against FLIR, Samper, Eagleburger, and Fitzhenry, the Accused owed FUR a duty to make arguments and assertions that was inconsistent with their duty to protect the interests of individual clients

[2] This removes from contention any aiiE;g tion concerning the individual interests of William Martin, Steven Wynne Roy Tucker, or FUR employees. This also removes from issue the Third through Eighth Causes of both Amended Complaints.

Samper, Daltry, and Eagleburger. The conflict of interest created by the Accused's joint representation thus ripened from a likely (waivable) conflict into an actual (non-waivable) one, requiring them to withdraw. Not only did the Accused continue the joint representation, they took actions designed to benefit FUR at Samper, Daltry, and Eagleburger's expense on three separate occasions: FUR's Wells submission; FUR's settlement with the SEC; and a telephone call Rosenbaum made to the SEC on October 3, 2002. The Accused thereby violated DR 5-105(E) [current client conflict of interest].

C. Part 3: the DOJ criminal investigation, from January to September 2003.

1. Former client conflict of interest (Eleventh Cause of Amended Complaint against Ellis, and Ninth Cause of Amended Complaint against Rosenbaum; Response to Accused's Second and Third Questions on Review).

When the DOJ revealed that it was investigating the Accused's now former clients Samper, Daltry, and Eagleburger for the same conduct earlier alleged by the SEC- and offered FUR the opportunity to escape prosecution if it helped the DOJ build a criminal case against these individuals- the Accused had a former client conflict of interest that prohibited their representing FUR in that matter without the informed consent of the former and current clients. Nevertheless, the Accused actively represented FUR for several weeks before seeking their former clients' consent. When the Accused did ask for consent, they failed adequately to disclose the nature and possible effect of the conflict. Their representation of FUR in the DOJ matter thus violated DR 5-105(C) [former client conflict of interest).

2. Misrepresentation (Eleventh Cause of Amended Complaint aga1nSt Eilts, and Ninth Cause of Amended Complamt aoa1nst Rosenbaum; Response to Accused's Fourth Qjjest1on on Review).

The "full disclosure" letter the Accused belatedly sent former clients Samper, Daltry, and Eagleburger- asking them to consent to the Accused's representation of FUR in the DOJ investigation – failed to mention so many material facts that it constituted a misrepresentation by omiSSion, in violation of DR 1-102(A)(3) [conduct involving misrepresentation].

D. Part 4: Fitzhenry's discipline matter, from November 2002 to 2007 (Tenth Cause of Amended Complaint against Ellis; Additional Question on Review #2).

In November 2002, the Oregon State Bar began investigating whether Fitzhenry (as the SEC had alleged), was guilty of making knowing misrepresentations in management representation letters given to FUR's auditors. *On* Fitzhenry's behalf, Ellis blamed now-former clients Samper and Daltry for the misrepresentations. Ellis's representation of Fitzhenry thus involved a former client conflict of interest, to which Ellis obtained ro client consent after full disclosure. He therefore violated DR 5-105(C) [former client conflict of interest].

V. STATEMENT OF FACTS

A. Background.

On June 16, 1999, then Deputy Attorney General Eric Holder issued a memorandum ("Holder Memorandum") to all US Attorneys outlining the DOJ's new plan to deal with corporate fraud. (Ex. 105.) The Holder Memorandum directed prosecutors to consider indicting not only corporate agents, but corporations themselves based on whether they

had: (1) timely and voluntarily disclosed their agents' misconduct; (2) willingly cooperated with government investigators; (3) taken remedial actions such as replacing responsible management and firing wrongdoers; and (4) otherwise cooperated with relevant government agencies, such as the SEC.

As an experienced securities lawyer, Ellis was aware of the Holder Memorandum and understood that to avoid criminal consequences, corporations should cooperate with SEC investigations by identifying and removing culpable corporate agents. (Ellis 2545-46.)

On October 23, 2001, the SEC issued Release No. 1470 ("the Seaboard Report." (ER 6-9 (Ex. 118).)[3] It formalized the SEC's criteria for settfing civil enforcement actions,[4] instructing agents to assess whether companies had: (1) identified those responsible for the wrongdoing; (2) fired the culpable individuals; (3) promptly, completely, and effectively disclosed the misconduct to the SEC; (4) cooperated completely with appropriate regulatory and law enforcement bodies; (5) volunteered information that the SEC had not requested; (6) waived the attorney-client and work product privileges; (7) identified additional related misconduct; and (8) offered credible assurances that the conduct would not recur.[5]

---

[3] Documents included in the Bar's Excerpt of Record are designated as "ER ". Documents included in the Accused's Opening Brief Excerpt of Recora as "OB ER____ "

[4] See, Kirlg>atrick & Lockhart LLP, *The Securities Enforcement Manual,* Amertcan Bar Association, Chicago, Ill., pp. 186-7 (1997).

[5] Securities Exchange Act of 1934, Release No. 44969/0ctober 23, 2001; Accounting and Auditing Enforcement, Release No. 1470/0ctober 23, 2001.

B. FLIR: The Accused's Corporate Client.

FUR Systems, Inc. ("FUR") is a publicly traded Oregon corporation that manufactures thermal imaging and infrared cameras for military and commercial use. In late 1999 and early 2000, while preparing FUR's 1999 financial statements, its auditors discovered that it had improperly claimed revenue in 1998 and 1999 for transactions that were:

- entirely fictitious;
- based on lease rather than sales agreements;
- prospective in nature (e.g., orders for uncompleted equipment or memorialized only by customers' non-binding letters of intent); or
- based on transfers of equipment to FUR's bonded warehouse rather than to its customers. (ER 21-33 (Ex. 367).)

These aggressive and questionable accounting practices caused FUR to significantly overstate its revenue for 1998 and 1999, requiring it to file restated financial statements for those years. (Wynne 2315-16; Ex. 459, 33, p. R-9100.)

FUR's Board of Directors blamed CFO Mark Samper. He resigned as CFO on February 18, 2000, but continued to work for FUR as an independent contractor until October 15, 2001. (Exs. 158, p. R-288; 542, p. R-11164.)

C. The Class Action Litigation.

On March 6, 2000, FUR issued a press release announcing its accounting errors, lowered earnings expectations, and Samper's

resignation.[6] (Ex. 2, p. R 5524.) Soon afterwards, shareholders filed three lawsuits, eventually consolidated and referred to herein as "the class action litigation," naming: FUR, its former CFO (Samper), its CEO (Kenneth Stringer), and (eventually) the Chairman of its Board (Robert Daltry). (Ex. 79.)

FUR hired the Stoel Rives firm (specifically, the Accused) to defend it. (Ex. 6.) Samper hired Peter Glade and the Markowitz Herbold firm. (Ex. 3.) Stringer hired William Martson, of the Tonkin Torp. firm. (Martson 217.)

FUR was obligated to pay for Samper, Stringer, and Daltry's defense. (Ex. 4; Rosenbaum 734-35.) General Counsel James Fitzhenry proposed that everyone share FUR's counsel; the individual defendants could keep their own retained counsel (to monitor the litigation, "be generally aware of [its] progress," and give individual advice as needed), but the Accused would act as everyone's primary defense counsel. (Glade 1144, 1147.)

The Accused confirmed Fitzhenry's offer by sending Samper, Stringer, FUR, and Daltry an engagement letter (OBER 92 (Ex. 6)) that:

- explained that the best defense was a unified defense;
- opined that the three defendants shared the "preponderance of defense issues;"[?]
- promised to "share with each Ooint client] all information that we learn about the litigation and not keep secrets relating to the litigation from any of you;"

[6] FUR restated its 1998 and 1999 financial statements on March 20, 2000.

[?] As described by the Accused, these shared issues were: the existence and materiality of misstatements or omissions, the measure of damages, and class administrative issues. (Ex. 6.)

- expressed doubt that any conflict of interest would arise but promised that if one did, the Accused would disclose it immediately and, if required to withdraw, would refrain from representing interests adverse to their former clients relating to the issues of the class action litigation; and
- asked each joint client to consent in advance, if withdrawal became necessary, to the Accused's continued representation of the remaining clients. (OB ER 92; Exs. 6, 392.)

Daltry, who did not have independent counsel, immediately accepted the joint representation. (OB ER 96 (Ex. 392).) Samper also consented, but specifically reserved his right to object, in the event of a conflict, to the Accused continuing to represent the other clients. (Glade 1141-42; Exs. 7, 392.) Stringer did not accept the joint representation; Martson, his independent counsel, anticipated finger-pointing among the defendants and also that the investigation might result in criminal charges. (Martson 225, 230-31; Rosenbaum 466-67.)

D. The Special Committee.

On May 16, 2000, FUR's auditors informed the Board that before they could prepare FUR's financial statement for the first quarter of 2000, they needed to audit its accounting information. (Ex. 459, p. R-9102-03.)

Wanting to hire new auditors, director Steven Wynne called accounting firm Arthur Anderson. (Ex. 459; p. R-9104-04.) However, Arthur Anderson hesitated to accept the engagement without the Board's assurance that FUR's current management (Stringer, Daltry, Fitzhenry, and William Martin (Senior Vice President of Sales)) was

trustworthy and not responsible for FUR's accounting problems. (Wynne 2416; Ex. 459, p. R-9106.)

Wynne proposed that the Board appoint a special committee to investigate FUR's senior management. (Ex. 383, p. R-8395; Wynne 2416-17.) On May 10, 2000, the Board appointed Wynne and another Board member, John Hart, to act as the special committee. (Wynne 2317-18.) Over the next ten days, Wynne and Hart (assisted by the Board's attorneys, Roy Tucker and Richard Baum of the Perkins Coie law firm) interviewed FUR officers and employees. The special committee eventually concluded that Daltry and Stringer uneeded to go." (Ex. 459, p. R-9110-11;Wynne 2423.)

The Board asked Daltry and Stringer to resign. Daltry complied, but Stringer refused and was placed on administrative leave. FUR fired Stringer in August 2000 (Martson 238, 270), and in July 2001, he sued the company for wrongful termination. (Martson 249; Ex. 354.)

E. Part 1: the SEC Investigation.

1. The Accused begin representing 40+ FUR-related clients.

On June 8, 2000, the SEC began investigating FUR's accounting and financial practices. (Exs. 12, 455.) Several weeks later, the SEC issued document subpoenas to FUR, Daltry, Samper, Fitzhenry, Wynne, Hart, Tucker, Baum, Steven Eagleburger (FUR's Director of Sales Operations), and several FUR employees. (ER 1-2 (Ex. 18); Exs. 19, 106, 389.)

The Accused offered to represent all subpoenaed FUR personnel in addition to FUR. (ER 1-2 (Ex. 18).) This was the only way the Accused could learn what the witnesses were saying in their interviews, since only the attorney for each witness was allowed to attend.

(Rosenbaum 697.) Over 40 individuals accepted the Accused's offer, including Samper, Oaltry, Eagleburger, and Fitzhenry. The SEC's attorney, Lorraine Echavarria, was concerned that this large joint representation would involve conflicts of interest. Echavarria wrote to Rosenbaum:

> "At this point, it appears that you are attempting to prov1de representation for the Company, !Jpper-level mana@ment individuals such as Mark Samper, Jim-Fitzhenry and Bill Martin, and [emphasis in original) lower-level employ es such as David [ee, Kim Hunter, and Mike Chaffee. We are concerned that the broad ranae of interests possessed bv your many clients cannot be adeguately represented 0t a smgle aftorne. SpecificallY,, we bel1eve flere are potential conflicts of interest raised by your representation of (1) a company currently under investigation by the Securities and Exchange Comm1ssion ("SEC"); (2) upper-leve! management who may /rossess civil liability in that investigation; and (3 lower-level employees who may act solely as wi nesses in this matter or vice versa." [emphasis added.) (ER 1 (Ex. 18).)

Echavarria urged the Accused to evaluate "stringently" any conflicts of interest and to explain the possibility of conflicts to all clients before continuing with the representation. (ER 1 (Ex. 18); Rosenbaum 547.)

Rosenbaum replied that the Accused were aware of and would comply with their ethical responsibilities, and that the SEC should not contact any FUR employee except through the Accused or (for those employees who had them) monitoring counsel. (ER 3 (Ex.18, p. R-5593).)

2. The Accused's conflicts disclosures regarding the SEC tnvestlgat1on.

The Accused ultimately represented: FUR, its Board and the Board's attorneys, upper-level management who became targets of the

SEC investigation (Samper, Daltry, Eagleburger, and Fitzhenry), and lower level employees who provided information and testimony. (Ex. 436, p. R-9027-28.)

The Accused sent engagement/conflicts disclosure letters to only eight of these dozens of clients. (ER 4-5 (Ex. 393).) The eight were: Daltry (Rosenbaum 513-14; Ellis 2635); Kim Hunter (an employee – Rosenbaum 506-07); Eagleburger (Rosenbaum 493); and FUR's Board members. (ER 4-5 (Ex. 393).) The Accused did not send a letter to Samper, the individual client they knew had the greatest possible exposure (Rosenbaum 494, 781), and sent no further disclosure letters during the course of the SEC investigation. (Rosenbaum 494.)

The conflict letter the Accused sent to Daltry, Hunter, Eagleburger, and the Board members had conflict language identical to that contained in the retention letter the Accused had sent to FUR, Samper, Daltry, and Stringer in the class action litigation (seep. 8, *supra).* (Compare OB ER 92 and ER 4-5 (Exs. 6 and 393).) The letter did not describe any circumstances or considerations peculiar to the SEC matter – for instance, that the SEC often shares the information it collects with other government agencies.

3. <u>The SEC Investigation.</u>

Subpoenaed witnesses produced documents to general counsel Fitzhenry. He sent them to the Accused, who cataloged and reviewed them for privilege issues, then produced them to the SEC. (Fitzhenry 2171-72.)

The Accused attended the sworn interviews of all of their clients. They thus heard:

- FUR manager Gina Chambers testify that Samper, who had authority to reverse sales, told her to destroy a log of such reversals (Chambers 392-93; Ex. 319, pp. R-7743-44);
- Chambers testify that FUR's manufacturing department worked overtime at the end of 1998 to complete units that at Samper's direction remained sitting in FUR's hallway but that were falsely reported as shipped in FUR's quarterly summary report (entries that were later reversed). (Chambers 396-97; Ex. 319, pp. R-7755-58);
- Fitzhenry and Daltry testify that each had relied on the other before signing false management representation letters (Ex. 315, p. R-7723-24; Ex. 341, p. R-7867);
- Fitzhenry assert, but Samper deny, that when Samper handed Fitzhenry the management representation letters to sign, Samper expressly assured him of their accuracy (Ex. 315, p. R-7724; 317, p. R-7731);
- Eagleburger testify that Samper had approved entry of sales orders based only on letters of intent (Exs. 334, p. R-7836; 337, p. R-7851);
- Samper testify that Daltry told him, falsely, that a customer had signed a binding amendment to a contract (Ex. 344, pp. R-7875-76);
- Wynne testify that more of FUR's transactions were booked incorrectly than correctly, and that FUR's accounting was so bad that Arthur Anderson concluded it had to have been done intentionally (Ex. 458, pp. R-9114-15);

- Several clients comment unfavorably on the credibility of other clients (Rosenbaum 569-70; Exs. 334, p. R-7831; 345, pp. R-7880, 7889); and
- David Muessle, FLIR's new controller, identify questionable transactions implicating Samper (Exs. 396, pp. R-8894; 398; 527).

Even after hearing their clients testify adversely to one another, the Accused made no supplemental conflicts disclosures. Rosenbaum sent Samper's monitoring counsel (Glade) her detailed notes of 18 employee interviews, but did not alert him that some of the testimony was highly critical of their mutual client. (Exs. 186, 532, 535.)

In November 2000, the SEC staff complained to the Accused that FLIR's documents were not aligning with customer documents, that some sales documents were inadequate, and that FLIR was not cooperating sufficiently. (Ellis 1943; Exs. 155, 157.) At a December 11, 2000 meeting with SEC staff, the Accused, Fitzhenry, and Earl Lewis (FLIR's new CEO) promised to cooperate more zealously and waived FLIR's attorney-client privilege with Fitzhenry for the period ending March 13, 2000. (Rosenbaum 606-07, 757-58; Ellis 1942; Exs. 385, 407.)

4. The Class Action Settlement and Issuance of the Seaboard Report.

The class action litigation settled in the spring of 2001. (Rosenbaum 734.) None of the defendants admitted liability and FLIR and its insurer paid the entire settlement. (Rosenbaum 735.)

The SEC investigation continued and was still ongoing in the fall of 2001, when the SEC issued the Seaboard Report. (ER 6-9 (Ex. 118).) As described above *(supra,* at 6), this report formalized the advantage

individuals and entities could hope to achieve- if eventually named as respondents in a civil enforcement action – by identifying, terminating, and helping the government build a case against wrongdoers.[8]

F. Part 2: Wells process and settlement.

1. Wells notices and meeting.s.

By January 2002, their investigation completed, SEC staff prepared to ask the Commission to authorize the filing of civil enforcement proceedings against four of the Accused's clients (FLIR, Fitzhenry, Samper, and Eagleburger) and two non-clients (Martin and Stringer).

Following its standard procedure, the SEC sent the six targeted respondents letters ("Wells notices") offering them the opportunity to meet separately with SEC staff to hear the proposed allegations ("Wells meeting"). (Exs. 50, 119, 409, 428, 453, 454.) Each targeted respondent could then respond to the proposed allegations *via* a written submission rwells submission"), arguing its (or his case) to the Commission.

The Accused received FUR's Wells notice on February 19, 2002, and attended FUR's Wells meeting on March 1, 2002. (Ex.119.) At the meeting, SEC staff described wrongdoing by Samper, Fitzhenry, and Eagleburger, and expressed doubts about Samper and Fitzhenry's credibility. (Ex. 187; Rosenbaum 809-10.) SEC staff also criticized FUR for failing to meet most of the Seaboard criteria- specifically by refusing to admit its officers had committed fraud. (Rosenbaum 810.)

---

[8] The report told the SEC to consider: "Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct?..Are P.ersons responsible tor any misconduct still with the company?... Did the company identify P-Ossible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law?" (ER 8 (Ex. 118).)

When the Accused received Fitzhenris Wells notice (Ex. 409) on February 19, 2002 (Fitzhenry 2175), they advised Fitzhenry to hire independent counsel to respond to it. He retained H. Steven Wilson, of the Latham & Watkins firm; however, the Accused continued to represent Fitzhenry throughout the Wells process. (Fitzhenry 2166, 2175-76.) Ellis accompanied him to his March 6, 2002 Wells meeting, at which SEC staff disclosed their belief that Fitzhenry had made misrepresentations in two management representation letters given to FUR's auditors in April 1999. (Ex. 466, p. R-9412; Ellis 1999; Fitzhenry 2187.)

The Accused received Eagleburger's Wells notice (Ex. 454) on March 14, 2002. Ellis accompanied him and his monitoring counsel, Carl Neil, to his Wells meeting on April 5, 2002. (Exs. 466, p. R-9419, 473.)

The Accused received Samoer's Wells notice (Ex. 50) on February 28, 2002, but did not attend Samper's Wells meeting on March 7, 2002. (Ex. 507.) The afternoon before, Ellis telephoned Glade to say that he was "swamped" and could not attend.[9] Ellis told Glade that SEC staff would probably make some "strident" assertions about how many of FUR's transactions "suck" but that SEC staff apparently accepted that Samper's errors were unintentional. (OB ER 245 (Ex. 54).)

At the Wells meeting, Glade and his partner Lisa Kaner were therefore shocked to learn that SEC staff not only considered Samper a principal wrongdoer, they believed he had lied to them during the investigation. (Glade 1186, 1351-52; Kaner 1449.) When Glade and Kaner asked SEC staff which witnesses had implicated Samper, staff told them to: "Ask Lois [Rosenbaum]" – because she represented those

[9] Ellis's pressingly urgent matter, according to his billings, was the preparation of FLIR's Wells submission. (Ex. 466, p. R-9412.)

witnesses as well as Samper. (Glade 1194; Kaner 1453-55; OB ER 260 (Ex. 552); Ex. 143, pp. R-650'7, 6511.)

2. The Wells submissions.

(a) FUR's Wells submission.

By this time (early 2002), director Wynne- himself an experienced corporate attorney- was immersed in the SEC matter. Wynne replaced Fitzhenry as FUR's general counsel after Fitzhenry received a Wells notice. Fitzhenry remained employed at FUR, taking the title of Senior Vice President for Corporate and Government Affairs. (Wynne 2313-14, 2318-20; Ex. 180, p. R-8937.)

Wynne was not surprised that FUR received a Wells notice. (Wynne 2321-22.) He knew the SEC would hold the company responsible for the actions of its officers and directors, and by spring 2001, Wynne had concluded (from Muessle's investigations) that Samper had helped Stringer commit fraud by recording transactions that overstated FUR's revenue and income and by submitting financial statements with fraudulently manipulated numbers. (Wynne 2340-41.) Wynne believed the clearest evidence of Samper's misconduct was a claimed $4.6 million transaction for which there was no supporting documentation ("the Swedish Drop Shipment"). (Wynne 2352-55, 2498-99.) Wynne concluded that Samper had "manufactured" the $4.6 million dollar number (Wynne 2354-55) and had "filed financial statements with the [SEC] based on entries that [Samper} by his own admission…either knew to be inaccurate or did not know they were accurate or not which to me constitutes a definition of securities fraud." (Wynne 2339.)

As a member of FUR's settlement team, Wynne communicated almost every day with the Accused, and helped write FUR's Wells submission. (Wynne 2335.) Having concluded himself that Stringer and

Samper had acted fraudulently, Wynne hoped to convince the SEC that FUR had recognized and resolved its problems and was striding into the future with a new CEO, new CFO, new auditors, new integrity, and new financial functionality. (Wynne 2336-39.)

On March 8, 2002, a week after FUR's Wells meeting (which Ellis attended) and the day after Samper's (which Ellis did not), the Accused filed FUR's Wells submission. (ER 10-20 (Ex. 158).) As envisioned by Wynne, carefully tracking the Seaboard criteria (Ellis 2591), approved by Rosenbaum (Ex. 348, p. R-7959), and signed by Ellis, FUR's Wells submission attributed its accounting problems entirely to the wrongful acts of its former officers, asserting that the company had:

> "...removed those senior managers who were responsible for the accounting errors... , including the President and CEO, Stringer. The Chairman of the Board *JDaltryl* also resigned....the CFO rsamper] ha tendered his resignation in February, and the Controller of the Company was also replaced. The ComQany also terminated the employment of the Senter Vice President forSales and Marketing and the Director of Sales Operations *[Eagleburger].* Board thus identified and removed air those tn semor manaaement w o were responst e or the Compans troubles... " [em phasts addeal (ER 12 (EX. 1 8); Ex. 351, pp. R-7958-59.)

In this paragraph, the Accused labeled evexy individual (except Fitzhenry)[10] who had received a Wells notice as "senior management who were responsible" for FUR's "accounting errors." Two of the individuals thus identified (Samper and Eagleburger) were the Accused's clients.

---

[10] Fitzhenry enjo yed the support of FUR's current management. (Ex. 409, p. R-8936; Tr. 2662-63.) FUR's Wells submission singled him out for praise, citing his exemplary cooperativeness, his unceastng efforts to locate subpoenaed documents, his important contributions as part of the current senior management team, and FUR's dismay that the SEC intended to pursue charges against him. (ER 16 (Ex. 158).)

FUR's Wells statement argued that the removal of these individuals- and adoption by FUR's new management of "an entirely new ethic" – militated against punishing FUR. The SEC should look elsewhere for retribution (the Accused wrote) because: "To the extent wrong-doing may have occurred, we understand that the SEC is pursuina fraud claims against one or more individuals who mav have been resoonsible." [emphasis added.] (ER 20 (Ex. 158).) Again, of the five individuals "the SEC [was] pursuing fraud claims against," three (Samper, Eagleburger, and Fitzhenry) were the Accused's clients.

The Accused neither discussed FUR's Wells submission with Samper, Eagleburger, or Fitzhenry (or their counsel) befae sending it, nor copied them with it. (Ex. 351, R-7960-61.) When Glade saw it a week later (he had to request it), he interpreted the document as identifying Samper as one of the bad actors (Glade 1197-98); Glade wrote across the top: "Hard to believe this was written by lawyers who represent Mark Samper." (Glade 1197-99; ER 10 (Ex. 158).) However, when confronted, Ellis assured Glade that FUR's and Samper's interests were still aligned and that no one at FUR believed Samper had acted intentionally.[11] (Glade 1200-01.)

Glade assumed the leading role in Samper's negotiations with the SEC. However, the Accused continued to represent Samper- as well as FUR – until mid-October 2002. (Glade 1200-04; Kaner 1526; Ex. 504, pp. R-10181-90.)

(b) Fitzhenry's Wells submission.

The Accused helped Fitzhenry's independent counsel prepare his Wells submission, filed on April 12, 2002. (Ex. 120.) It asserted that

[11] Althoug.this was not true as to Wynne, the Accused's closest contact at FLIR.lwynne 2338.)

Fitzhenry had signed the misrepresentative management representation letters in reliance on Samper's express assurances and the fact that they had already been signed by Samper and Daltry. The Accused did not tell Samper or Daltry that Fitzhenry blamed them for the letters' inaccuracies or ask them to consent to the Accused's continued representation of Fitzhenry.

(c) Samper{no Wells submission}.

After Samper·s March 7, 2002 Wells meeting, Glade questioned whether it was wise to make a Wells submission and Samper ultimately chose not to do so. (Glade 1202; 08 ER 261.)

3. The SEC Civil Enforcement Settlements.

By spring 2002, the SEC was thus poised to file civil enforcement actions against six respondents, four of whom (FUR, Samper, Eagleburger, and Fitzhenry) were the Accused's clients. The Accused also represented Daltry, who – although not targeted by the SEC – Fitzhenry was blaming (in his Wells submission) for the misrepresentative management representation letters.

The Accused continued to represent all five of these clients in summer and early fall 2002, as the parties discussed settling the SEC case. (Exs. 159, 173.)

(a) FUR's settlement.

Although FUR's Wells submission blamed the company's accounting problems on prior management, the submission described the problems as resulting from "errors" rather than fraud. (Ellis 2660-61, 2667; ER 10-18 (Ex. 158.) Asserting that FUR "still [didn't] get it," and threatening to advocate for the imposition of large penalties, SEC staff refused to consider any settlement that did not admit fraud. (Rosenbaum 587, 810; Ellis 2667-69.)

The Accused ultimately agreed to settlement language that stipulated (without admitting or denying) that FUR *and its senior management* had:

- engaged in fraudulent revenue recognition practices (ER 22 (Ex. 367));
- understated expenses and overstated assets (ER 22, 30 (Ex. 367));
- made material misstatements in FUR's SEC quarterly and year-end reports for 1998 and 1999, by overstating earnings and understating losses (ER 22 (Ex. 367)); and
- intentionally falsified its books and records throughout 1998 and 1999 (ER 23-31 (Ex. 367).)

The Accused did not discuss this settlement offer with their other targeted clients (Samper, Fitzhenry, and Eagleburger) or obtain their consent to the Accused's continuing representation of FUR. (Ellis 2671.) FUR's settlement finalized on or before September 30, 2002. (Ex. 411.)

(b) Fitzhenrv/Eagleburger/Samper settlements.

Eagleburger and Samper consulted with the Accused- in addition to their independent counsel – before they settled with the SEC. (Eagleburger 426-27; Glade 1368; Exs. 122, 159.}[12] Eagleburger decided to settle in order to buy peace from what was "probably the worst experience of my life." (Eagleburger 425-26.) Samper too settled because he "simply didn't have the emotional stamina to keep up the fight." (Glade 1201-02.) Samper expected the SEC settlement to resolve any issue concerning his involvement with FUR's accounting problems. (Glade 1210.)

[12] Martin, advised by Carl Neil, also negotiated and signed a settlement agreement.

On September 30, 2002, the SEC filed a civil enfCX"cement action against FUR, Stringer, Martin, Eagleburger, and Samper. (Ex. 356.) The same day, pursuant to their signed settlement agreements, FUR, Samper, Eagleburger, and Martin filed consents to the entry of judgment. (OB ER 267 (Ex. 358).) On October 2, 2002, judgment was entered in the federal district court against everyone except Stringer and Fitzhenry. (Exs. 358; 578, p. R-11516.) On November 21, 2002, a cease and desist order was entered against Fitzhenry. (Fitzhenry 2191-92; Ex. 160.)

The Accused continued to represent Samper until at least October 15,2002. (Rosenbaum 627; ER 74 (Ex. 173).)

4. The Swedish Droo Shioment.

After the SEC settlements, the only remaining SEC respondent was non-client Stringer (Rosenbaum 843). He was also still pursuing his wrongful termination action against FUR. (Rosenbaum 845.)

On October 3, 2002, Wynne obtained a copy of the SEC's complaint *(SEC v. Stringer)* and noticed that it did not mention the transaction Wynne considered FUR's most egregious accounting problem – the $4.6 million, completely undocumented and (everyone had concluded) wholly fictitious "Swedish Drop Shipment." (Wynne 2351-55; Ellis 2532; Ex. 222.)

If the SEC proved that Stringer had committed fraud, FUR could use that finding as a defense to Stringer's wrongful termination lawsuit. (Rosenbaum 847; Wynne 2407-08) Believing that the SEC's case would be stronger if it alleged the Swedish Drop Shipment, Wynne directed Rosenbaum to remind the SEC about it. (Rosenbaum 629-30; OB ER

275 (Ex. 171).)[13] Although the Swedish Drop Shipment implicated Samper as well as Stringer- and the Accused still represented Samper – Rosenbaum immediately called the SEC. She reminded it of the Swedish Drop Shipment and offered to help build its case against Stringer. (OB ER 275 (Ex. 171); Rosenbaum 629-30.)

G. Part 3: the DOJ investigation.

1. The Accused learn about the criminal investigation.

On January 27, 2003, Assistant US Attorney Allan Garten telephoned the Accused to reveal that the DOJ had been tracking the SEC investigation, had received transcripts of depositions taken by the SEC, and had opened a criminal investigation. (Rosenbaum 631, 885; Ex. 94.) The Accused conveyed this information to Glade and Carl Neil (Eagleburger's separate counsel). (Ex. 181, p. R-6668)

The Accused met with Garten on January 30, 2003. Garten said that he was considering prosecuting various current or former FLIR personnel but did not intend to indict FUR !fit cooperated fully with his investigation. (Exs. 94, 151; 08 ER 293 (Ex.566).) Garten directed the Accused's attention to a newly issued DOJ memorandum ("the Thompson Memorandum") setting criteria for when a corporation should be criminally charged. They included whether the corporation had:

- cooperated in the investigation of its agents by waiving its attorney-client and work product privileges;
- identified its wrongdoers and disclosed the complete results of its internal investigation; and

[13] If a court determined that Samper and S ringer acted fraudylently, FLIR could also recover amounts 1t had Qald Sarru er and Stnnger's independent lawyers. (Wynne 2455-56; ER 55 (Ex. 572, p. R-11503).)

- taken remedial actions, such as disciplining wrongdoers and disclosing information concerning their illegal conduct. (Rosenbaum 887; OB ER 284 (Ex. 123).)

Because FUR did much of its business with the federal government and because a criminal conviction could mean no future government contracts, FUR was highly motivated to avoid criminal indictment. (Rosenbaum 841-42.)

On January 30, 2003, FBI special agent Christopher Davis called Rosenbaum to ask for the documents (primarily notes) prepared by the special committee's attorneys (Tucker and Baum) during its investigation in 2000. Parts of these documents had been redacted as privileged before being produced to the SEC; however, the Accused immediately produced the unredacted documents to the FBI. (Rosenbaum 849, 889-90; ER 41 (Ex. 162); Ex. 189, p. R-6861.)

On February 4, 2003, Garten called Rosenbaum to say that if FUR wanted to avoid criminal charges, it should waive its attorney-client privilege as to both in-house (Fitzhenry) and outside counsel (the Accused). (Rosenbaum 943-44; ER 36 (Ex. 190, pp. R-6930-31.) Garten said that his primary targets included Samper and Eagleburger; that FUR could avoid criminal charges by cooperating; that "if it were up to him" FUR would come out looking good (like a "hero of the war on terrorism"); and that the Accused were in the best position to tell him where to look for the evidence he needed to prove his case. (ER 37 (Ex. 190).)

On February 5, 2003, Garten asked Rosenbaum to produce Muessle's evaluations of FUR's 1998 and 1999 accounting irregularities and all files Muessle had reviewed. (ER 37 (Ex. 190, p. R-6932); ER 42

(Ex. 456).) She immediately began locating and producing the documents. (Ex. 181, p. R-6674.)

On February 11, 2003, Garten called Rosenbaum to schedule a meeting to discuss further his expectations. Rosenbaum's notes of that conversation say: "Garten wants [FLIRJ to help make [aJ case against certain former employees." (ER 37 (Ex. 190, p. R-6933).)

On February 12, 2003, the Accused met again with Garten, accompanied by Wynne and FUR CEO Earl Lewis. (ER 80 (Ex. 181, R-p. 6674).) Garten reiterated that FUR's willingness to cooperate would impact whether it would be criminally charged – and that "cooperation" included having the Accused help him "develop the evidence I know they have." (Ellis 2706-07.)

Garten confirmed these expectations in a February 14, 2003 letter to the Accused:

> "In this case, FUR seeks immunity from prosecution. In return we expect tflat the company actively to rsic) assist us in assembling evidence\ by way of documents and testimony__\ Which Will allow us to prove the charges ana allegations in the SEC complaint...Our assessment of the extent of the comQany's cooperation will be a function, in part, of how proactive you are in assisting us w1th our proof ag ainst ttie former employees identified in the SEC complaint...our ability to...bring ao ropriate criminal charges,. if anifj, against md1v1dua s rather than the comoanw1 be d1recflv Influenced DO the nature and e ent of your cooperation an assistance. Based upon Mr. Lewis' express assurances that the company will do whatever it takes to assist us, I would assume that the two of you and knowledgeable employees wrthm the company would 5e able to put together the evidence of the obvious fraudulent conduct outlined in the SEC complaint in a rather short time frame." [emphasis added.] (ER 46 (Ex. 97).)

Garten also asked: that FUR waive its attorney-client and work product privileges for 1997-2001; for information about compensation

paid to Daltry, Stringer, Samper, and Eagleburger; and for the addresses and contact information of 37 FUR-related witnesses and 13 of its customers. (ER 45-46 (Ex. 97).)

The Accused understood that Garten was threatening to indct FUR unless they betrayed their former clients. (Rosenbaum 972.} They considered his demands "outrageous" (Rosenbaum 907, 966) and "despicable" (Ellis 2802). However, they communicated their outrage to oo one nor did they forward Garten's letter (or describe its contents) to Samper, Daltry, or Glade. (Rosenbaum 965-66, 973-74; Myers 1049; Glade 1214; ER 49 (Ex. 220).) They did, however, (1) forward Garten's letter to FUR (ER 49 (Ex. 200)), and (2) begin collecting the requested information. (Rosenbaum 960-61.)

On February 18, 2003, Wynne provided Rosenbaum with contact information for the FUR employees (and former employees) Garten wanted to interview. Wynne reiterated that FUR was committed to "full and complete cooperation." (Ex. 215.)

On February 18, 2003, Rosenbaum wrote to Garten that "FUR is committed to fully cooperating in your investigation," that FUR had waived the attorney-client privilege, and that she was gathering the requested documents. (ER 50 (Ex. 182, p. R-6761).) Rosenbaum also wrote that although Samper, Daltry, Eagleburger, and Fitzhenry were the Accused's former clients, the Accused's ethical responsibilities would not impede Garten's investigation because: 'To the extent Barnes and I are limited in our ability to respond because of these prior client relationships, we will arrange for Steve Wynne, who is not limited by these relationships, to respond on the Company's behalf." [emphasis added.] (ER 51 (Ex. 182).) Rosenbaum copied her letter to FUR, but not to Samper, Daltry, or Glade. (ER 51 (Ex. 182, p. R-6762).)

Ellis testified at the disciplinary hearing that he decided to try to convince Garten that requiring the Accused to help develop a case against their former clients might backfire against the government by tainting the government's evidence. (Ellis 2709-10.}[14] Ellis advanced that argument to Garten (although he admits not forcefully- Ellis 2714) at a third meeting between the Accused and Garten on February 19, 2003.

Rosenbaum's extensive notes of that meeting contain exactly five words about the utainting" issue (urisk of tainting – he agrees." (ER 39 (Ex. 190).) Garten told the Accused that if he (Garten) had proof on Stringer, Samper, and Martin, his case against FLIR would ugo away." (ER 39 (Ex. 190); Rosenbaum 971.) Other topics discussed were:

- that the investigation would focus on Martin, Samper, Stringer, Eagleburger, Fitzhenry, and perhaps Daltry – and they should all retain defense counsel;
- Garten would consider offering Daltry and Fitzhenry informal immunity in exchange for incriminating information about Samper and Stringer;
- Garten would not offer Samper such informal immunity;
- that Garten who "is a man of his word," would not indict FLIR if it cooperated, and would "ultimately send letter (assuming coop.) that [the DOJ] won't indict co." (Rosenbaum 968; ER 39 (Ex. 190)); and
- Garten would be "happy to" have the Accused attend interviews of current FLIR employees but would "have to

[14] Garten submitted a declaration (Ex. 609) in this disciplinary action that suggested that concern about the effect of the Accused's former client conflict on the criminal investigation originated with him. (Ex. 609, p. R-12581.)

think about" whether to allow them to attend interviews of former employees (ER 38 (Ex. 190)).

Later that same day (February 19, 2003), Garten emailed the Accused that he would not permit them to attend witness interviews, because:

> "I am somewhat concerned that you may have a conflict because if you urge these witnesses to cooperate with us, it is bi hly likely that we will obtain information that wtLinculoate Qur former clients Eagleouraer. Daltrv. and Samper. I leave thrs conflrct 1ssue up to you t>ut we will be seeking information from these fact witnesses which may: redound to the benefit of your extant client FLIR., but be harmful to the rnterests of y our former clients, Samper, Daltry, and Eagleburger." [emphasis added.] (ER 52 (Ex. 163}.)

After the February 19, 2003 meeting, Rosenbaum telephoned Glade (and on February 20, 2003, sent him a confirming letter) to say that the DOJ was targeting Samper, Stringer, Martin, Eagleburger, Daltry, and Fitzhenry, and they should all retain criminal defense counsel. (ER 53 (Ex. 99).) She said that FUR was not a focus of the investigation and that the Accused planned to assist FUR by producing documents and making witnesses available. (ER 53 (Ex. 99).) She did not reveal:

- the reason FUR was not being targeted (i.e., in exchange for its cooperation building a criminal case against Samper and other former clients);
- that Garten might offer the same deal to Fitzhenry and Daltry, but not Samper;
- that the Accused had already sent Garten and the FBI thousands of pages of documents;

- that the Accused and Garten had recognized and discussed the conflict between FUR's interests and Samper's; and
- that Ellis (as of October 2002) was representing Fitzhenry in a lawyer discipline case in which Fitzhenry was blaming Samper and Daltry for misrepresentations (Tr. 1218).

In fact, the Accused never disclosed Garten's demands – or the deal Garten had offered FUR – to Samper, Daltry, or Eagleburger. (Glade 1217-18.) The Accused explained at the disciplinary trial that "there was nothing to report" to their former clients because Garten's February 19, 2003 email showed that he had seen reason and the "whole ugly episode of Mr. Garten trying to put the screws on us ...had ended." (Rosenbaum 972-73; Ellis 2025-26.) The Accused did, however, report to Wynne what had happened at the meeting. (ER 54 (Ex. 413).)

On February 21, 2003, Rosenbaum caused Muessle's transaction analyses and supporting documentation to be hand-delivered to Garten. (Ex. 414.) On February 24, 2003, Rosenbaum sent him a schedule of Samper and Daltry's compensation data. (Wynne 2384.)

On or about February 25, 2003, Daltry hired criminal defense counsel Steven Myers. (Myers 1031.) Rosenbaum told Myers that Garten *might* give Daltry informal immunity in exchange for his cooperation, but said nothing about FUR already receiving such a deal. (Myers 1034-35.)

Peter Jarvis told Rosenbaum that because the Bar would regard the Accused's representation of FUR in the DOJ investigation as a former client conflict, she should make full disclosures and ask for client consent. (Jarvis 1867, 1869; ER 64 (Ex. 209).) On February 26, 2003, Rosenbaum drafted a conflict disclosure letter and asked Ellis and Jarvis

to review it. (Rosenbaum 643-44; Jarvis 1857.) Jarvis suggested that Rosenbaum add the following language:

> "Regardless [of the direction the DOJ takes the investigation], we will not represent FUR in responaing to DOJ reguests unless we have your consent to do so.....' (ER 58 (Ex. 211).)

Jarvis also suggested that Rosenbaum add:

> "- - - notwithstanding our intention to be neutral on personal privilege issues, we might nonetheless be more rnclined to cooperate w1th the DOJ due to our continuing representation of FUR than we would be if we were merely a repositorY of documents for an investigation in which FUR would be represented 6y other counsel." (ER 59 (Ex. 211).)

Rosenbaum rejected Jarvis' suggested language (Jarvis 1886-87; Rosenbaum 650-51) and waited until March 3, 2002 to send the disclosure letter.

On February 27, 2003, at Garten's request, he and Wynne met alone. (Wynne 2364-65.) Wynne called Rosenbaum immediately after the meeting to report what had happened. (Wynne 2366; Ex. 221.) As recorded by Rosenbaum's notes, Garten told Wynne that he (Garten) no longer wanted to deal with the Accused because they "couldn't be party to delivery of information that hurts [their] former clients." (ER 61 (Ex. 221).) When Wynne protested that "other lawyers can't help [FUR] at all," Garten agreed that the Accused could remain involved so long as they did not attend interviews or act as intermediaries between Garten and FUR. (ER 62 (Ex. 221).)

As recorded by Rosenbaum's notes, Wynne also told Garten that he should meet with Muessle and have him "walk you thru [the accounting] files." (Wynne 2369; ER 62 (Ex. 221, p. R-7077).) Wynne further advised Garten to take a closer look at the Swedish Drop

Shipment, an issue inexplicably ignored by the SEC, and suggested that Garten interview Arne Almerfors, the head of FUR's European operations. (Ex. 221, p. R-7077; Rosenbaum 989, 991-92; Wynne 2384-85.)

On March 3, 2003, Rosenbaum sent FUR, Samper, Daltry, and Eagleburger each an identical disclosure/consent letter. (ER 65 (Ex. 101); Exs. 223, 418.) It stated that:

- FUR had asked the Accused to represent it in the criminal investigation by "advising FUR, which is cooperating in the investigation, and assisting the Company in producing documents and arranging for witnesses to be interviewed by the DOJ;"
- the criminal investigation "obviously" was a matter "related to" the Accused's earlier representation of Samper, Daltry, and Eagleburger in the SEC matter, and it had potentially adverse consequences to them;
- FUR was not a "focus" of the investigation and had already waived its attorney-client privilege with Stoel Rives;
- the Accused would play only a limited role and would not attend witness interviews;[15]
- the Accused would not voluntarily disclose materials that were arguably the subject of the recipient's personal claim of confidentiality; and
- the risk of consenting to the Accused's representation was "very small."

[15] Note: this term -which was not contained in the proposed conflicts letter that Rosenbaum drafted on February 26, 2003 (ER 66 (Ex. 211)) - was presumably added after Garten and Wynne agreed on February 27, 2003 that the Accused would not attend witness interviews.

Although the letter identified the former client conflict of interest rule (DR 5-105(C)), it did not say that the Accused actually had such a conflict or why, or that their ability to proceed with the representation depended on whether the recipients consented. The letter discussed no possible negative consequences that might arise from the proposed representation, nor did it disclose that:

- the DOJ had promised not to indict FLIR *if* it helped build a case against FUR's former employees, including Samper;
- the OOJ was perhaps willing to offer a similar deal to Fitzhenry and Daltry;
- the Accused had been helping FLIR cooperate with the DOJ for weeks (Exs. 219; 226);
- "cooperation" (as Garten defined it) meant more than providing requested documents;
- the Accused had already produced thousands of pages of documents (some previously withheld as privileged) to Garten and the FBI (ER 71-73 (Ex. 373); Roberts 1805-08);
- FLIR had waived its attorney-client privilege with both Stoel Rives and Fitzhenry through 2001;
- Wynne had just urged Garten to take a closer look at the Swedish Drop Shipment; and
- Ellis was representing Fitzhenry in a lawyer disciplinary matter and blaming Samper and Daltry for misrepresentations (Myers 1056-57).

On March 5, 2003, Wynne emailed Rosenbaum that Almerfors (who resided in Sweden) was coming to Portland, and the SEC wanted to interview or depose him. (Rosenbaum 992.)

On March 13, 2003, Myers conveyed Daltry's consent to the Accused's representation of FLIR in the DOJ matter, conditioned on the understanding that the Accused would only be producing documents and arranging interviews. (ER 68 (Ex. 473).) Rosenbaum immediately responded that Myers' understanding was not correct: the Accused also intended to advise FLIR with respect to the DOJ investigation. (ER 70 (Ex. 194).) Eagleburger conveyed his consent on March 28, 2003, but Samper did not consent until April11, 2003. (Ex. 573.)

During the six week period between the Accused's March 3, 2003 letter and their receipt of Samper's consent, the Accused helped FLIR "cooperate" with the DOJ by: arranging for Muessle (accompanied by Wynne) to meet with Garten and the FBI on March 13, 2003 to discuss the details of the Swedish Drop Shipment (Wynne 2409-10; Muessle 2469; Ex. 469, p. R-9593; Ex. 470, p. R-9601); arranging for Almerfors to be deposed by the SEC; and producing over 2,400 pages of documents to Garten and the FBI. (Roberts 1833; ER 71-73 (Ex. 373).)

On April 17, 2003, the SEC interviewed Muessle- represented by Rosenbaum – about the Swedish Drop Shipment. (Ex. 387.) On April 22, 2003, the SEC took Almerfors' deposition; Almerfors was also represented by Rosenbaum. (Ex. 227.) That same day, Garten interviewed Almerfors at Stoel Rives' offices. (Wynne 2385-87; Ex. 609, p. R-12581; ER-75 (Ex. 189).) Rosenbaum also represented Daltry and Wynne at their SEC depositions on June 5-6 and June 13, 2003, respectively (ER 76 (Ex. 189), and was scheduled to represent Fitzhenry at his SEC deposition in late September 2003.

2. The indictment.

Between January and September 2003, Wynne communicated with Garten several times- and with the Accused many times. (Wynne

2387; ER 74-77 (Ex. 189); ER 79-85 (Ex. 181) In July 2003, Wynne testified before a grand jury (Wynne 2387-88), and on September 17, 2003, Samper, Stringer, and Martin were indicted for securities, mail, and wire fraud. The indictment alleged that the three defendants – in order to increase their personal compensation through cash bonuses, stock grants, and stock options – had fraudulently inflated FUR's revenues through a series of transactions that included the Swedish Drop Shipment and the Jamarillo transaction (the latter being the subject of the misrepresentative management representation letters signed by Fitzhenry, Samper, and Daltry). (Rosenbaum 630-31; Ex. 249, pp. R-7153-54, 7162,7174, 7179-80.)

The defendants moved to dismiss the indictment, arguing that they had been denied due process by not being advised that during the entire SEC investigation, the SEC was funneling evidence to the DOJ for a criminal prosecution. Samper also argued that the government had taken unfair advantage of the Accused's conflict of interest. In 2006, the district court dismissed the indictment. *United States v. Stringer,* 408 F.Supp.2d 1083 (2006), but in 2008, the dismissal was vacated on appeal. *United States v. Stringer,* 521 F.3d 1189 (9th Cir. 2008). The latter decision brought the Accused's conduct to the Bar's attention. (Ellis 2819.)[16]

[16] Before the disciplinary hearing, the trial panel granted the Accused's motion to exclude these decisions from evidence. The Bar does not contest the panel's rulirtg and does not ask the court to consider these decisions as evidence of unethical conduct by the Accused. However, in this disciplinary case, the Accused asserted the Affirmative Defense of Estoppel/Laches and argue on appeal that the Bar delayed the prosecution. (OB p. 101.) Because these federal court decisions are relevant to the issue of how and when the Accused's conduct came to the Bar's attention, the Bar asks the Court to take judicial notice of them. ORS §§ 40.065, 40.080, 40.090(1).

H. Part 4: Ellis's representation of Fitzhenry in lawyer disciplinary matter.

In early October 2002, when the SEC matter settled, Ellis knew that the attendant publicity could result in a lawyer discipline investigation of Fitzhenry's conduct. (Fitzhenry 2172-73; Ex. 412.) On November 26, 2002, Ellis – on Fitzhenry's behalf – self-reported the matter to the Bar, explaining that Fitzhenry had signed the misrepresentative management representation letters in reliance on Samper's assurances and the pre-existing signatures of Samper, Daltry, and others. (DB ER 276 (Ex. 160); DB ER 280 (Ex. 161).)

The Bar filed a formal complaint against Fitzhenry in September 2003 (Fitzhenry 2209), Ellis and Peter Jarvis represented Fitzhenry in the discipline matter until 2007, when the court issued its decision in In re Fitzhenry, 343 Or 86, 162 P3d 260 (2007). (Ex. 381.) For this entire period – on numerous occasions to the Bar, the trial panel, and the court – Ellis blamed FUR's former executives (including Samper and Daltry) for the misrepresentations the Bar alleged against Fitzhenry. (Fitzhenry 2188-89; Ex. 378 p. R-8296, 8302, 8305; Ex. 379 p. R-8339; Ex. 376 p. R-8264.) The court's decision in In re Fitzhenry reflects Ellis's argument, stating that Fitzhenry "was not the only FUR management executive who participated in the misrepresentation at issue." In re Fitzhenry, supra, 343 Or at 110.

VI. ARGUMENT

A. Part 1: During the SEC investigation, the Accused's simultaneous representation of FLIR, Samper, Daltry, Eagleburger, and Fitzhenry involved a likely current client conflict of interest that was not waived by client consent after full disclosure, and therefore violated DR 5-105(E).

The First Cause of both Amended Complaints alleged that during the SEC investigation, the Accused's representation of FLIR, Samper, Daltry, Eagleburger, and Fitzhenry involved a likely current client conflict of interest that was not waived by client consent after full disclosure.

The trial panel dismissed this charge, finding no adversity of interest because:

- even though FUR held Samper responsible for the accounting irregularities, FUR thought he had acted incompetently, not fraudulently;
- the SEC investigation process allowed the Accused no opportunity to advocate for any client;
- because FUR was vicariously responsible for its agents' wrongdoing, everyone's interests were aligned; and
- all of the Accused's clients benefitted from the joint representation.

The panel also found that even if there were adversity, Samper was not harmed because he had independent counsel (Glade) and because the engagement letter the Accused had sent Samper in the class action litigation was a sufficient "full disclosure."

- The trial panel's analysis and conclusions are incorrect.

1. DR 5-105(E).

DR 5-105(E) prohibits lawyers from representing multiple current clients when the representation would result in an actual or likely conflict of interest

An "actual" conflict focuses on the lawver's duties, and exists when the lawyer must contend for something on behalf of one client that which he/she must oppose on behalf of another client. DR 5-105(A)(1). A "likely" conflict focuses on the clients' interests, and exists when the objective personal, business, or property interests of joint clients are adverse. DR 5-105(A)(2). In analyzing conflicts, all facts that the lawyer knew or should have known are attributable to him/her. *KAO Oregon v. Ferguson,* 315 Or 135, 145, 843 P2d 442 (1992); *In re Knappenberger,* 338 Or 341, 355-6, 108 P3d 1161 (2005).

Actual conflicts can never be waived; likely conflicts can be waived by client consent after "full disclosure" – meaning an "explanation sufficient to apprise the recipient of the potential adverse impact on the recipient of the matter to which the recipient is asked to consent." DR 5-105(F). A "full disclosure" must be contemporaneously confirmed in writing and include a recommendation that the recipient seek independent legal advice to determine if consent should be given. DR 10-101(B).

2. The clients' interests were adverse.

Joint representation of clients who have an objective legal interest in accusing one another involves at least a likely conflict of interest. *In re O'Neal,* 297 Or 258, 683 P2d 1352 (1984); *In re Cohen,* 316 Or 657, 853 P2d 286 (1993).

Clients' varying degrees of involvement in suspected wrongdoing also creates adversity of interest. In *In rePorter,* 283 Or 517, 520, 524,

584 P2d 744 (1978), an attorney who represented 14 clients in the pre-indictment stage of a criminal matter claimed he could have no conflict until at least one client was formally charged. The court disagreed because, "the accused could not freely advise one client in regard to such critical decisions as whether to plea bargain, testify, or plead the Fifth Amendment, without weighing the consequences and disadvantages to another client." In In re Gopman, 531 F.2d 262 (5th Cir. 1976), the court found a likely conflict where a lawyer represented a union and several of its officials during the investigation of possible violations of the Labor Management Reporting and Disclosure Act, because the officials' assertion of Fifth Amendment privilege was adverse to the union's interests in cooperating. Likewise, in In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977), two attorneys representing ten witnesses in a grand jury investigation were found to have a likely conflict because some clients stood to benefit from cooperating with the government, while others did not.

All of the Accused's clients – FUR, its officers, directors, and employees – hoped that the SEC would find no misconduct, but all had an interest in protecting themselves in case it did. Individuals involved in SEC investigations face exposure independent of the company; they have an opportunity to limit that exposure if they cooperate with SEC investigators. Kirkpatrick & Lockhart LLP, The Securities Enforcement Manual, American Bar Association, Chicago, Ill., p. 477 (1997). When the SEC investigation began, every one of the Accused's 40+ individual clients thus had an interest in identifying and testifying against possible wrongdoers, a category that likely, if not inevitably, included some of the Accused's other clients.

During the SEC interviews, the Accused heard clients Chambers, Muessle, Daltry, Fitzhenry, and Wynne offer testimony that was adverse to the interests of client Samper, who the Accused recognized was their individual client most likely to be targeted by the SEC (Rosenbaum 781; Ellis 1979).[17] Glade discovered this at Samper's Wells meeting, when SEC staff told him Samper had been implicated by other of the Accused's clients. (08 ER 260.)

The Accused's individual clients had other interests adverse to one another and to FLIR. Because the SEC was likely to share information with other agencies for use in future criminal, disciplinary, or other proceedings,[18] those witnesses most intimately involved with suspected misconduct (such as Samper and Daltry) must consider whether to assert their Fifth Amendment privilege against self-incrimination. Those witnesses with professional licenses (such as CPA Samper and attorney Fitzhenry) must also consider the impact of any testimony in the SEC investigation on future professional discipline actions. Any action the Accused's individual clients took to protect these

---

[17] According to *Committee of Sponsoring Organizations of the Treadway Commission* ("COSO") *Fraudulent Financial Reporting* 1987-1997, P.P. 19-20, during this time period, CFOs were the second most likelY senior executive (after CEOs) to be found responsible by the SEC for fraudulent financial reporting.

[18] Form 1662 tells witnesses:

> "The Commission often makes its files available to other governmental agencies, particularly United Stafes Attorneys ana state prosecutors. There is a likelihood tnat information supglied by you will be made available to ... other federal, state, local, or foreign law enforcemem agencies... to a bar association, state accountancy board, or other federal, state, local, or foreign licensing or oversight authority." (Ex. 402 p. R-8920.)

interests might well have been adverse to FUR's interest in presenting itself to the SEC as forthright and cooperative (one of the Seaboard criteria). This adversity of interest (and the possible effect on the Accused's judgment) should have been clear to the Accused when Glade asked Rosenbaum whether Samper should assert the Fifth Amendment instead of testifying before the SEC. Instead of considering the serious implications of this question, she dismissed the idea as "ridiculous." (Ex. 24; Rosenbaum 799-800; Glade 1158.)

Samper and FUR's "joint strategy" was to cooperate with the SEC to show that no wrongdoing had occurred; the decision to have Samper testify early in the investigation was in furtherance of that strategy, but failed to take into account the effects such early testimony might have on Samper. (Glade 1264-65.) In July 2003, with Samper facing criminal charges, Kaner questioned whether the Accused's decision about the timing of Samper's testimony had been in his best interests. She wrote to the Accused that:

> "fSamper] was completely cooperative with [FUR's] efforts to respond to the SEC Investigation and even agreed to be one of the first witnesses to try to explain to the SEC the transactions they were focused on. As a result [he] was put on tne spot before all the documents came to light and consequently the SEC took away the imRression that . . . he was not being honest . . . One has to wonder whether as [J result of his willingness to assist [the company], he now finds himself facing a criminal investigation." (Ex. 427.)

In addition to the adversity between the company's interest m cooperating and the individuals' interest in protecting themselves against possible criminal and professional consequences, as the SEC's focus becomes more obvious during the investigation, a oompany's interest in "remediating" (a Seaboard factor) by firing suspected wrongdoers

becomes stronger. This interest in remediation is clearly adverse to those individuals' interest in remaining employed and in preserving a good professional reputation.[19] Although Samper and Daltry resigned before the SEC investigation began, Eagleburger was fired during it. [20] (Eagleburger 415-16; Ex. 591, p. R-11901, 596, 598.) At their first opportunity (FUR's Wells submission), the Accused argued that FUR should receive "extensive remediation" credit for voluntarily ridding itself of wrongdoers, including Samper, Eagleburger, and Daltry. (ER 12 (Ex. 158).)

Even if the Accused were not extremely experienced securities lawyers who would already know of the adversity of their clients' interests, the SEC's attorney warned them at the outset that the "broad range of interests possessed by your many clients," made conflicts likely. So too warned Form 1662, attached to the SEC's subpoenas, which told witnesses:

> "You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potentia conflict of interest if one client's interests are or may be adverse to another's." (Ex. 402 p. R-8920.)

---

[19] See Kirk_patrick & Lockhart LLP, *The Securities Enforcement Manual,* American Bar Association, Chicago, Ill., p. 477 (1997)"Corporations may avoid or lessen liability by taking prompt action to replace wrongdoers and showing that the wrong was a matter of individual not corporate fault. These possibilities create considerable room for conflicts to develop."

[20] FLIR also fired non-clients Stringer and Martin during the investigation and terminated Samper's indepenoe.nt contractor agreement. (Ex.1542 p R-11164; Martin 327.)

3. The trial panel's reasons for finding no adversity during the SEC nvestJoat1on lack ment.

The panel's first reason for finding no adversity was that "no one" at FUR thought Samper had acted fraudulently. Even if this were true, it was irrelevant. The SEC would inevitably draw its own conclusions about Samper's conduct and mens *rea.* During the investigation, the testimony of the Accused's other clients (especially Muessle) put Samper at the scene of the crime with a ledger in his hand, and provided the SEC with the facts and details from which it could (and did) draw its own inferences. Testimony that provided the investigators with even one piece of the evidentiary jigsaw puzzle against Samper, was adverse to his interests – even if the witness did not express it in conclusory terms such as "fraud" or "securities violations."

Also, it was not true that '•no one" at FUR thought Samper had acted fraudulently. Relatively early in the investigation (March 2001), Wynne concluded that Samper had "manufactured" the $4.6 million Swedish Drop Shipment to "boost the financial statements for purposes of meeting the market's expectations." (Wynne 2354-55, 2338-39, 2346.) Although Wynne testified that he did not share this opinion with the Accused during the SEC investigation (Wynne 2447-48), this testimony is simply not credible for the following reasons. Throughout FUR's accounting crisis, Wynne worked zealously and decisively to correct the problems and protect FUR; he hired new auditors, appointed and served on the special committee, recommended the termination of Stringer and Daltry (Samper having already resigned), and worked with Muessle to correct FUR's books. Communicating closely with the Accused after FUR received its Wells notice, Wynne helped them develop FUR's settlement strategy and prepare its Wells submission. (Wynne 2314, 2319-20, 2325, 2335.)

As Wynne and the Accused negotiated settlement with the SEC, Wynne had it specifically in mind that former management (including Samper) had committed fraud. (Wynne 2346.) Given Wynne's commitment to achieving a favorable resolution for FUR's shareholders by convincing the SEC that FUR was an entirely new company, his complete lack of concern about protecting FUR's prior management (Wynne 2334), and his close communication with the Accused, it is simply not believable that he would have failed or overlooked to tell them he now believed Samper was culpable. (Wynne 2333-36, 2346.)[21]

The panel's second reason for finding "no adversity" was that the SEC investigation, by its nature, offered the Accused no opportunity to advocate for any client. Here, the panel applied the wrong conflict definition. The Bar alleged a "likely" conflict- which is defined in terms of the clients' interests – not an "actual" conflict, which is defined in terms of the lawvers· duties. The Accused's opportunity to advocate during the investigation was irrelevant to whether their clients' interests were adverse; it was therefore also irrelevant to whether the Accused had a likely conflict.[22]

The panel's third reason for finding no adversity was that because FUR would be responsible for its agents' misconduct, the interests of the Accused's clients were necessarily aligned. This analysis overlooks the Seaboard factors. Because of the SEC's emphasis on remediation, FUR could (and did) position itself during the investigation to ask for

[21] The trial panel too found it implausible and concluded that even if Wynne did not tell the Accused about his "revised and negative conclusion fabout Sampe]""the Accused had to have known of it since they knew the same facts vvynnedid. (OB ER 177.)

[22] Even if the Bar had alleged "actual" conflict, the lack of an "opportunity to advocate" would not be dispositive. The court has held that the "duty to contend" can exist even for lawyers acting solely in an advisory capacity. *In rePorter,* 283 Or 527, 584 P2d 744 (1978).

favorable treatment at the expense of individual clients (e.g., Samper, Daltry, and Eagleburger) who the SEC was most likely to target as wrongdoers. This analysis also ignores the adversity created by the individual clients' interest in cooperating with the SEC (another Seaboard factor) by accusing each other.

The panel's fourth reason for finding no adversity was that the individual clients received a benefit from the joint representation (increased access to information) that outweighed the potential harm posed by any conflict of interest. (OB ER 155,160.) However, this cost/benefit analysis was not the panel's to make. The ethics rules give clients the right to decide whether to proceed with a conflicted representation, in advance, after their lawyers have fully disclosed the relevant facts and potential consequences.

4. The Accused failed to make full disclosures.

Because the Accused had a likely conflict of interest, they could undertake the joint representation only if FLIR, Samper, Fitzhenry, Daltry, and Eagleburger waived the conflict after full disclosure. The Accused sent an engagement/conflicts disclosure letter only to FLIR, Daltry, and Eagleburger. They made no conflicts disclosures to Samper or Fitzhenry (although as FUR's general counsel, Fitzhenry received the letter the Accused sent to FLIR). The panel erroneously concluded that the retention letter the Accused had earlier sent Samper in connection with the class action litigation was (essentially) "close enough."

None of these clients received adequate disclosures. The court in *In re Brandt and Griffin,* 331 Or 113, 134, 10 P3d 906 (2000) stated that to satisfy the "full disclosure" requirement:

> "...it is not sufficient that [the prospective clients] be informed of the fact tnat the lawyer is undertaking to represent both of them, out he must explatn to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them." Citing *In re Boivin,* 271 Or 419, 424, 533 P2d 171 (1975).

The lawyer must disclose how the clients' differing interests might affect the lawyer's ability to exercise his or her independent professional judgment on their behalf as well as the possible adverse consequences of the joint representation. *In re Brandt and Griffin, supra,* 331 Or at 135, 137, citing *In re O'Byme,* 298 Or 535, 548-9, 694 P2d 955 (1985). Conflicts disclosure letters sent to a client with independent counsel are not held to a lesser standard: "DR 10-101(8) does not provide that advice from independent counsel may serve as a *post hoc* substitute for the lawyer's own disclosure." *In re Brandt and Griffin, supra,* 331 Or at 137. This is particularly true where independent counsel relies on the disclosure to assess the conflict and advise the client.

The class action retention letter the Accused sent Samper (08 ER 92 (Ex. 6) could not and did not disclose the conflict created by the Accused's joint representation in the SEC investigation. Although the SEC investigation and the class action derived from the same set of facts, they involved different considerations and potential consequences.

The class action involved the Accused's joint representation of only three clients and threatened the individual clients (Daltry and Samper) with only monetary damages, for which they would be indemnified by FUR. If Samper and/or Daltry were liable, so too would be FLIR, and neither could hope to gain any advantage by implicating

the other. (Rosenbaum 686-87.) Also, the discovery taken in such a class action would not routinely be provided to government agencies.

The SEC investigation.on the other hand, involved the Accused's representation of over 40 clients and threatened the individual clients (including Daltry, Samper, Eagleburger, and Fitzhenry) with the imposition of non-reimbursable fines (Ellis 2648-49), the likely sharing of information with government agencies, and the possibility of future professional discipline and/or criminal charges. It also gave FUR an incentive – not present in the class action – to distance itself from its former management. Because the class action retention letter disclosed none of these considerations to Samper, it was not a "full disclosure" of the likely conflict presented by the Accused's joint representation in the SEC investigation.

The disclosure letter the Accused sent to FUR, Daltry, and Eagleburger in the SEC matter also failed to fully disclose the conflict. (ER 4 (Ex. 393).) Not only did the letter fail to describe any adversity between the prospective clients, it suggested that no conflicts existed then or were likely to exist in the future: uBased on our present knowledge of the facts, we do not anticipate that any conflicts will arise among our clients." (ER 4.) As stated by this court, a conflicts disclosure that suggests the non-existence of a conflict is not a "full disclosure." *In re Brandt and Griffin, supra,* 331 Or at 136.

The Accused's letter to Daltry and Eagleburger (and previous letter to Samper) also failed to mention:

- that the Accused's judgment might be affected by the fact that FUR was paying their bills;
- the possibility of finger-pointing among the Accused's clients;

- that testifying in the SEC investigation could result in a civil enforcement action and penalties- or even criminal charges -against the client or some other person;
- that an individual client's refusal to testify might hurt FUR's interest in cooperating with the SEC;
- that FUR's interest in cooperating with the SEC might be adverse to the interests of the individual clients;
- that the individual clients might have an interest in cooperating with the SEC inconsistent with FUR's interests or those of other individual clients; or
- that by sharing counsel, the clients were also waiving confidentiality.

Finally, the letters asked Samper, Daltry and Eagleburger to consent in advance to the Accused continuing to represent remaining clients if the Accused had to withdraw from that client's representation. Obviously, no letter requesting an advance waiver of conflicts in a situation as fluid and unpredictable as an SEC investigation could ever fully disclose the nature and consequences of a future conflict.[23]

Because these disclosure letters disclosed no adversity of interests, no possible effect on the Accused's professional judgment, and no possible negative consequences to the recipients, it met none of the requirements of DR 5-105(F). Consent based on this inadequate disclosure was insufficient to waive the likely conflict of interest. The Accused therefore violated DR 5-105(E).

---

[23] "'[l]formed consent' to an advance waiver is virtually a contradiction in terms." New York City *Formal Ethics Opinion* No. 2009-6.

B. Part 2: The Accused's simultaneous representation – during the SEC Wells and settlement process – of FLIR, Samper, Daltry, Eagleburger, and Fitzhenry involved a likely or actual current client conflict of interest, in violation of DR 5-105(E).

The Second Cause of both Amended Complaints alleged that the Accused represented FUR, Samper, Eagleburger, and Daltry, despite their adverse interests, throughout the SEC Wells and settlement process. The Second Cause further alleged that after FUR implicated Samper, Daltry, and Eagleburger in its Wells submission, the Accused continued the joint representation despite the existence of a likely or actual conflict of interest.

The trial panel found no conflict up until March 8, 2002, the date the Accused filed FUR's Wells submission. (Ex. 158.) The panel then wrestled with whether three statements in that submission – statements critical of FUR's prior management – necessarily referred to Samper, Daltry, Eagleburger, or Fitzhenry. If so, the panel noted, FUR's interest in achieving a favorable settlement was adverse to the individual clients' interest in not having their own lawyers accuse them of wrongdoing.

The three statements that concerned the panel were:

- "Within a week after the completion of the 1999 audit, when the Board could obtain some preliminary sense of the complexity and nature of the accounting errors, it formed these [special committee] to investigate the circumstances surrounding the accounting and management problems, determine who was responsible and to take immediate action against those individuals." (ER 14 (Ex. 158); 08 ER 167.)

- "The individuals who were responsible for the accounting errors have been terminated, and the Company is under new executive and financial management." (ER 15 (Ex. 158); 08 ER 168.)

- "Finally, to the extent wrong-doing may have occurred, we understand that the SEC is pursuing fraud claims against one or more

> individuals who may have been responsible." (ER 20 (Ex. 158); OB ER 168.)

The panel found that the first two statements could be interpreted to refer only to non-clients Stringer and Martin; however, the third necessarily referred to Samper, Fitzhenry, and Eagleburger because they were among the individuals against whom "the SEC is pursuing fraud claims." (OB ER 168.) The panel therefore concluded that this one statement constituted a "likely" current client conflict of interest that the Accused were required but failed to disclose.

The trial panel erred by finding that this statement constituted, rather than evidenced, the Accused's conflict of interest. It also erred by concluding the conflict was likely (and waivable) rather than actual (and non-waivable).

As discussed above, likely conflicts of interest occur when lawyers represent clients with adverse interests; actual conflicts occur when lawyers owe their clients inconsistent duties. Developing circumstances often change "likely" conflicts into "actual" ones. See *In re Cohen,* 316 Or 657, 853 P2d 286 (1993) [lawyer's likely conflict – concurrently representing husband charged with criminal mistreatment of stepchild and wife in juvenile proceedings – became actual when lawyer learned that wife was taking action contrary to husband's legal interests); *In re Barber,* 322 Or 194, 904 P2d 620 (1995) [lawyer's likely conflict – representing two personal injury clients seeking recovery from possibly insufficient insurance proceeds – became actual when lawyer learned that one client's injuries were far more serious than originally thought].

When the SEC sent Wells notices, the Accused learned who the SEC considered the principal wrongdoers and – for the first time – could argue that FUR should not be punished for their wrongdoing. The

Accused's duty to FUR to admit misconduct by Samper, Daltry, and Eagleburger and to argue that the company should be credited with "extensive remedial efforts" for getting rid of them (ER 15 (Ex. 158)) was irreconcilable with the Accused's duty to these individual clients to refrain from accusing them of wrongdoing.[24] This actual conflict continued until the joint representation ended in October 2002.

Because this conflict was created and defined by the Accused's conflicting duties, it existed regardless of any act or failure to act by the Accused. However, on three separate occasions, they took affirmative steps to benefit FUR at the expense of their individual clients.

1. FUR's Wells submission.

The panel looked closely at this document but not closely enough. It missed the paragraph in which the Accused most clearly alleged misconduct by Samper and Eagleburger (and also Daltry, although he was not an SEC target):

> "At the conclusion of the [special committee's] investigation, the Board removed. those senior managers who were responsible for the accounting errors andthe management grqblems, including the President and- CEO Stnngec The Chairman of the Board [Da/t,Yi also resigned...the CFO *[Samper]* had tendered his resignation in February, ana the Controller of the Company [Tom Widdows] was also replaced. The Company also terminated the employment of the Senior Vice President for Sales and Marketing IMartinl and the Director of Sales Operations *[Eag/eburgert* Having satisfied itself that it had Identified and removed all those in senior mana9ement who were responsible for the Company s troubles, the Board immediately turned 1ts attention to assisting remaining management in rescuing and then improving the Company." (O8 ER 121 (Ex. 158).)

[24] Because FUR wanted Fitzhenry to remain part of current management (Ex. 410, pp. R-8936-37) – possibly because of his contacts with the federal government at a time when the United States was ramping up its war on terror (Ex. 380 p. R-8342)- the Accused's conflict as to him remained "likely."

This paragraph made two points: first, that prior management were responsible for FUR's accounting problems, and second, that FUR got rid of these wrongdoing individuals as part of its "extensive remediation efforts" (per the Seaboard criteria). Fairly interpreted, this paragraph asserted that evf!l'y person identified in it (including, by their titles, Samper, Daltry, and Eagleburger) was a righteously discarded wrongdoer.

The Accused argue that this interpretation is "uncharitable" because Ellis used the word "removed" deliberately so that the paragraph could not be read to apply to Samper, who had voluntarily resigned. (O8 97; Ellis 2661).[25] How then, would a charitable interpreter explain the Accused's attempt – only a couple of months later – to persuade the SEC that FUR's "extensive remediation efforts" were proved by its "replacement of the ...Chief Financial Officer (Samper)"? [emphasis added.] (ER 99 (Ex. 410 p. R-8940).) The word "replacement" no more accurately described how Samper left FUR than the word "removed." Uncharitably, the SEC rejected both the Accused's characterization of how Samper left FUR and their continuing attempt to use his departure from the company as an example of FUR's "extensive remediation efforts." (ER 99-100 (Ex. 410).)

The above-quoted paragraph from FUR's Wells submission, as well as the sentence that so troubled the panel, attempted to divert the SEC's attention from FUR toward the real culprits. Rosenbaum admitted as much when she testified in 2005 in the criminal case *United States v. Stringer.*

[25] Of course this explanation does not address why the paragraph did not refer to client Eagleburger.

> "[The purpoe was} to convince the SEC ⋒<;>t to bnng an act1on agamst the company fbY.say1ng]: what good will it do to bring an action? You have gotten the management. You are ⋒njy going to flurt the shareholders." (Ex. 351, p. R-7964.)

Rosenbaum further testified:

> "Q. *(by* Ronald Hoevet) You are SLtggesting in this Wells submission ... that [the SEC doesn't] need to come after [FUR) because fthe SEC is going to come after the individuals who are responsible...
>
> A. (by Rosenbaum) Right.
>
> Q. ...and that includes your client, Mr. Samper?
>
> A. That is only if you believe – and the SEC believed – that [Samper) is responsible, yes. It doesn't hurt Mr. Samper either – if [the SEC doesn't] go after the company. and they do decide to go after Mr. Samper, the fact that they haven't gone after the comg_any doesn't hurt Mr. Samper at all." (Ex. 351, p. R-8036.)

Although Glade worried that FUR's Wells submission was "[throwing Samper) in with the bad actors" {Glade 1198), FUR had equal reason to worry that its submission did not go far enough to blame prior management. Ellis drafted the document carefully, purposely using words like "errors" and "problems" and building in ambiguities to avoid implicating his individual clients. (Ellis 2660-61.) But by pulling his punches, Ellis did FUR no favors; the SEC was offended by the company's continued unwillingness to concede fraud by its senior officers, asserting that FUR "still didn't get it." (Ellis 2667-68.)

2. FUR's settlement offer.

The SEC was unwilling to consider settlement unless FUR admitted fraud by its prior management. (Ex. 410; Rosenbaum 831; Ellis 2668-69.) That the Accused's loyalty to their individual clients stood

between FUR and an acceptable settlement for even a moment proves the actual conflict. But the moment was fleeting. By September 2002, the Accused had negotiated settlement language that conceded (albeit "without admitting or denying") that FUR and its senior management had: engaged in fraudulent revenue recognition practices; understated expenses and overstated assets; made material misstatements in quarterly and year-end reports for 1998 and 1999 by overstating earnings and understating losses; and intentionally falsified books and records throughout 1998 and 1999. (ER 21-33 (Ex. 367).)

The Accused claim that these statements did not harm their individual clients because the statements were not binding in any future legal proceedings. However, a public statement by FUR that its books and records were "intentionally falsified" could hardly recommend Samper to future employers and could reasonably be expected to pique the interest of the Oregon Board of Accountanci[6] and the American Institute of CPAs.[27] In fact, both the AICPA and the Oregon Accountancy Board subsequently opened investigations into Samper's conduct. (Ex. 504, p. R-10199.)

Also, FUR's settlement contained a provision that prohibited it from ever making any public statement denying that its former senior management had committed financial fraud. (ER 32 (Ex. 367).) To the extent that Samper could have hoped for supportive testimony from his former employer in any future proceeding, the settlement agreement ended any chance of his getting it.

---

[26] OAR 801-030-0020(1)(b), prohibits CPAs from committing "acts or conduct that would cause a reasonable person to have substantial doubts about the individual's honesty, fairness, and respect for the rights of others or for the laws of the state and the Nation."

[27] AICPA Rule 102.01(a), prohibits "materially false and misleading entries in an entity's financial statements or records."

3. The Swedish Drop Shipment.

The third example of the Accused acting on their actual conflict is Rosenbaum's October 3, 2002 telephone call to the SEC, drawing its attention to the Swedish Drop Shipment. The trial panel incorrectly found that this telephone call constituted rather than evidenced a conflict of interest. The panel also incorrectly analyzed the telephone call under the Sixth Cause rather than Second Cause of the Amended Complaints.

Although Rosenbaum claims that her representation of Samper ended the very instant judgments were entered in the SEC matter on October 2, 2002 (Rosenbaum 487, 627), her billings show that the attorney-client relationship continued at least until October 15, 2002, as she helped Glade wrap up Samper's remaining issues. (ER 74 (Ex. 189); ER 34 (Ex. 173).) *In re Adams,* 293 Or 727, 736, 652 P2d 787 (1982) [attorney-client relationship continues as to facts and issues arising directly from the purpose of the employment].

Rosenbaum was thus still Samper's attorney on October 3, 2002, the day Wynne (by then, FUR's general counsel) instructed her to remind the SEC about the Swedish Drop Shipment. Although Wynne intended this reminder to harm Stringers interests (Wynne 2408), it was also harmful to Samper's. As found by the trial panel, the Swedish Drop Shipment was so "egregious" that Rosenbaum "had to know that there was a possibility that the analysis of that transaction by the SEC might lead to charges being brought against Samper by the DOJ." (OB ER 180.)

When Rosenbaum testified in the *United States v. Stringer* criminal case, she admitted that evidence of the Swedish Drop Shipment "probably" advanced the government's case against Samper. (Ex. 348, p. R-8009.) Even if Rosenbaum's October 3, 2002, telephone call did

not contribute to Samper's eventual indictment, it was contrary to his interests and she knew it.

The Accused argue (First Question on Appeal) that because the Bar's pleadings did not specifically identify the October 3, 2002 telephone call, neither the panel nor this court can find it constituted an ethics violation. It is correct that the court can only find violations that the Bar has fairly pled *(In re Magar,* 296 Or 799, 806 fn 3, 681 P2d 93 (1984)); however, the Bar need not allege every fact upon which it intends to rely to prove a charge. *In re Kluge,* 332 Or 251, 262, 27 P3d 102 (2001). The Bar did not plead – and has never contended – that Rosenbaum's October 3, 2002 telephone call constituted a separate conflicts violation; rather, it evidences the actual conflict fairly pled by the Second Cause of both Amended Complaints (paragraphs 25-27).

C. Part 3: the Wells process and settlement.

1. The Accused's representation of FLIR in the DOJ matter involved a former client conflict of interest that was not waived by client consent after full disclosure, in violation of DR 5-105(C). (Response to Accused's Second and Third Questions on Review).

The Bar alleged that when the Accused began representing FLIR in the DOJ investigation- adverse to the interests of Samper and Daltry – they engaged in either a current client conflict of interest (Ninth and Eleventh Causes of the Amended Complaints) or, alternatively, a former client conflict (as alleged in the Tenth and Twelfth Causes). The panel left unresolved the predicate issue- whether in January 2003, Samper, Daltry, and Eagleburger were the Accused's current clients or whether (as argued by the Accused) they had become former clients. Either way, the panel found that the Accused had an unwaived conflict of interest.

2. The Accused had a former client conflict.

The weight of the evidence at trial proved that sometime after October 15, 2002 – but before January 2003 – Samper, Daltry, and Eagleburger became the Accused's former clients. The applicable disciplinary rule is therefore DR 5-105(C).

DR 5-105(C) provides that except with client consent after full disclosure, lawyers *(the Accused)* who have represented clients (*Samper, Daltry, and Eagleburger)* shall not subsequently represent another client *(FLIR)* in the same or significantly related matter *(DOJ investigation)* when the interests of the current *(FUR)* and former (*Samper, Daltry, and Eagleburger)* clients are in actual or likely conflict.

As defined by DR 5-105(C)(1) and DR 5-105(C)(2), there are two ways that a subsequent matter can be "significantly related" to an earlier matter. See *In re Brandsness,* 299 Or 420, 430, 702 P2d 1098 (1985). A "matter specific" conflict exists when the subsequent representation would or would likely inflict injury or damage upon the former client "in connection with any proceeding, claim, controversy, investigation, charge, or other matter in which the lawyer previously represented the former client." DR 5-105(C)(1).

An "information specific" conflict exists when the earlier representation provided the lawyer with confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent representation. DR 5-105(C)(2). To prove an information specific conflict, the Bar need not prove that the Accused revealed the former clients' confidences or secrets but only that they possessed them.

(a) The Accused had both a "matter specific" and an uinformation soedfic" former client conflict.

Rosenbaum described her March 3, 2003 letter to Samper, Daltry, and Eagleburger as "the best conflict waiver letter I ever wrote." She stated that she "[could not] imagine how it could have been done any better" (Rosenbaum 920-21).

This letter (Ex. 101) admitted every element of a matter specific conflict by:

- identifying Samper, Daltry, and Eagleburger as former clients;
- stating that these former clients were being investigated by the DOJ and that FLIR was cooperating with that investigation;
- stating that FLIR had asked the Accused to represent it in the DOJ investigation;
- citing the applicability of DR 5-105(C), the former client conflict rule;
- characterizing the DOJ investigation as · obviously" related to the Accused's earlier representation; and
- pointing out that the DOJ investigation could have ' potentially adverse consequences" (albeit unidentified) to the former clients. (ER 66 (Ex. 101).)

The March 3, 2003 letter also admitted every element of an "information specific" conflict by asserting that:

- the Accused possessed "confidences obtained from you personally during our [former] representation" (ER 66 (Ex. 101)), and "[i]nformation or materials that are arguably

subject to a personal claim of confidentiality by you." (ER 66); and

- the DOJ might request such information or materials (ER 66).

The record contains ample additional evidence of both a matter specific and an information specific conflict. The Accused represented Samper, Daltry, and Eagleburger until the SEC matter settled in October 2002. (Rosenbaum 627.) The Accused began representing FUR in the DOJ investigation in January 2003. The later representation was adverse to Samper, Daltry, and Eagleburger because the Accused were helping FUR help the DOJ build a criminal case against them. The DOJ matter was "significantly related" (in the matter specific sense) to the earlier SEC matter because it arose from the same facts, relied on the same investigation, involved the same witnesses and evidence, and targeted the same individuals. (Exs. 190, p. R-6930; 191, p. R-6937; 192.) Also, the DOJ matter tended to deprive the former clients of the finality and peace of mind concerning FUR's accounting problems that was the "benefit" they derived from the earlier representation:. (Glade 1201-02; Eagleburger 425-26.) See Formal Ethics Opinion No. 2005-174 [matter specific former client conflict exists if later representation requires the lawyer to attack or undercut the benefit the former client received from the lawyer's earlier representation].

The DOJ matter was also "significantly related" (information specific conflict) to the SEC matter because the Accused obtained confidential or secret information during the earlier representation that would or would likely inflict damage on the former clients. Rosenbaum testified repeatedly that the Accused possessed documents that were "subject to [these clients'] personal claim of confidentiality." (Rosenbaum

651, 914, 923, 928.) [28] Her point at trial- and the Accused's on appeal- was that the Accused were better equipped than unconflicted counsel would have been to recognize and keep their former clients' confidential/secret documents out of the DOJ's hands. While this may be so, it is irrelevant to the analysis of whether the Accused had an "information specific" conflict: DR 5-105(C)(2) looks only at whether lawyer Q.ossess such confidential/secret materials; if they do, they have an "information specific" former client conflict. The Accused did.

(b) The Accused's arguments as to why they had no former client conflict lack merit.

The Accused argue that despite their March 3, 2003 letter suggesting otherwise, they had no former client conflict because:

- they did not really "represent" FLIR in the DOJ investigation because they acted only in a "ministerial role," and "merely as a document depository [so} there was no risk of a compromise to their professional judgment" (OB p. 49);
- their involvement as document custodian actually benefitted *(i.e.,* was not adverse to) Samper, Daltry, and Eagleburger because (1) it allowed their former clients access to FUR's documents, and (2) the Accused were on watch to protect against the voluntary disclosure of their personal confidences; and
- "none of the three Stoel Rives attorneys who discussed the matter, and neither of the former clients' attorneys (Glade and Myers), believed that Samper's and Daltry's consent to Stoel Rives' ministerial role was even required." (OB p. 52.)

[28] The Opening Brief also admits that the Accused possessed their former clients' personal documents and confidential information. (OB pp. 50, 86.)

With respect to their first argument, the Accused do not define "ministerial" representation and provide no legal authority that such a concept exists in Oregon or anywhere else, or that if it does, ministerial representations are somehow exempt from the disciplinary rules in general or the conflicts rules in particular.[29] *Black's Law Dictionary* is more helpful. Although it does not recognize the existence of a "ministerial representation," it defines a "ministerial act" as one that is performed without the independent exercise of discretion or judgment."

By describing their representation of FLIR in the DOJ matter as ministerial, the Accused contend that it involved no legal judgment, independent thought, or initiative- that their activities were "mechanical" and "performed mostly by paralegals." (OB p. 49.) However, an interesting exchange between Rosenbaum and Myers (Daltry's attorney) shows that the Accused did not and never intended to so limit themselves.

Myers understood that the Accused's March 3, 2003 ..disclosure" letter to former clients Samper, Daltry, and Eagleburger consent meant (and Myers conditioned Daltry's consent on the understanding) that the Accused would act merely as a document depository and "conduit." (Ex. 473.) However, Rosenbaum quickly corrected Myers' misunderstanding. She wrote:

> "In my letter, I indicated that the scope of our representation would include advising FUR, in addition to assrstrng thCompaJ1Y rn producing documents and arrangrng for wrtnesses to be interviewed. I assume thaf the description in your letter, which omitted the reference to our 'advising FLIR' was inadvertent and that Mr. Daltry's consent included our advising FLIR with

[29] This court sugg sted otherwise in *In re O'Neal, supra* 297 Or 258, 263, 683 P2d f352.(1984) [lawyer cannot mitigate conf(ict by limiting scope of representatron].

> respect to the DOJ investigation." [emphasis added.] (ER 70 (Ex. 194).)

Rosenbaum thus told Myers (if not Glade, who had similarly misinterpreted her March 3, 2003 letter (Ex. 102)), that the Accused intended to continue exercising their professional judgment on FUR's behalf during the DOJ investigation.

From January through March 2003, the Accused's invoices in their "Department of Justice" billing file show that they exercised their legal judgment. They met and corresponded many times with the DOJ, performed and reviewed legal research, communicated often with Wynne, and strategized FUR's and their own responses to the DOJ's demands. (ER 78-91 (Ex. 181).) On March 17, 2003, Rosenbaum told Wynne that FUR should not produce documents to the DOJ befae Stoel Rives reviewed them. (Ex. 229.) A document review necessarily involves legal judgment.

In late February 2003, Garten and Wynne agreed that the Accused would remain behind the scenes so as not to "taint" the DOJ's evidence. Soon afterwards, the Accused asked their former clients to consent to their "limited" representation of FUR in the DOJ matter, promising that they would "not represent any witnesses or be present when any witnesses are interviewed by the DOJ." (ER 66 (Ex. 101).) Almost immediately after sending this letter and making this promise, the Accused stopped billing most of their time – and virtually all of their "substantive" (nonparalegal) time- to their "DOJ" file and began billing it instead to their "SEC Inquiry" file.

The Accused's "SEC Inquiry" file had been open for years but dormant for months. After the October 2002 SEC settlements, non-client Stringer was the only remaining SEC respondent. Because none of the

Accused's clients (or former clients) faced any action by the SEC, it is not surprising that the "SEC Inquiry" file reflected very little activity after October 2002. What is surprising is that in April 2003, the file suddenly lit up with the Accused's time entries ($8,300 worth in April 2003).The Accused claim that their activities on SEC matter in 2003 were completely unrelated to the DOJ investigation (Rosenbaum 992-93), but that claim does not bear up to scrutiny.

Ever since the SEC began investigating FUR in 2000, the SEC had been providing information to the DOJ *(United States v. Stringer,* 535 F3d 929, 936 (9th Cir. 2008)).[30] The DOJ thereby obtained access to discovery that would otherwise have been procedurally unavailable to it. See FRCP 15(a)(1) [witnesses in criminal proceedings can be deposed only under exceptional circumstances]. Garten greatly valued this access; the district court in *United States v. Stringer,* 408 F.Supp.2d 1038, 1066 (Or 2006) noted that Garten told SEC investigator Echavarria that once he obtained a criminal indictment, "discovery is over...criminal is totally 1-sided and he would give everything and get nothing."

In late January 2003, the Accused learned that the DOJ had been monitoring the SEC's investigation from its beginning and that the SEC had been providing the DOJ with transcripts of witness interviews. {Ex. 168; Rosenbaum 995.)

On February 27, 2003, at the meeting between Wynne and Garten (which Wynne duly reported to Rosenbaum (ER 61-63 (Ex. 221)), Wynne told Garten to look more closely at the Swedish Drop Shipment "wh[ich] the SEC hasn't paid much att[entio]n to." (ER 62 (Ex. 221).)

---

[30] The Bar asks the court to take judicial notice of both federal court opinions, again not to prove any conduct or knowledge by the Accused, but to demonstrate the interaction between the SEC and DOJ.

Wynne told Rosenbaum that he had recommended that Garten talk to Muessle and Almerfors about the Swedish Drop Shipment, and had promised to make those witnesses available. (Wynne 2384-85.) On March 5, 2003, Wynne emailed Rosenbaum that Almerfors was coming to Portland, Oregon (from Sweden) and that the SEC wanted to interview or depose him. (Rosenbaum 994.)

The Swedish Drop Shipment was not pled in the SEC's complaint against Stringer, and the SEC had shown no interest in pursuing it, even after Rosenbaum called it to the agency's attention on October 3, 2002. (See pp. 22-23, 54-55, supra.) (Ex. 609, pp. R-12580.) In this context, the SEC's sudden interest in interviewing or deposing Almerfors about the Swedish Drop Shipment can only be explained by the DOJ's interest (on Wynne's very recent recommendation) in obtaining Almerfors' testimony.

When the SEC deposed Almerfors on April 22, 2003, at Stoel Rives' offices, Rosenbaum represented him. Although she billed some time preparatory to Almerfors' deposition to the DOJ file (.8 hours talking to Wynne and corresponding with Almerfors on April 16, 2003 (Ex. 181, p. R-6687), she billed all of her time attending the deposition (8.0 hours (ER 75 (Ex. 189)) to the SEC Inquiry file. Rosenbaum testified at the disciplinary trial that she was unaware that Almerfors' deposition had anything to do with the DOJ's investigation:

> "Q. (by Bar counsel Eric Neiman): On March 5, 2006, did Mr. Wynne send you an e-mail about Mr. Almerfors?
>
> A (by Rosenbaum): Said he's going to be in town....
>
> Q....Did you say that you didn't know Mr. Almerfors was a critical government witness about the Swedish Drop Shipment?

> A. I didn't even know what the [DOJ] was investigating.
>
> a.... On April 22, 2003, did you spend eight hours in Mr. Almerfors[1] deposition?
>
> A. With the SEC in the...*SEC* vs. *Stringer* case. This isn't the DOJ matter.
>
> a. did you spend-
>
> A Yes.
>
> a. Did yru have lunch with him and Mr. Wynne?
>
> A. I did, I guess. It says lunch with them. Don't bill it.
>
> a. Did Mr. Wynne then take Mr. Almerfors to the [DOJ]?
>
> A. I have heard that, but I wasn't present at that. I don't know about that. I know that I attended his SEC deposition.…
>
> a. You knew by then that the [DOJ] and the [SEC] staff were freely exchanging information?
>
> A. It's very hard for me to know what the DOJ was doing. I know that ...Allan Garten at our first meeting said he had SEC deposition transcripts and was critical of the SEC deposition technique." (Rosenbaum 992-95.)

Rosenbaum's claim to have been unaware of any connection between the DOJ's interest in Almerfors and the SEC's deposition does not ring true because on the same day as the deposition, Almerfors and Wynne met with Garten at Stoel Rives' offices. (Ex. 227; Wynne 2385-87.) Wynne testified that the Stoel Rives lawyers attended this meeting (Wynne 2386).[31]

---

[31] The Accused's time records do not record that they did so, and Rosenbaum denies it. Garten does not recall if Rosenbaum was at the meeting. (Ex. 609 p. R-12.581-82.)

The SEC also helped the DOJ obtain Muessle's testimony about the Swedish Drop Shipment by interviewing him on April 17, 2003. (ER-37 (Ex. 190); Ex. 387.) Rosenbaum represented Muessle at the SEC interview. (Exs. 387, 193). Ultimately it was Muessle's information about the Swedish Drop Shipment- conveyed by the SEC to the DOJ- that led to Samper's indictment. (Wynne 2409.) See *United States v. Stringer, supra,* 535 F3d at 936. Rosenbaum testified in the criminal action that she was unaware that Muessle's SEC interview had anything to do with the DOJ's investigation:

> "a. (by Hoevet): But following this letter to Mr. Garten and your assurance to Mr. Glade, you continued to attend interviews conducted by the SEC with Mr. Muessle, didn't you?
>
> A. (by Rosenbaum) Sure. I was still representing FLI'R in the SEC matter as I had been all along.
>
> a. And so you felt that there was no problem then with representing Mr. Muessle, who was Qroviding incriminating information against Mr. Samper, as long as it was an interview with the SEC ana not the [DOJ]. Is that it?
>
> A. I felt there was no problem continuing. to regresent the..People we had been representing in front of the SEC.
>
> a. It didn't occur to you that the SEC would be sharing this information with the [DOJ]?"
>
> A No. I thou9ht the agencies were operating independently. (Ex. 348, pp. R-8052-53.)

In addition to Muessle and Almerfors, the DOJ was also interested in receiving testimony from Daltry and Fitzhenry. Rosenbaum's notes record that on February 19, 2003, Garten told the Accused that the DOJ might be willing to give Daltry and Fitzhenry informal immunity if they came forward with useful information. (ER 39 (Ex. 190).) Fitzhenry

accepted this offer (he ultimately spoke with Garten on three occasions (Fitzhenry 2205)), as did Daltry (Myers 1082), and soon afterwards the SEC scheduled their depositions. Rosenbaum represented Daltry at his SEC deposition on June 5 and 6, 2003 (ER 76 (Ex. 189)), and also represented Wynne at his SEC deposition on June 13, 2003. (ER 76 (Ex. 189).) The SEC set Fitzhenry's deposition for late September 2003. On June 24, 2003, the Accused provided Garten with copies of deposition transcripts. (ER 76 (Ex. 189).)

After this flurry of SEC discovery- and after Wynne testified to a grand jury about the Swedish Drop Shipment in July 2003 (Wynne 2401) – on September 17, 2003, the DOJ indicted Samper, Stringer, and Martin for alleged misconduct that included the Swedish Drop Shipment. (ER 92 (Ex. 249).) On September 18, 2003, the DOJ moved to stay the SEC action and the Accused prepared an affidavit supporting this motion, billing their time to the SEC Inquiry file (Ex. 189 p. R-6889). {Ex. 197). On September 24, 2003, the Accused moved for a protective order postponing Fitzhenry's deposition in the SEC case until the court decided the DOJ's motion to stay. (Ex. 432.) To support the motion for protective order, Rosenbaum prepared several affidavits: her own {Ex. 198), Fitzhenry's (Ex. 432), and Garten's (Ex. 431). Again, Rosenbaum billed this time to the "SEC Inquiry" file. (Ex. 189, p. R-6889.)

The Accused's claim that they were unaware of any link between the SEC's discovery and the DOJ's investigation is not credible. They had no reason to believe the SEC was not continuing to share information with the DOJ, and by March and April 2003, they had every reason to know that it was. The Accused knew that:

- FUR was "fully committed" to cooperating with the DOJ;

- the DOJ's primary targets were Samper and Stringer, against whom the strongest evidence of wrongdoing was the Swedish Drop Shipment (ER 61 (Ex 221));
- the DOJ wanted evidence from Muessle and Almerfors about the Swedish Drop Shipment (ER 39 (Ex. 190); Ex. 219);
- the SEC had no independent reason for wanting Muessle and Almerfors' testimony about the Swedish Drop Shipment (ER 39 (Ex. 190)); and
- the DOJ wanted evidence from Daltry and Fitzhenry (ER 39 (Ex. 190); Fitzhenry 2208).

The SEC's sudden interest in deposing Muessle, Almerfors, Daltry, and Fitzhenry – and FUR's eagerness to make those witnesses available – makes sense only in the context of the DOJ investigation. By April 2003, the SEC had not taken a sworn statement from any FUR witness for an entire year. (Ex. 503, p. R-10051.) That the SEC suddenly wanted the statements of the four individuals whose testimony most interested the DOJ shows that its depositions and interviews were the vehicles by which FUR conveyed evidence to the DOJ. It is not credible that the Accused would not have known or realized this, especially given their close communication with Wynne; Garten's presence at the Accused's offices when the SEC took Almerfors deposition; and the fact that the Accused themselves provided Garten with deposition transcripts. The Accused's substantive representation of FUR in the DOJ matter – which they disguised as a continuing representation of

FUR in the SEC matter- was thus far more surreptitious than it was "ministerial."[32]

The Accused's remaining arguments as to why they had no former client conflict are equally unmeritorious. Whether Samper, Daltry, and Eagleburger benefitted from the Accused's willingness to provide them with documents during the conflicted representation is obviously irrelevant to whether a conflict existed.[33] Whether the Accused and Jarvis decided there was no former client conflict does not prove its non-existence; at best, such testimony is "expert opinion" on an ethics issue, impermissible even if offered by witnesses less obviously self-serving. *In re Leonard,* 308 Or 560, 570, 784 P2d 95 (1989). And, whether Glade and Myers failed to protest the conflict proves nothing more than the inadequacy of the Accused's March 3, 2003 "disclosure" letter.

3. Samrer and Daltr1did not consent to the Accused's former chen conflict after· ull diSClosure.

The trial panel found that the Accused's March 3, 2003 letter failed to fully disclose facts relevant to the issue to which they asked their clients to consent, especially that DOJ and FLIR had a *quid pro quo* cooperation arrangement. (08 ER 200.)

The panel's finding is correct, but the consent issue should be analyzed separately for three distinct time periods.

---

[32] That the Accused dis ised their substantive time on the DOJ matter QY billing it to the " I C Inquiry" file is further demonstrated by Rosenbaum's billing entries in earry July 2003, when Kaner asked her for documents to a1d in Samper's defense in the criminal matter. (Ex. 427). This request related solei'{ to the DOJ matter but Rosenbaum billed time responding to it to the SEC Inquiry file. (ER '77 (Ex. 189).)

[33] And a pleading email from Kaner dated July 10, 2003, suggests that the Accused were not as amenable abouf providing Samper with documents as they now claim. (Ex. 427.)

(a) February 4 through March 3, 2003 – no conflicts disclosures. no consent.

The Accused's DOJ representation began on January 27, 2003. On January 30, 2003, they learned that Garten had offered FLIR informal "immunity" from prosecution in exchange for helping him build a criminal case. On February 4, 2003, they learned that Garten was targeting former clients Samper and Eagleburger. (Exs. 94, 151, 190.) On February 12, 2003, Garten clarified that by "cooperation," he meant proactive assistance from both FLIR and the Accused. (Ellis 2706-07.) Thus, by February 4, 2003 (at the earliest) or February 12, 2003 (at the latest) the Accused knew all the facts establishing their former client conflict. Nevertheless, for several weeks they represented FLIR without asking for consent. They advised Wynne, met three times with Garten, waived privileges, and produced thousands of pages of documents including Samper's compensation information. (Tr. 991; Ex. 219.) It was not until March 3, 2003, that the Accused sought consent from Samper, Daltry, and Eagleburger.

The Accused's unconsented representation of FLIR during most of February 2003 violated DR 5-105(C).

(b) March 3 through April 11, 2003 – disclosure (inadequate). no consent by Samper.

The Accused finally asked for consent on March 3, 2003, Daltry (through Myers) consented on March 13, 2003, Eagleburger on March 28, 2003, and Samper on April 11, 2003.

During the six-week interim between the March 3, 2003 letter and Samper's April 11, 2003 consent, the Accused continued to actively represent FLIR- producing documents to Garten and arranging for him

to meet with Muessle on March 13, 2003, to discuss the details of the Swedish Drop Shipment. (ER 71-73 (Ex. 373); Exs. 228, 229.)

The Accused's unconsented representation of FUR during this six-week period violated DR 5-105(C).

{c) Aoril 11. 2003 through September 2003 (inadequate disclosures: uninformed consent).

Even though Samper, Daltry, and Eagleburger eventually consented to the Accused's representation of FUR in the DOJ matter, their consent was not fully informed and therefore did not waive the former client conflict.

Again, to satisfy the "full disclosure" requirement, all information that might limit lawyers' ability to comply with their fiduciary obligations of undivided loyalty and confidentiality must be disclosed, including any acts or events concerning the subject matter of the retention for which the client has a right to exercise discretion or control and the legal significance of those acts or events. Mallen and Smith, *Legal Malpractice§* 14.19 (5th ed. 2000).

The Accused intended their March 3, 2003 letter to be perceived as a former client conflicts disclosure letter (Rosenbaum 921). However, it did not actually state whether or why the Accused's "proposed" representation of FUR involved such a conflict. (ER 65-66 (Ex. 101).) The letter identified the DOJ investigation as a "related matter with potentially adverse consequences to you," but did not describe what those consequences were. Although the letter stated that there was some risk involved in consenting, it did not identify what it was – only that it was "very small." (ER 66 (Ex.101).) The letter promised that the Accused would not "voluntarily disclose [your) confidences" or "affirmatively assist the DOJ *in* developing his case" (ER 65-66 (Ex.

101)), but did not reveal that the DOJ had demanded such affirmative assistance, that FLIR had agreed to provide it in order to save itself from criminal prosecution, or that the Accused had assured the DOJ that they could "arrange for" Wynne to respond to any request made problematic by the Accused's own ethical obligations. (ER 51 (Ex. 182).)

The letter also did not reveal that the Accused had for weeks been responding to the DOJ's demands by producing documents and arranging for interviews; that the Accused had (as requested by the DOJ) already produced Samper and Daltry's compensation information;[34] that FLIR (through Wynne, as he reported to Rosenbaum (ER 62 (Ex. 221)) was again trying to interest the government in the Swedish Drop Shipment; that the Accused intended to help FLIR provide information to the SEC to be shared with the DOJ; or that Ellis was

---

[34] (ResQonse to Accused's First Question on Review) The Accused argu.(OB pp. 7-38) that because the Am.ended Complaints did not spec1f1cally _ldefltlfy (1JJhe Accused's production of Samr and Daltry)s compensation 1nformat1on, and (2) Garten's February 14, 2003 letter, tne trial panel erred by concluding the Accused should have disclosed that information.

Again, the Bar need not plead very fact upon hich it intends to rely. Tfle Amended Com pla1nts (N1nth Cause agaJnst Rosenbaum garag_raphs 64(d) and (e), 66); Eleventh Cause against Ellis paragraphs 75 *(a)* and (e), 77) alleged that the Accused failea to disclose that they hacf already prod'uced documents to the DOJ and the FBI. Those documents Included the compensation documents.

The Amended Complaints (N1nfh Cause against Rosenbaum; garagraphs 64(a), (b), (c)Eleventh Cause against Ellis paragraQhs *75(a),* (b), (c)) alleged that the Accused faired to disclose FUR,s agreement to excnange cooperation for immunity from criminal prosecution and "the nature or extent of Garten's demands for FUR's coor:;>eration." Those demands were expressed in Garten's February 14. 2003 letter.

asserting in Fitzhenry's disciplinary matter that Samper and Daltry were responsible for misrepresentations.[35]

The panel believed Myers' testimony that this information would have made a difference to Daltry's decision whether to consent. (Myers 1047-48, 1051-52, 1055, 1057.) Glade and Kaner testified similarly as to Samper. {Glade 1213-18, 1409, 1474; Kaner 2123, 2126.) These facts were material and by omitting them, the Accused failed to make full disclosures. Because Samper, Daltry, and Eagleburger consented based on inadequate information, they did not waive the Accused's former client conflict of interest.

D. (Part 3b) The Accused knowingly withheld material information from former clients Samper, Daltry, and Eagleburger and therefore violated DR 1-102(A)(3) (Response to Accused's Fourth Question on Review).

DR 1-102(A)(3) prohibits lawyers from engaging in conduct involving dishonesty, deceit, misrepresentation, or fraud. Unethical misrepresentations can consist of affirmative misstatements, intentional nondisclosures, or a combination. *In re Hiller,* 298 Or 526, 532-33, 694 P2d 540 (1985). The rule is violated by misrepresentations that are both

---

[35] (Res8onse to Accused's First Question on Review) The Accused argue (B ER 40) that the Accused's joint obligation to disclose Ellis's representation of Fitzhenry in the Bar discipline matter (as alleged in the Tenth and Twelfth Causes of the Amended Complaints) depends on whether Ellis's representation involved a former client conffict, as alleged in the Ninth Cause of the Amended Complaint against Ellis). The Accused note the inconsistency between the panel's dismissal of the Fitzhenry former client conflict and the panel's finding that the Accused should liave disclosed the Fitzhenry matter when they asked Samper, Daltry, and Eagleburger to consent to their representation of FUR in the DOJ matter.

The : anel erred in dismissing the Fitzhenry former client conflict. Samper, Daltry, and Eagleburger were therefore entitled to full disclosures from the Accused that the firm had not one but two former client conflicts.

material and knowing. A misrepresentation is material if it is likely to affect the decision-making process of the recipient; however, the Bar need not prove actual reliance. In re Brandt and Griffin, supra, 331 Or at 138; In re Kluge, supra, 332 Or at 255. A "knowing" mental state may be inferred from the facts and circumstances. In re Phelps, 306 Or 508, 513, 760 P2d 1331 (1988).

The trial panel correctly found that the Accused knowingly omitted material facts from their March 3, 2003 letter and therefore violated DR 1-102(A)(3).

By March 3, 2003, the Accused had been actively representing FUR in the DOJ matter for more than a month and had been aware of the facts creating the former client conflict for almost a month. They had decided, however, that if they could characterize their role as "ministerial," they would not have a conflict. (Ellis 2720) Their then-partner Peter Jarvis told them that the Bar would disagree with this analysis (Rosenbaum 981), so they sent the March 3, 2003 "full disclosure" letter in order to continue the representation without "the Bar [taking] the position that we hadn't fully disclosed everything."(Rosenbaum 643, 648-49, 981-82) Of course, this self-protective goal presupposed that Samper, Daltry, and Eagleburger would consent.

The Accused's March 3, 2003 letter omitted two fundamental requirements of a disclosure/consent letter: first, a description of any possible negative consequence to the recipients of the proposed representation; and second, a statement that the representation depended on the recipients' consent and could not (would not) proceed without it. (ER 65-67 (Ex. 101).)

Jarvis noted both omissions when the Accused showed him the draft letter. (ER 56-59 (Ex. 211).) Jarvis suggested they add language

disclosing potential negative consequences. The Accused declined. (Rosenbaum 650-51.) Jarvis suggested they add the phrase: "We will not represent FUR in responding to DOJ requests unless we have your consent to do so...." The Accused declined. (Compare ER 5'7-59 (Ex. 211) and ER 65-67 (Ex. 101).)[36]

Instead, the Accused sent a disclosure letter that disclosed half-truths. It stated that the Accused "have been asked to continue to represent FUR in the DOJ investigation." It failed to mention that they had already been doing so for more than a month or that they had already provided thousands of pages of documents to the DOJ and FBI, some of which had previously been withheld as privileged or had never before been requested, such as information about Samper's and Daltry's compensation.

The letter stated that FUR was "not a focus of the DOJ investigation." It failed to mention that the DOJ had offered FUR the chance to save itself from criminal prosecution by helping the DOJ build a case against Samper, Daltry, and Eagleburger, that FUR was "fully committed" to the cooperation effort, or that FUR had already waived privileges, produced documents, facilitated access to witnesses, and provided helpful suggestions such as, "look at the Swedish Drop Shipment."

The letter stated "we have informed FUR and the [DOJ] that Stoel Rives can cooperate only to the extent that doing so is consistent with our obligations [to former clients]." It failed to mention that the Accused had assured the DOJ that even if they themselves could not ethically

---

[36] The Accused also showed the letter to Stoel Rives attorney Per Ramfjord. He thought it was not a "normal conflict waiver letter" so much as an informationar letter to Glade to alert him that he might want to take action to protect his client's interests. (Ramfjord 874-75.)

accommodate Garten's requests, they would help ("arrange for") Wynne do so.

The letter stated that "we have met with the Assistant US Attorney to gain some insight into the parameters of the investigation." It failed to mention that the Accused had had three such meetings, that Garten had identified Samper, Daltry, Eagleburger, and Fitzhenry as targets, or that Garten was perhaps willing to offer Daltry and Fitzhenry (but not Samper) a deal.

The letter stated that "[the Accused's} role will be limited because we will not represent any witnesses or be present when any witnesses are interviewed by the DOJ." It failed to mention that the Accused intended to represent witnesses in depositions and interviews conducted by the SEC, for the DOJ's benefit.

The letter stated that "we believe the risk to you of consenting to our representing FLIR ... is very small." It failed to mention that Garten had – in his February 14, 2003 letter – demanded that the Accused personally, in exchange for leniency toward FLIR, help him build the criminal case; that the Accused considered this demand a "threat" against FLIR unless they betrayed their former clients; that although they considered Garten's demand outrageous" and "despicable," they did not clearly and unambiguously reject it but instead assured Garten that they would find a way to work around their ethical responsibilities; that Wynne had convinced the DOJ to look closely at the Swedish Drop Shipment; or that Ellis was representing Fitzhenry in a lawyer disciplinary matter in which Fitzhenry was arguing that Samper and Daltry were responsible for the misrepresentations of which Fitzhenry was accused.

The omitted facts were all known to the Accused, very recent, and obviously material to Samper, Daltry, and Eagleburger's decision whether to consent to the "proposed" representation.

The Accused intended their March 3, 2003 letter to appease the Bar and thereby protect themselves. They did not believe the letter was necessary so long as they could portray their representation as "ministerial," and they never intended to take "no" for an answer. That is why they omitted Jarvis's suggested language about how the representation would not proceed without the former clients' consent, why they continued to represent FUR in the DOJ investigation for the six weeks it took Samper to consent, and why shortly after sending the letter they began disguising their substantive activities on the DOJ matter by billing them to the SEC Inquiry file.

Like the disclosure letter sent by the lawyers in the In re Brandt and Griffin case, the March 3, 2003 letter was not intended to educate the recipients so that they could make an informed choice, but to protect the Accused from disciplinary complications by enabling them to claim "consent." Every omitted fact increased the Accused's likelihood of achieving that goal. By knowingly omitting material information, the Accused violated DR 1-102(A)(3).

E. (Part 4) Ellis's representation of Fitzhenry in the discipline matter involved a former client conflict of interest (Additional Question on Review #2).

The Ninth Cause of the Amended Complaint against Ellis alleged that his representation of Fitzhenry in a lawyer discipline matter involved a former client conflict of interest that was not waived after full disclosure.

The trial panel erroneously dismissed this charge, finding that no communication by Ellis in that matter was or was likely to be adverse to Samper or Daltry's interests.

Ellis began representing Fitzhenry in October 2002, in a Bar disciplinary investigation that arose out of the same facts and circumstances as the SEC matter. The issue under investigation was whether (as the SEC had concluded) Fitzhenry had made false representations in management representation letters presented to FUR's auditors in 1999. (Ex. 376.) Fitzhenry's defense was (as it had been in the SEC matter) that he had signed the letters in reliance on the pre-existing signatures of Samper and Daltry and affirmative assurances by Samper.[37] To the Bar, Ellis first asserted this defense in a letter dated November 26, 2002. (Ex. 160.) On December 17, 2002, Ellis again wrote the Bar that:

> ·rsamper, Stringer, and Widdows]...were the *three* persons directly responsible for accounting issues....Before sign1ng the representation letter, Mr. FitzhenrY specifically confirmed with the company's CFO [Samper] that the accounting representations contained' in the letter were accurate." (Ex. 161.)

By early February 2003, Ellis knew that the DOJ (Garten) was investigating possible criminal charges against Samper (and to a lesser extent, Daltry) and wanted FUR and the Accused to provide information that would help him build a case. On September 17, 2003, Samper was criminally indicted and his criminal matter was pending for the entire duration of the Bar discipline matter.

On November 7, 2003, the Bar filed a Formal Complaint charging Fitzhenry with misrepresentation. Before the disciplinary case was tried

---

[31] Fitzhenry first articulated this defense in his Wells submission (Ex. 120.)

in 2005, Ellis submitted a trial memorandum asserting that in addition to Samper's pre-existing signature on the letters, Samper had assured Fitzhenry (in response to Fitzhenry's specific inquiry) that all the accounting representations were accurate. (Ex. 582, pp. R-11547, 11553.) Ellis also stated that Fitzhenry thought the accounting-related matters had been properly addressed by the other signatories, who included FUR's Chairman (Daltry). (Ex. 378 p. R-8302.)

On October 3, 2005, the first day of the disciplinary hearing, in his opening statement, Ellis told the panel that the DOJ had criminally charged only those it had concluded were dishonest, a group that did not include Fitzhenry (but did include Samper); that Samper and Stringer, not Fitzhenry, had made all the revenue recognition decisions; and that the management representation letters had already been signed by Samper and Stringer before they were given to Fitzhenry to sign. (Ex.583, pp. R-11568-69.)

In a post-trial memorandum filed on November 4, 2005, Ellis repeated these assertions and also asserted that the SEC had charged three FUR officers with fraud, but not Fitzhenry; that Fitzhenry was entitled to rely on Samper's signature; and that "Mr. Fitzhenry, a lawyer and not an accountant, is an exceptional individual who has suffered enough as a result of his non-detection of the apo rently bad acts of others." [emphasis added.) (Ex. 586, pp. R-11748-49, 11768.)

In a brief to this court filed in September 2006, Ellis repeated that Fitzhenry had relied on Samper's express and implied assurances, adding: "If Fitzhenry erred at all, it was... his failure to be suspicious of individuals who had given him no cause for suspicion...A lawyer is not required to doubt the veracity of ostensibly trustworthy clients." (Ex. 587, p. R-11810.)

In 2007, the court found Fitzhenry guilty of misrepresentation but noted that he "was not the only FUR management executive who participated in the misrepresentation." *In re Fitzhenry, supra,* 343 Or at 110. Thus for over three years, during the pendency first of a criminal investigation targeting Samper and Daltry and then of a criminal prosecution against Samper, Ellis repeatedly asserted on Fitzhenry's behalf that if anyone was responsible for misrepresentation, accounting malfeasance, and dishonesty in connection with the management representation letters, it was the Accused's former clients Samper and Daltry, among others.

Fitzhenry's discipline matter was "significantly related" to the SEC matter because it arose from the same operative facts and involved the same allegations of misconduct. Given the concurrent criminal investigation, criminal action, and disciplinary investigations against Samper by the Oregon Accountancy Board and/or the American Institute of CPAs, Fitzhenry's allegations of wrongdoing tended to deprive Samper and Daltry of the finality and peace of mind that was the benefit they thought they had derived from the Accused's earlier representation. (Glade 1201-02, 1210.)

Ellis's representation of Fitzhenry involved a former client conflict to which his former clients did not consent. Ellis therefore violated DR 5-105(C), as alleged in the Ninth Cause of Complaint against him.

VII. SANCTION the Accused's misconduct warrants a suspension of at least four months (Additional Question #3).

The Oregon Supreme Court refers to the ABA *Standards for Imposing Lawyer Sanctions ("Standards"),* in addition to its own case law for guidance in determining the appropriate sanctions for lawyer misconduct. *In re Hostetter,* 348 Or 574, 598-99, 238 P3d 13 (2010).

A ABA *Standards.*

The *Standards* establish an analytical framework for determining the appropriate sanction in discipline cases using three factors: the duty violated; the lawyer's mental state; and the actual or potential injury caused by the conduct. Once these factors are analyzed, the court makes a preliminary determination of sanction, which it adjusts, if appropriate, for applicable aggravating or mitigating circumstances.

1. Duties Violated.

The panel found that the Accused violated their duties of loyalty and candor to their clients. *(Standards* §4.3 and §4.6.) The *Standards* state that obligations owed to clients are a lawyer's most important duties. *(Standards* at 5.)

2. Mental State.

The panel found that the Accused acted intentionally or knowingly when they omitted information from their March 3, 2003 "disclosure" letter. In its sanction discussion, the panel repeated its finding that the Accused's nondisclosures were "knowing." However, it also stated – inconsistently – that the Accused "negligently failed to provide information that they incorrectly concluded was not necessary to disclose." [emphasis added.) (OB ER 211, 215.) The panel found that the Accused acted negligently when they engaged in actual conflicts of interest during the Wells process.

The *Standards* define an act is "intentional" if it is done with the conscious objective or purpose to accomplish a particular result. An act is "knowing" if it is done with the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *(Standards* at 7.)

The Accused's actions were either intentional or knowing. The Accused knew all the facts and circumstances that gave rise to likely or actual conflicts of interest among their FLIR clients, and they were warned by the SEC that such conflicts existed. During the SEC investigation (Part 1), they knowingly failed to obtain informed client consent to the likely conflict. During the Wells process and settlement negotiations (Part 2), they knew that their duty to advocate for FLIR was inconsistent with their duty to refrain from accusing their individual clients of wrongdoing, yet they continued the conflicted representation and took acts benefitting FLIR at the expense of their individual clients. During the DOJ investigation (Part 3), they knowingly engaged in a representation that involved both a matter specific and an information specific former client conflict. The udisclosure" letter they sent their former clients, was not only inadequate to disclose the nature and potential risks of the conflicted representation, it knowingly omitted facts that were material to Samper, Daltry, and Eagleburger's decisions whether to consent. Finally, Ellis knew that his defense of Fitzhenry (Part 4) involved a former client conflict of interest, but did not seek Sampers and Daltry's consent after full disclosure.

3. Actual or Potential Injury.

For the purposes of determining an appropriate disciplinary sanction, the court will consider both actual and potential injury. *Standards* at 6; *In re Williams,* 314 Or 530, 547, 840 P2d 1280 (1992).

The panel found that the Accused's conflict during the Wells stage (Part 2) caused no injury because the individual clients had independent counsel,[38] but that the Accused's conflict during the DOJ investigation (Part 3) – and their failure to provide full disclosures – injured Samper

[38] The Bar does not concede lack of injury.

and his counsel by depriving them of the facts they needed to analyze their options.

There was additional actual injury to the clients during the three years the Accused engaged in conflicted representations. The Accused looked on while the testimony of some of their clients *(e.g.,* Muessle and Wynne) helped build the SEC's and the DOJ's cases against their other clients *(e.g.,* Samper). The Accused dissuaded at least one client (Samper) from invoking his Fifth Amendment protections during the SEC investigation, in furtherance of another client's (FUR's) interest in appearing cooperative. Samper might not have been indicted if the Accused had not helped the DOJ (through the SEC) assemble the evidence against him. Had Samper, Daltry, or Eagleburger been apprised that FLIR was trying to save itself from criminal prosecution by turning on them, they might not have consented to their former lawyers joining the effort Given a choice, Samper and Daltry probably would have elected against having their former attorney, Ellis, accuse them publicly of misconduct in the Fitzhenry discipline matter, accusations that resulted in a published supreme court decision mentioning their wrongdoing if not their names.

Finally, although not measurable in economic terms, the Accused's conflicts of interest injured the public's confidence in the integrity of lawyers and in a legal system predicated on undivided loyalty. Mallen and Smith, *Legal Malpractice§* 16.2 (5th ed. 2000).

4. Preliminary Sanction.

Absent aggravating a mitigating circumstances, the following *Standards* suggest that a suspension is the appropriate sanction:

Standards § 4.32: ususpension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a

client the possible effect of that conflict, and causes injury or potential injury to a client."

Standards § 4.62: "Suspension is appropriate when a lawyer knowingly deceives a client, although not necessarily for his [or her} own direct benefit, and the client is injured."

5. Aggravating Circumstances.

The panel correctly found as aggravating factors: the Accused's substantial experience in the practice of law *(Standards* § 9.22(i)) and their "steadfast refusal ...to even consider the possibility that their conduct was in any way inappropriate." *(Standards* § 9.22(g)). The Accused are very experienced lawyers; Ellis was admitted to the Oregon Bar in 1964, Rosenbaum in 1977. They had previously represented clients in SEC investigations and knew the SEC's and DOJ's policies with respect to cooperation. They used their expertise to persuade at least one client, Samper, that his interests and FUR's were aligned, when that was not the case.

Other aggravating factors include:

(a) *A Qattern of misconduct. Standards§* 9.22(c). The Accused's conflicted representations continued for *at least* three years, despite warnings from the SEC, the DOJ, and Peter Jarvis. Once the SEC investigation ended and the criminal investigation began, the Accused belatedly sought Samper's, Daltry's, and Eagleburger's consent to the former client conflict while knowingly withholding material information from them. The court should weigh this pattern of misconduct heavily, as it did in *In re Butler,* 324 Or 69, 76, 921 P2d 401 (1996).

(b) *Multiple offenses. Standards* § 9.22(d). The Accused engaged in multiple conflicts of interest, involving several clients, and made misrepresentations to Samper, Daltry, and Eagleburger.

6. Mitigating Circumstances.

The panel found five mitigating factors: the absence of pnor records of discipline *(Standards* § 9.32(a)); excellent character and reputation *(Standards* § 9.32(g)); Rosenbaum's claim that she refrained from correcting misrepresentations about her conduct in the DOJ criminal case out of loyalty to her former client Samper *(not a factor recognized by the Standards* as *mitigating);* delay in the disciplinary proceedings *(Standards* § 9.320)); and full and free disclosure to disciplinary board and a cooperative attitude with the Bar *(Standards* § 9.32(e)).

The panel erred in creating a mitigating circumstance neither recognized by the *Standards* nor developed in the record. The panel also erred by finding that the disciplinary proceedings were unreasonably delayed. This mitigating factor is not available to an accused lawyer unless there is evidence that the Bar took an unreasonably long time to pursue the matter. *In re Phillips,* 338 Or 125, 143 n. 20, 107 P3d 615 (2005). Although the Accused's misconduct occurred between 2000 and 2006, it did not come to the Bar's attention until 2008. (Ex. 435.) The initial Formal Complaint was filed on July 21, 2010, and there was no unwarranted delay in the prosecution, particularly given the factual complexity of the case and that it has been "hard fought." (Ex. 391) *In re Phillips, supra.* Most importantly, the Accused should not be credited with full and free disclosure to the disciplinary board or a cooperative attitude. The trial panel found "not credible" their testimony about whether anyone at FUR believed Samper had engaged in wrongful or fraudulent conduct (OB ER 186) and whether FUR had a *quid pro quo* arrangement with the DOJ. (OB ER 200.)

After applying the appropriate mitigating and aggravating factors, the Standards suggest that the Accused should be suspended.

B. Case Law.

Consistent with Oregon case law, the appropriate sanction is a suspension of at least four months.

The court has often stated that a single violation of DR 5-105 will justify a 30-day suspension. In re Hostetter, supra, 348 Or at 603, citing In re Hockett, 303 Or 150, 164, 734 P2d 877 (1987); In re Knappenberger, 337 Or 15, 33, 90 P3d 614 (2004). In In re Moore, 299 Or 496, 703 P2d 961 (1985), the court suspended for one-year a lawyer who violated DR 5-105(A) and (B) and DR 5-104(A) [business transactions with clients–two counts], and DR 5-101 (A) [lawyer's self-interest conflict]. Moore involved the concurred representation of individuals and a corporation in efforts to purchase a business. After a falling out among the individual clients, the lawyer helped some of them purchase the business excluding another client.

Conflicts that are aggravated by misrepresentation usually result in a suspension. In In re Hostetter, supra, 348 Or at 574, a lawyer who engaged in a former client conflict and made misrepresentations was suspended for 150-days. In In re Brandt and Griffin, supra, 331 Or at 149, lawyers who engaged in a self-interest conflict and made misrepresentations in a letter seeking their client's consent to a settlement (and to the lawyers' agreements to represent the opposing party in the future), were suspended 12 months and 13 months. The conflict in In re Brandt and Griffin was a self-interest conflict, and the misrepresentations – affirmative and by omission – were made to both the client and the Bar. In those respects, that case warranted a harsher

sanction than this one. However, the conflicts here were of much longer duration and involved a greater number of clients.

In In re Wyllie, 331 Or 606, 19 P3d 338 (2001), a lawyer was retained to give three criminal clients – each of whom had his own counsel – a second opinion about whether to accept a plea offer in a burglary/assault case. Because the clients could have asserted different defenses or each could have argued that the assault was committed by the others, the lawyer was held to have had a current client conflict. The court found several aggravating factors, including a pattern of misconduct, substantial experience in the practice of law, and a refusal to acknowledge wrongful conduct. The lawyer (who also failed to deposit client funds into trust and who charged an excessive fee) was suspended for four months. That would appear to be an appropriate resolution in this matter as well.

VIII. CONCLUSION

However complicated the facts, this case distills to the right of clients to expect their lawyers' undivided loyalty and the disclosure of any material matters that could infringe upon it.[39] The Accused had one client – FUR – whose interests they placed above all others. On FUR's behalf, they represented as many FUR personnel who received SEC subpoenas as would agree to the joint representation; identified their own clients Samper, Daltry, and Eagleburger to the SEC as wrongdoers; negotiated settlement language stipulating that their individual clients were guilty of fraud; worked behind the scenes to help the DOJ build a criminal case against former client Samper; and Ellis defended favored

[39] Mallen and Smith, Legal Malpractice, supra, at § 14.1.

FLIR employee, Fitzhenry, in a Bar disciplinary matter by blaming Samper and Daltry for his misrepresentations.

By July 2003, the Accused's loyalty to their individual clients had been compromised for years, yet Samper and his attorneys were still unaware of their disloyalty. Two months before Samper was criminally indicted, on July 10, 2003, Kaner begged Rosenbaum for her and FUR's help "defending [Samper against) what seem to be the inevitable indictments." (Ex. 427.) Had the Accused disclosed the truth, Samper would have known that FLIR was fully committed to helping the DOJ, that the Accused were fully committed to helping FLIR, and that no one was sparing a thought for him.

The Accused were disloyal and knowingly withheld the information their individual clients needed to protect themselves. The Accused should be suspended for at least four months.

DATED this 22nd day of November, 2013.

OREGON STATE BAR

By

•v a•rn. ᵛᵛᵛ ᵗ, uatu...,.v. ᵛ tv013
s§istant Disciplinary Counsel

Martha M, Hicks, Bar No. 751674
Assistant Disciplinary Counsel

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 22nd day of November, 2013, by submitting the electronic form in Portable Document Format (PDF) that allows text searching and allows copying and pasting text into another document to:

http://appellate.courts.oregon.gov

I further certify I served the foregoing OREGON STATE BAR'S RESPONDENT'S BRIEF on the 22nd day of November, 2013, by mailing two certified true copies by first class mail with postage prepaid through the United States Postal Service to:

W. Michael Gillette
Schwabe Williamson & Wyatt PC
1211 SW 5th Avenue, Suite 1900
Portland, OR 97204
(Counsel for the Accused)

Nathan R. Christensen
Perkins Coie LLP
1120 NW Couch, 10th Floor
Portland, OR 97209
(Counsel for the Accused)

Eric J. Neiman
Williams Kastner
888 SW 5th Avenue, Suite 600
Portland, OR 97204
(Bar Counsel)

DATED this 22nd day of November, 2013.

OREGON STATE BAR

By.
Mapl A. vooper, Ue,tVNO. 910013

CERTIFICATE OF COMPLIANCE WITH CRAP 5.05(2)(d)

t certify that (1) this brief complies with the word-count limitation set forth in the Courfs Order dated October 17, 2013, and (2) the word-count of this brief is 23,060 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP s.o5(4Xf).

I certify pursuant to ORAP 9.17(5)(e) that the electronic form of this brief has been scanned for viruses and that it is virus free.

May"A. Cooper, OSB No 910013