IN THE SUPREME COURT FOR THE STATE OF OREGON

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

PETITION FOR REVIEW AND OPENING BRIEF

OF BARNES H. ELLIS AND LOIS O. ROSENBAUM

Review of a Decision of an Oregon State Bar Trial Panel

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I. STATEMENT OF THE CASE

A. Nature of the Action.

Barnes H. Ellis ("Ellis"), Bar No. 640325, and Lois O. Rosenbaum ("Rosenbaum"), Bar No. 773250, (collectively, "Petitioners") appeal from a Trial Panel decision rendered in disciplinary proceedings filed against them by the Oregon State Bar ("the Bar").

B. Nature of the Judgment.

The Bar alleged 12 causes of complaint against Ellis and 10 causes of complaint against Rosenbaum. The Trial Panel conducted a hearing over 12 days during the period beginning October 9, 2012, and ending November 14, 2012, and issued its Opinion on May 7, 2013 (the "Opinion").

In the Decision section of the Opinion, the Trial Panel held there was no violation for nine of the 12 causes of complaint against Ellis. With respect to the three remaining causes, the Trial Panel found two violations of former Disciplinary Rule ("DR") 5-105(E) (current client conflicts) and one violation of former DR 1-102(A)(3) (misrepresentation).[1]

The Trial Panel held there was no violation for seven of the 10 causes of complaint against Rosenbaum. With respect to the remaining causes, as well as to a cause that the Trial Panel acknowledged was not alleged in the Bar's

[1] Copies of the former Disciplinary Rules at issue in this case are attached as Appendix ("App") 1-5.

complaint, the Trial Panel found three violations of former DR 5-105(E) (current client conflicts) and one violation of former DR 1-102(A)(3) (misrepresentation).

C. Petition for Review and Statutory Basis for Appellate Jurisdiction.

Pursuant to Oregon State Bar Rule of Procedure ("BR") 10.3, Petitioners timely filed their Request for Review on June 5, 2013, and petition this Court for *de novo* review of each of the Trial Panel's holdings of violation. ORS 9.536(2); BR 10.1, 10.5, and 10.6.

D. Questions Presented for Review.

1. Did the Trial Panel err in finding violations of the disciplinary rules that were not pled by the Bar?

2. Did the Trial Panel err in holding that the consents of clients were required for Petitioners' law firm, Stoel Rives LLP ("Stoel Rives"), to act solely as a document depository and interview scheduler, with no advocacy role, in connection with a Department of Justice ("DOJ") investigation (hereinafter, the "ministerial role")?

3. Did the Trial Panel err in holding that the consents, which Petitioners did obtain, were obtained without full disclosure of material facts?

4. Did the Trial Panel err in holding that any information not disclosed in the consent requests was required to be disclosed, was material, and was withheld knowingly?

5. Did the Trial Panel err in holding that one sentence in a client's Wells submission to the Securities and Exchange Commission ("SEC") conflicted with the interests of other clients?

6. Did the Trial Panel err in finding that a phone call to the SEC staff conflicted with the interest of another client?

E. Summary of Argument.

The 12-day hearing focused on (1) the legal representation that Petitioners provided to FLIR Systems, Inc. ("FLIR"), a publicly-traded company, and certain of its directors, officers and employees in connection with a 2000 to 2002 SEC investigation; (2) the ministerial role performed by Stoel Rives, under Petitioners' supervision, during a 2003 DOJ investigation; and (3) Ellis's representation of the General Counsel of FLIR during a 2005 Bar disciplinary proceeding.

The Trial Panel held that Petitioners' representation of their clients during the SEC investigation, including the multiple representation strategy that was the primary target of the Bar's complaints, was not only consistent with the rules of professional responsibility and national practice in this field, but provided significant value to all clients. The Trial Panel also held that Ellis's representation of FLIR's General Counsel in the disciplinary proceeding was not a conflict of interest.

The Trial Panel's determination that there were violations (and therefore this appeal) focuses on three discrete events, each of which the Trial Panel held involved conflicts of interest and/or misrepresentations by omission: (1) one sentence in a document submitted to the SEC on behalf of FLIR; (2) a phone call made to the SEC staff at the request of FLIR after all affected Stoel Rives clients had settled with the SEC and before Petitioners had any knowledge of DOJ involvement; and (3) a conflict waiver letter that Petitioners sent to their former clients asking for the former clients' consent to Stoel Rives performing the ministerial role. Each of those adverse Trial Panel holdings was based on legal and factual errors, including one or more of the following:

First, the Trial Panel exceeded its authority by finding ethical violations that were not pled by the Bar. The Trial Panel's role is to determine, in a neutral and detached manner, whether the Bar has proved its charges by clear and convincing evidence—not to act as a prosecutor by unilaterally adding new charges.

Second and Third, the Trial Panel erred in (1) assuming, without discussion, that Stoel Rives' ministerial role was a conflict of interest that required consent, and (2) holding that the letter Petitioners sent to their former clients to obtain the former clients' consent to perform the ministerial role was misleading by omission. Because Petitioners played only a ministerial role in connection with the DOJ investigation—a role that benefitted both FLIR and

Petitioners' former clients—no consent was required. Further, the Trial Panel applied the wrong standard of "full disclosure." As required under former DR 10-101(B) (a rule cited by all parties but never even acknowledged by the Panel), Petitioners provided an explanation that apprised their former clients of the potential adverse impact, if any, of Stoel Rives, rather than someone else, performing the ministerial role.

Fourth, the Trial Panel erred in holding that Petitioners knowingly withheld information that they had in mind, knew to be material, and were under a duty to disclose. There was no evidence to support that holding. To the contrary, the disclosures Petitioners provided were extensive, were reviewed by in-house ethics counsel, and conveyed all the information Petitioners had in mind and believed to be material.

Fifth, the Trial Panel erred in holding that a single sentence in FLIR's 11-page post-investigation submission to the SEC conflicted with the interests of Petitioners' individual clients. As the Trial Panel elsewhere correctly held, the interests of Petitioners' clients were not adverse, and FLIR's submission, which did not concede fraud or accuse any of Petitioners' clients of wrongdoing, did not make them adverse. The Trial Panel's holding that the single sentence nonetheless encouraged the SEC to pursue Petitioners' other clients is inconsistent with the wording of the sentence, the testimony of every witness who was asked about the FLIR submission, the criticism FLIR received from

the SEC for *not* having admitted that fraud had occurred, and the Trial Panel's own holdings regarding every other part of the submission.

Sixth, the Trial Panel erred in holding that a phone call made to the SEC staff, after Petitioners' clients had settled with the SEC, conflicted with the interests of another client. The call related solely to FLIR's former CEO, who was adverse to FLIR in a wrongful termination lawsuit and who was not Petitioners' client.

F. Summary of Facts.

This case relates to work Petitioners performed and supervised 10 to 13 years ago. Petitioners were first retained in March 2000 after FLIR announced that it would restate financial statements, triggering private securities class action lawsuits and, shortly thereafter, an SEC investigation. As discussed below, Petitioners' strategy and role evolved with the underlying legal proceedings, from an information-gathering role on behalf of FLIR and individuals during the SEC investigation, to an advocacy and negotiating role on behalf of the company at the close of the SEC investigation, to a ministerial role as document depository during the subsequent DOJ investigation.

1. FLIR restates its financial statements to address accounting errors (January – May 2000).

FLIR is a publicly-held Oregon company that manufactures and sells thermal imaging equipment. (Exs. 599, 627; Ellis 2523:1-13.[2]) In the late 1990s, FLIR rapidly expanded and acquired two companies, including one located in Sweden. This growth strained the company's resources and complicated its accounting. (Exs. 32, 518 at R 10,781 (987:7-24).) As of early 2000, FLIR's personnel included: Board Chair Robert Daltry; CEO Ken Stringer; CFO Mark Samper; General Counsel James Fitzhenry; and Director Steven Wynne.[3]

At a meeting of the FLIR Directors in February 2000, CFO Samper reported that FLIR's financial statements would not be prepared on time. (Wynne 2314:25-2315:5, 2413:5-11.) The Board criticized senior management, including Samper, for their failure to manage the company's accounting on a timely basis. (Wynne 2414:5-2415:1.) On February 18, 2000, Samper voluntarily resigned. (Exs. 1, 410.)

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[2] References to the hearing transcript are made by using the last name of the witness and the page and line numbers in the court reporter's transcript. Where the reference is to statements by the Panel or lawyers, a generic "Tr." cite is used. An index of testimony presented at the hearing, including the corresponding page numbers in the Bar's Corrected Record, is attached as App 6-10. References to exhibits are by the exhibit number used at the hearing. An index of exhibits, including corresponding page numbers in the Excerpt of Record and the Bar's Corrected Record, is attached as App 11-16.

[3] A cast of characters is attached as App 17-19.

Shortly thereafter, during the annual fiscal year audit, FLIR and its auditors found accounting errors related to intercompany consolidations, inventory accounting, and capitalization of research expenses. (Ellis 2519:9-17.) They found no evidence of fraud. (Ellis 2519:22-24.) On March 6, 2000, FLIR announced to the market that it would restate its 1999 interim financial statements. (Ex. 2.) Immediately thereafter, FLIR's stock price dropped (Ellis 2540:25-2541:5), and a week later the first of several shareholder class action lawsuits was filed against FLIR, Stringer, and Samper (and ultimately Daltry), alleging securities fraud (Ex. 80).

On March 20, 2000, FLIR retained Petitioners. (Ex. 503 at R 9,888.) FLIR informed Stringer and Samper that it would pay for their representation by Stoel Rives and/or by personal counsel of their choosing. (Ex. 4.) Samper had already retained attorney Peter Glade to represent him personally. (Ex. 3.) On Glade's recommendation, Samper elected to retain Stoel Rives also, consenting to Petitioners' representation of him and FLIR while continuing to employ Glade as his independent counsel. (Ex. 7.) Stringer retained attorney William Martson as his counsel and elected not to be included in the multiple representation. (Rosenbaum 465:25-466:4.)

2. Securities and Exchange Commission proceedings (June 2000 – September 2002).

a. The SEC Staff investigates FLIR's accounting.

On June 8, 2000, the SEC opened an investigation into FLIR's accounting. (Ex. 12.) The investigation arose out of the same facts and issues alleged in the class actions. (Rosenbaum 494:8-23.) The SEC served subpoenas on FLIR and numerous FLIR personnel. (Rosenbaum 464:12-23.) At FLIR's request, Petitioners expanded their representation to include any FLIR current or former employees who (1) received an SEC subpoena and (2) wanted to be represented by Petitioners under the umbrella of their representation of FLIR. (Ex. 18 at R 5,593-5,594; Rosenbaum 560:12-21, 561:22-562:2.)

The multiple representation strategy was designed to address the special rules governing SEC investigations, which maximize the SEC staff's acquiring knowledge of the underlying facts while limiting the information available to companies and witnesses. (Maletta 1615:10-1616:20, 1635:25-1637:3.) Unlike civil litigation, (1) an SEC investigation is not supervised by a judge or other neutral party; (2) the SEC staff does not disclose the recipients of subpoenas or identify which individuals or specific transactions or claims are being investigated; (3) the SEC staff is empowered to compel secret sworn interviews, which may be attended only by the witness and his attorney; (4) the attorney

attending the interview is not allowed to examine the witness, other than to ask clarifying questions; (5) the SEC does not provide copies of interview transcripts to attorneys who are not representing the witness; and (6) the SEC staff does not provide to the witnesses or their attorneys copies of the exhibits used at the sworn interviews. (Maletta 1615:10-1616:20, 1635:25-1637:3, 1644:3-14; Ex. 604.) During its investigation of FLIR's accounting, the SEC staff interviewed 64 witnesses over the course of 250 interview days and collected hundreds of thousands of documents numbering in the millions of pages. (Ellis 2603:21-2604:1; Wynne 2431:10-19; Roberts 1822:24-1823:2; Ex. 112.)

Multiple representation of a company and witnesses allows their attorneys to act as a central clearinghouse to consolidate and disseminate information to the joint clients. (Maletta 1634:4-1637:3.) It is therefore a common and advantageous strategy for countering the one-sided advantages that the SEC rules accord its staff. (Exs. 52 at R 5,697-5,698, 462 at R 9,133-9134; 464 at R 9,268-9,269; Maletta 1758:25-1759:17.)

Throughout the SEC process, Petitioners functioned as the central clearinghouse for their clients. They assisted their clients in producing to the SEC documents relevant to the accounting issues in question (*see, e.g.*, Exs. 44, 139, 512, 514, 526); attended their clients' SEC interviews and circulated extensive summaries of those interviews (*see, e.g.*, Exs. 132, 134, 542, 550);

distributed verbal or written summaries of the meetings and other communications they had with the SEC staff (*see, e.g.*, Exs. 49, 51, 54, 62); and provided securities law information, expertise, and independent analysis to all of their clients (*see, e.g.*, Exs. 41, 54, 552).

b. The SEC Staff Issues Wells Notices to FLIR and Certain Individuals.

By the end of 2001, the SEC staff had substantially concluded its investigation. The SEC staff issued Wells Notices (indicating the SEC staff's intent to recommend enforcement action against the recipient) to FLIR and to Fitzhenry on February 19, 2002 (Exs. 119, 409), to Samper on February 28, 2002 (Ex. 50), and to FLIR's Sales Operation Manager, Steve Eagleburger, on March 14, 2002 (Ex. 454). Daltry did not receive a Wells Notice. (Rosenbaum 487:10-488:1.)

Petitioners arranged for their individual clients who had received a Wells Notice and who did not already have independent counsel to retain independent counsel to represent them during the Wells process and any ensuing settlement negotiations. (Ellis 2606:1-10.) Samper was already personally represented by Glade and his partner, Lisa Kaner. Los Angeles attorney Steve Wilson represented Fitzhenry, and Portland attorney Carl Neil represented Eagleburger. (Ellis 2605:22-2606:19.) Petitioners assisted the individual attorneys by sharing information, but did not participate in any settlement discussions on

behalf of the individuals. (Rosenbaum 525:24-526:23; Ellis 2608:10-2609:11, 2611:6-25.)

On March 8, 2002, FLIR submitted its Wells response, signed by Ellis.[4] (Ellis 2616:1-2, 2650:16-21; Ex. 179.) FLIR chose not to argue with the SEC staff about specific 1998 and 1999 transactions, both because SEC guidelines discourage parties from arguing facts in their Wells Submissions and because the SEC staff appeared resistant to any argument on these issues. (Ellis 2651:2-2652:5; Maletta 1702:21-1703:11.) FLIR's Wells Submission focused instead on the remedial efforts made by management during the two years that followed the discovery of its accounting problems. FLIR explained that it had a near-complete turnover of management as well as shareholders, had new auditors, had expanded and strengthened its accounting personnel and controls, had two years of accurate reporting, and therefore that sanctioning the company was unnecessary and not in the interest of shareholders. (Ex. 158; Ellis 2651:2-2652:5; Wynne 2335:25-2336:7, 2337:15-19.) FLIR did not suggest that there was any fraud or other wrongdoing. It described the accounting issues as "errors or problems," terminology that SEC practitioners understand does not imply fraud. (Ellis 2660:18-2661:2; Wynne 2425:6-16; Maletta 1700:4-18, 1702:8-1703:11; Glade 1366:16-24; Ex. 158.)

[4] Rosenbaum was on sabbatical and out of the country from March 6, 2002 to mid-April 2002. (Rosenbaum 806:4-9.)

c. All of Petitioners' clients settle with the SEC.

FLIR and each of Petitioners' individual clients who had received a Wells Notice (Samper, Fitzhenry, and Eagleburger) negotiated settlements with the SEC. (Exs. 358, 360; Rosenbaum 525:20-526:23; Ellis 2633:3-16, 2672:16-2675:13.) The individuals' settlements were negotiated solely by each of their independent counsel, with no substantive input requested from Petitioners. (Rosenbaum 525:20-526:23; Ellis 2611:22-25, 2633:3-16, 2672:16-2675:13.) Petitioners represented FLIR in its settlement discussions. (Ex. 311; Ellis 2622:7-13.)

On September 30, 2002, the SEC filed civil and administrative pleadings reflecting the settlements. (Exs. 311, 356, 358, 360.) A civil complaint filed by the SEC named Eagleburger and Samper (confirming their settlements) and Stringer, who had not settled. (The Complaint also named former FLIR Vice President of Sales, William Martin, who was not a client of Petitioners but had also settled with the SEC.) (Ex. 356.) The SEC's action against Fitzhenry settled with an administrative order on November 21, 2002. (Ex. 244.) Those filings formally concluded the SEC's investigation of all of Petitioners' clients.

3. Post-SEC Settlements (October – December 2002)

a. Rosenbaum conveys FLIR's willingness to assist the SEC in reviewing the testimony of former FLIR CEO Stringer, who had not been a client of Petitioners and who had not settled with the SEC.

Former FLIR CEO Stringer was not a client of Petitioners. (Rosenbaum 465:25-466:4.) In July 2001, he sued FLIR for millions of dollars in damages, claiming that FLIR had wrongfully terminated him "for cause." (Rosenbaum 630:4-7, 847:5-15; Wynne 2351:20-25.) Stoel Rives represented FLIR in that action. (Rosenbaum 847:5-15.) Stringer, represented by Martson, had received a Wells Notice but had not settled with the SEC. (Rosenbaum 625:19-25, 619:23-630:3.) FLIR had an interest in the SEC's case against Stringer, because a finding by the SEC against Stringer would undermine Stringer's wrongful termination case against FLIR. (Rosenbaum 847:5-15; Ellis 2730:10-2731:22.)

In early October 2002, after the SEC settlements of FLIR, Samper, and Eagleburger had become final, Wynne obtained a copy of the SEC's federal court complaint against Stringer. (Ex. 356; Wynne 2350:24-2351:1.) At Wynne's request, Rosenbaum called the SEC staff to convey FLIR's willingness to provide FLIR's comments on Stringer's SEC testimony. (Ex. 171; Rosenbaum 629:20-630:7, 848:7-12; Wynne 2407:14-21.)

Wynne also asked Rosenbaum to convey to the SEC his surprise that the SEC's complaint against Stringer did not mention an accounting entry referred to as the "Swedish Drop Shipment."[5] (Wynne 2350:24-2351:11; Rosenbaum 630:8-13.) Wynne understood that the entry had been made at the direction of Stringer, and therefore was surprised that the SEC had not raised it in its complaint against him. (Wynne 2351:13-19, 2396:12-2402:7.) Samper, too, had testified that Stringer, who had regular communications with FLIR's new division in Sweden, had directed the Swedish Drop Shipment entry. (Ex. 140; Rosenbaum 847:16-23; Ellis 2531:10-2532:12.) Samper had further testified that he had reversed the entry the following quarter when he did not receive the backup from Sweden substantiating Stringer's representations with respect to the underlying transactions. (Ex. 40; Ellis 2532:6-12.) In November 2000, FLIR, still unable to find any backup for the accounting entry, had restated the third-quarter entry. (Wynne 2396:12-2398:5; Ellis 2527:11-22.)

b. FLIR General Counsel Fitzhenry self-reports to the Bar.

Also in October 2002, Fitzhenry, faulted by the SEC for signing a management representation letter to FLIR's auditors for fiscal year 1998, asked Ellis to self-report to the Bar on Fitzhenry's behalf. (Ellis 2013:17-23.)

[5] Although the "Swedish Drop Shipment" was a single accounting entry, it was intended to reflect multiple direct shipment sales out of FLIR's new division in Sweden. (Ellis 2531:1-2532:1.)

As Fitzhenry had requested, Ellis notified the Bar about the situation (*id*.) and sent a letter on Fitzhenry's behalf, explaining that Fitzhenry was not an accountant, had no background in accounting, had relied on the company's accountants and outside auditors to determine whether the one sale in which Fitzhenry was involved could be recorded, and expected in signing the letter that he was verifying the legal, not the accounting, representations (Ex. 160).

Responding to an ensuing information request from the Bar (Ex. 246), on December 17, 2002, Ellis sent to the Bar Fitzhenry's Wells Submission (Ex. 120), annotated transcripts of Fitzhenry's SEC testimony, and facts and citations to case law that Ellis believed would assist the Bar in deciding not to take action against Fitzhenry. (Ex. 161; Ellis 2727:7-14.) The Bar filed a formal complaint against Fitzhenry on November 7, 2003, nearly a year later. (Ex. 250; Ellis 2738:17-21.)

4. Department of Justice investigation (January – April 2003).

a. The DOJ reveals its investigation.[6]

On January 27, 2003, Allan Garten, an Assistant United States Attorney ("AUSA") in the Portland office of the DOJ, called Ellis to notify him that the

[6] The Bar's allegations and the Panel's holdings relating to the DOJ investigation concerned only two of Petitioners' former clients, Samper and Daltry. Consequently, this brief addresses only those two individuals. As a matter of record, however, Petitioners disclosed all material information to and received consent from each of their former clients with potential exposure in the DOJ investigation. (Exs. 101, 605, 624, 418.)

DOJ was opening a criminal investigation of FLIR's accounting and to request a meeting. (Ellis 2689:16-21.) The call from Garten was totally unexpected—neither Ellis, nor Rosenbaum, nor any of the lawyers representing Ellis and Rosenbaum's former clients, including Neil, Glade, and Kaner, thought there was any likelihood that a DOJ investigation would follow the SEC investigation. (Rosenbaum 692:4-10, 850:16-851:23; Neil 2278:12-16; Glade 1269:18-22; Kaner 2092:16-19; Ellis 2705:4-11.)

b. Petitioners immediately notify counsel for Samper and attempt to notify Daltry.

The meeting that Garten requested occurred on January 30, 2003. (Ex. 503 at R 10,101.) At the start of the meeting, Garten informed Petitioners that he did not intend to prosecute FLIR and had "deliberately not used [the] 'target' word with respect to [FLIR]." (Ellis 2704:12-15; Ex. 566.) Garten provided Petitioners with a copy of a recently-published DOJ Policy Memorandum (the "Thompson Memorandum"), which defined what it meant for a company to "cooperate" with the DOJ. (Exs. 94, 123, 609 at ¶ 4.) The Thompson Memorandum had been released on January 20, 2003, and "was well known among prosecutors and the entire criminal defense bar." (Ex. 609 at ¶ 4.) On the issue of corporate cooperation in cases of this kind, it reaffirmed long-standing DOJ policy, which previously had been expounded in a policy statement known as the "Holder Memorandum." (Ex. 105.)

Petitioners reported their meeting with Garten to Glade and Kaner the following day. (Exs. 94, 151, 503 at R 10,101.) Petitioners informed them that the DOJ had requested FLIR's cooperation and had provided a handout [the Thompson Memorandum] "defining [the DOJ's] expectations of a corporation's cooperation," which Rosenbaum faxed to Kaner. (Exs. 94, 151; Rosenbaum 886:16-887:25.) Petitioners further reported that the DOJ was interested in reviewing FLIR documents relating to an internal investigation that two members of FLIR's Board, represented by independent counsel, had performed in 2000. (Exs. 94, 151; Ellis 2725:1-5.) Petitioners also attempted to contact Daltry with the same information, but Daltry was out of town and Petitioners were unable to reach him until February 24, 2003. (Ex. 610; Myers 1079:18-24, 1090:8-1091:11.)

c. Petitioners refuse to assist the DOJ.

On February 4, 2003, Garten reiterated to Rosenbaum in a phone call several of the points mentioned in the Thompson Memorandum. Specifically, Garten explained that FLIR's cooperation would be "one of [the] factors" that the DOJ would consider in deciding whether to indict FLIR, although that did not mean that the DOJ would necessarily indict FLIR if FLIR did not produce the documents that DOJ had requested. (Ex. 567.) Garten told Rosenbaum that, in light of the importance to national security of the infrared night vision

devices that FLIR manufactured, he "wanted to present FLIR as the hero in the War on Terrorism." (*Id*.)

On February 12, 2003, Ellis, FLIR CEO Earl Lewis, and Wynne met with Garten. (Ex. 503 at R 10,102; Ellis 2705:12-2706:9.) Lewis stated at the outset that FLIR intended to cooperate fully. (Wynne 2365:5-18; Ellis 2706:10-18.) Garten indicated that he expected as part of FLIR's cooperation that its counsel, Ellis, would assist him. (Ellis 2706:10-2707:18.) After the meeting, Ellis told Lewis and Wynne that Stoel Rives ethically could not do what Garten was suggesting. (Wynne 2453:24-2454:6.)

On February 14, 2003, Petitioners received a letter from Garten. The letter requested that FLIR: (1) waive its attorney-client privilege for certain years and for subjects related to the facts alleged in the SEC complaint; (2) provide the company's annual reports, SEC filings, bank documents, officer compensation history, and documents produced and pleadings filed in the class actions; and (3) coordinate interviews of certain current and former personnel and customers. (Ex. 97.) These requests mirrored the definition of cooperation outlined in the Thompson Memorandum. (Ex. 123.) In a separate paragraph directed personally to Petitioners, Garten stated that the DOJ's "assessment of the extent of [FLIR's] cooperation will be a function, in part, of how proactive you are in assisting us with our proof against the former employees identified in the SEC complaint." (Ex. 97 at 304.)

Petitioners were appalled by Garten's attempt to pressure them into assisting him in developing a case against their former clients. (Rosenbaum 895:12-24, 907:7-22; Ellis 2709:22-2710:8, 2711:22-2712:2, 2714:13-19.) Ellis developed an argument to persuade Garten to withdraw his demand for their cooperation without antagonizing the DOJ: After informing Garten that they were precluded by their ethical duties from assisting him, they would explain that any assistance that Garten received from them could taint his entire case. (Ellis 2709:22-2710:23; Rosenbaum 905:24-906:17.) On February 17, 2003, Rosenbaum sent Garten a letter which stated, among other things, "[i]n assessing how proactive the Company is in assisting you with proof against the former employees identified in the SEC complaint, *we trust that you will understand the limitations imposed on Barnes and me as a result of our fiduciary responsibilities to individuals with whom we have had an attorney-client relationship*." (Ex. 182 (emphasis added); Ellis 2710:25-2711:18.)

On February 19, 2003, Petitioners met with Garten and advised him that they could not act adversely to their former clients and, in their opinion, his entire investigation could be tainted if they were to do what he had asked. (Ellis 2712:9-2713:24.) A few hours later, Garten sent Petitioners an email in which he abandoned his earlier request for Petitioners' personal assistance and adopted their conflict concerns as his own. (Ex. 163.) Nevertheless, Garten continued to send requests for documents and interviews to FLIR through

Petitioners. (*Id*.) That same day, Petitioners reported to Glade the substance of their meeting with Garten and informed him that the DOJ was "pressing [FLIR] for information," including by requesting that FLIR produce company documents. (Ex. 100.)

On February 20, 2003, Petitioners consulted with their partner Per Ramfjord, a former AUSA and experienced white collar criminal defense lawyer, about how best to handle the situation consistent with their ethical duties. (Ramfjord 859:2-860:9, 872:24-874:24.) Based on his advice, Rosenbaum sent Glade a letter reaffirming that Stoel Rives was producing FLIR documents to the DOJ. (Ex. 99.)

d. Petitioners agree that Stoel Rives will act in a ministerial role.

Petitioners had explained to Wynne, then FLIR's Acting General Counsel, that "they could not be involved [in the DOJ investigation] because of their conflict." (Wynne 2376:22-25.) On February 27, 2003, Garten told Wynne the same thing. (Wynne 2367:23-2368:3.)

Wynne proposed an alternative: FLIR would retain a separate firm to represent it substantively in connection with the DOJ investigation, and Stoel Rives would continue to serve as FLIR's document depository. (Wynne 2376:19-2377:19; Ex. 221.) FLIR's documents, which numbered in the millions of pages, filled "a very large room" at Stoel Rives and had been

catalogued, organized, and entered into an electronic database there. (Roberts 1799:12-14, 1800:3-6, 1822:24-1823:2; Wynne 2372:21-25.) "[G]iven the time and effort [FLIR] went to to build [the] document database which included restructuring years of e-mails and all the other things [FLIR] had to do for the SEC * * * [Wynne] did not want to start over somewhere." (Wynne 2373:5-10, 2377:1-8.) Stoel Rives also had compiled contact information for (and was familiar to) FLIR's current and former personnel, so Wynne hoped the firm could coordinate the dates and times of interviews requested by the DOJ. (Wynne 2373:2-4; Rosenbaum 638:2-10, 919:17-920:2.)

On February 27, 2003, Wynne sought and received Garten's approval for FLIR to produce documents through Stoel Rives and for Stoel Rives to arrange the availability of witnesses identified by the DOJ for interviews. (Rosenbaum 919:17-920:2; Wynne 2377:9-19.) Wynne then asked Petitioners if Stoel Rives would agree to perform that ministerial role. (Ex. 221.)

e. Petitioners' former clients consent to Stoel Rives' ministerial role.

On February 24, 2003, Rosenbaum was finally able to reach former client Daltry. (Myers 1090:14-19; Ex. 610.) Rosenbaum recommended that Daltry retain criminal defense counsel. (Myers 1038:4-5.)

The next day, Daltry's new criminal defense lawyer, Steven Myers, called Rosenbaum. (Exs. 503 at R 10,106; 610.) Rosenbaum informed Myers

that the DOJ did not intend to charge FLIR and that Garten had requested documents from FLIR for the same period of accounting that had been at issue in the SEC investigation. (Myers 1034:8-20.) The next day, Myers called Ellis, who reiterated that Garten had requested that FLIR produce documents to the DOJ. (Myers 1037:13-20; Ex. 610.) Myers understood that documents were being produced. (Myers 1069:25-1070:13, 1080:6-15.)

Neither Myers nor Glade or Kaner requested further information from Petitioners about what documents FLIR was producing to the DOJ, or raised any questions about the propriety of that production. Throughout the 2003 DOJ investigation, neither Myers nor Glade or Kaner ever expressed any concern with Stoel Rives' ministerial role.

On February 27, 2003, Petitioners consulted with their partner and in-house ethics expert, Peter Jarvis, as to whether Wynne's request that Stoel Rives serve in the "conduit function," as Jarvis described it, required consent from Petitioners' former clients. (Jarvis 1863:9-12.) Jarvis, Rosenbaum and Ellis agreed that consent was not necessary, because performing the ministerial role did not create any former client conflicts of interest. (Jarvis 1863:13-15; Rosenbaum 648:21-649:5; Ellis 2719:20-2721:3.)

Jarvis recommended, however, that Petitioners seek their former clients' consent anyway, because "nobody's ever been disciplined for sending a conflicts waiver letter that wasn't necessary." (Jarvis 1863:13-20.) Rosenbaum

wrote a draft of the letter and, after receiving and incorporating input from Jarvis, sent it to Samper and Daltry, in care of their individual counsel, on March 3, 2003. (Exs. 101, 418.) When Samper retained criminal defense counsel Ronald Hoevet, Petitioners also sent Hoevet a copy of the conflict waiver letter. (Ex. 574.) The letters explained to each former client and the client's individual lawyers that:

(1) FLIR had been told that it "is not a focus of the DOJ investigation and therefore does not expect to be a defendant;"

(2) Stoel Rives had been asked to "advis[e] FLIR, which is cooperating with the investigation, and assist[] the Company in producing documents and arranging for witnesses to be interviewed by the DOJ;"

(3) Petitioners had informed the DOJ that "Stoel Rives can cooperate only to the extent that doing so is consistent with [their] obligations arising from [their] past representation;"

(4) Petitioners had met with the AUSA but "do not intend to have further contact with him, other than to facilitate document production or interview schedules;"

(5) "[U]nder no circumstances will [Stoel Rives] voluntarily disclose confidences obtained from you;"

(6) The DOJ investigation has "potentially adverse consequences to you;"

(7) "In deciding whether or not to consent, you should consider how our representation of FLIR with respect to the DOJ investigation could affect you;"

(8) "FLIR has agreed to waive the attorney-client privilege with respect to all communications with its counsel, including Stoel Rives, through December 31, 2000;" and

(9) Samper and Daltry each should "review these matters carefully and for yourself," and seek independent counsel to aid in determining if consent should be given.

Both Samper and Daltry, after consulting with and upon the advice of their independent counsel, consented. (Exs. 102, 418, 473.)

II. ARGUMENT

A. First Assignment of Error: The Trial Panel Erred in Finding Violations Not Alleged by the Bar.

The Trial Panel found four violations of the Code of Professional Responsibility not alleged by the Bar: (1) that the content of the October 3, 2002 phone call to the SEC conflicted with another client's interests; (2) that Petitioners were required to disclose to their former clients that FLIR's production to the DOJ included an officer compensation schedule; (3) that Petitioners were required to disclose the February 14, 2003 letter from Garten; and (4) that consent was required for Ellis's representation of Fitzhenry in a potential Bar disciplinary matter.

The Trial Panel acknowledged in its Opinion that the first of those four findings was not in response to any charge by the Bar, but contended "that a result analogous to that provided for in ORCP 23B should apply in this disciplinary hearing."[7] (ER 182.) The Trial Panel failed to acknowledge, however, that the other three determinations of violations referenced above also were not alleged in the Bar's complaints.

[7] ORCP 23B provides, in relevant part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Trial panels in Bar disciplinary proceedings have a limited role: to decide issues of evidence and procedure and to determine impartially whether the Bar has proven the charges in its complaint by clear and convincing evidence. BR 2.4(i)(1) and 5.2. The substantive problems with the Trial Panel's findings regarding the four unalleged charges are discussed in Section II.B, below. But the substantive merits of those charges should not need to be addressed at all, because none of them was alleged by the Bar in its amended complaints against Petitioners.

1. A Trial Panel is not authorized unilaterally to add to the charges in a complaint.

a. Oregon separates the roles of prosecutor and adjudicator.

The Trial Panel's conclusion that it may find violations not alleged in the Bar's complaints ignores the separation of the roles of prosecutor and adjudicator embedded in the Bar Rules.

Under the Rules adopted by this Court, only the State Professional Responsibility Board ("SPRB") has the authority to authorize the charge of a violation of the disciplinary rules. BR 2.6(c), (f) ; BR 4.1. Further, the role of investigating issues relating to potential attorney misconduct is assigned to Bar Disciplinary Counsel, BR 2.5(b)(2) and 2.6(a), under the SPRB's oversight, BR 2.3(b)(3) and 2.6(c).

The role of a trial panel is stated concisely: to "promptly try the issues" and to "pass on all questions of procedure and admission of evidence." BR 2.4(i)(1). There is no role for a trial panel to play in the investigation or charging process. It is only after such charges have been approved and the accused lawyer denies them that a trial panel is even convened. BR 2.4(f)(1) and 2.6(c)(1)(B) .

The Rules of Procedure also establish a formal process for amending a complaint. Amendments are permitted, *see* BR 4.4, but an amended complaint must be filed and served, *see* BR 4.2. A trial panel has no role in this process, either, other than to extend the time for filing pleadings, *see* BR 4.3(c) , presumably to ensure that all parties have sufficient notice and time to respond.

Maintaining the separation between the roles of prosecutor and adjudicator is crucial to ensuring a fair process. As reflected in the American Bar Association Model Rules on Lawyer Discipline, "prosecutorial and adjudicative functions should be separated as much as possible within the unitary system to avoid unfairness and any appearance of unfairness."[8] The authority to change the delineation in roles and authority between the SPRB and a trial panel, and the Rules of Procedure that implement it, lies solely with this

[8] *See* Rule 2 (commentary), available at www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_2.html.

Court, and not with a trial panel. *See*, *e.g.*, *Ramstead v. Morgan*, 219 OR 383, 399-400, 347 P2d 594 (1959) ("No area of judicial power is more clearly marked off and identified than the courts' power to regulate the conduct of the attorneys who serve under it.").

b. Lawyers are entitled to prior written notice of the charges against them.

The Trial Panel's conclusion that it could find violations that were not alleged by the Bar is also inconsistent with the statutory requirement that attorneys receive prior written notice of the charges against them. Every member of the Oregon State Bar, "formally accused of misconduct by the [B]ar, shall be given reasonable written notice of the charges against the member [and] a reasonable opportunity to defend against the charges[.]" ORS 9.534(2).

The Bar Rules reinforce this requirement. Members of the Bar are entitled to a formal complaint identifying "the acts or omissions of the accused, including the specific statutes or disciplinary rules violated, so as to enable the accused to know the nature of the charge or charges against the accused." BR 4.1(c). As discussed above, amendments to formal complaints are permitted but, once again, the accused lawyer is entitled to "a reasonable time * * * to answer the amended formal complaint, to procure evidence and to prepare to meet the matters raised by the amended formal complaint." BR 4.4(b)(1). In this case, the Bar in 2012 followed long-standing practice—

and the spirit of the rules—by obtaining SPRB approval of amendments—a step that the Panel's post-hearing further amendments omitted.[9]

Variation from the process described in the rules has consequences. This Court has repeatedly held that a trial panel's findings of disciplinary violations not alleged by the Bar violate the notice rules and are improper. *See, e.g., In re Chambers*, 292 Or 670, 676, 642 P2d 286 (1982) ("The proof supports this finding, but the pleadings do not. The complaint contains no allegation that would put [the accused lawyer] on notice that he was charged with this misrepresentation.") (decided under former DR 6-101(A)(1), (2) and (3); 7-101(A)(3); 7-102(A)(5)); *In re Ainsworth*, 289 Or 479, 487, 614 P2d 1127 (1980) ("It also appears from an examination of the first charge of the complaint that it does not very clearly charge the accused with a conflict of interest in violation of either DR 5-105 or DR 7-104(A), so as to give him a fair opportunity to defend himself against a charge of violating the terms of those disciplinary rules.") (decided in relevant part under former DR 5-105 and DR 7-104(A)). *See also In re Thomas*, 294 Or 505, 526, 659 P2d 960 (1983) ("The difficulty is that the Bar in this cause did not allege that [the accused lawyer] had violated the [statute the trial panel found that he violated]. An attorney

[9] Bar counsel's letter advising the Regional Chair that the SPRB had approved amendments to the original complaints is attached as App 20.

shall be given reasonable written notice of the charge against him.") (decided under former DR 1-102 and 9-102).

This prohibition applies not only when a trial panel finds a violation based on a disciplinary rule not alleged in the Bar's complaint, but also when a panel finds a violation based on facts, or a theory about the facts, not alleged in the complaint, even if the disciplinary rule was cited. *See, e.g., In re Fulop*, 297 Or 354, 359-60, 685 P2d 414 (1984) (rejecting the Disciplinary Review Board's finding of a violation of DR 5-101(A) because, although DR 5-101(A) was alleged to have been violated, the Bar's allegation was based on the lawyer's alleged "financial" interest, whereas the Board's finding was based on the lawyer's alleged "personal" interest, and thus the lawyer was not "given fair notice that he should defend against that interpretation").

This Court also has held in analogous circumstances that notice to a defendant of the charges made against him, including in an administrative proceeding, is a constitutional right. *See State ex rel. Currin v. Commission on Judicial Fitness and Disability*, 311 Or 530, 533, 815 P2d 212 (1991) ("Adequate notice is a necessary component of due process of law."). Petitioners did not and do not consent to the adjudication of any unalleged charges against them. We turn to a detailed discussion of each of those unalleged charges.

2. The Bar did not allege a conflict of interest relating to the October 2002 phone call.

The Trial Panel found:

> In the sixth cause of complaint against Ellis and Rosenbaum, the only factual basis for a conflict of interest allegation is the representation of Wynne at his SEC interview. However, clear and convincing evidence was presented at the hearing that potentially could cause the Trial Panel to conclude that Rosenbaum engaged in a likely conflict of interest when, at Wynne and FLIR's urgings, she took action that was adverse to the objective personal and business interests of Samper. * * * However, the Bar did not allege this evidence as a cause of complaint against Rosenbaum. * * * [B]ecause the evidence of the Swedish drop shipment transaction was admitted into evidence, without objection, the question is whether the Trial Panel should find Rosenbaum guilty of an ethical violation when these facts were not specifically alleged in any cause of complaint in the Bar's amended formal complaint against Rosenbaum. The Trial Panel concludes that a result analogous to that provided for in ORCP 23B should apply in this disciplinary hearing.

(ER 176-183.)

The Trial Panel listed six reasons why it believed Rosenbaum had notice of the charge sufficient to meet the statutory, procedural and constitutional requirements. (ER 182-183.) None of those purported reasons can withstand scrutiny.

First and Second, the Trial Panel found that Rosenbaum had notice that she might be held responsible for a conflict of interest because the October 2002 phone call was referenced (1) in a "Partial Draft Complaint" sent to her by the Bar and (2) in early correspondence with Disciplinary Counsel. (ER 182.)

In fact, neither the "Partial Draft Complaint" nor the correspondence alleged that the October 2002 call conflicted with another client's interests. (*See* Ex. 439 at R 9,063-9,064 (Bar's draft complaint faulting Petitioners for not *disclosing* the call, not for having a conflict of interest in *placing* the call) and R 9,055-9,059 (Petitioners' response to the allegation of insufficient disclosure).) Further, the Trial Panel has it backwards. The fact that the phone call was referenced in the Bar's "Partial Draft Complaint" and was subsequently *removed* by the Bar indicated that a charge of conflict of interest relating to the phone call would *not* be at issue in this case. A lawyer accused of ethical violations should have the right to rely on the final formal complaint, not a "Partial Draft Complaint" or informal correspondence, for notice of the charges against which he or she must defend.

Third, the Trial Panel found that the following allegation in the Bar's amended complaints "undoubtedly" referred to the October 2002 phone call:

> In the March 3, 2003 letter and at all other times relevant herein, [Petitioners] failed to disclose to Samper or Daltry * * * that with [Petitioners'] assistance, the United States Attorney's Office was investigating FLIR's accounting for transactions that had not been alleged in the SEC's civil enforcement proceeding.

(ER 88-89 at ¶ 64(k); ER 182.) But the Bar's allegation does not mention the call; in fact, it does not identify *any* specific acts of "assistance."[10] The same is

[10] Petitioners twice requested that the Bar clarify what it meant by "assistance" (Ex. 634 at R 12,768-12,773), and twice the Bar refused to do so (Ex. 634 at

true for the rest of the Amended Formal Complaints—they never mention the call, either as a substantive offense, a required disclosure, or even as a background fact. Further, the Panel never explains how the allegation that Petitioners were required to disclose information about the scope of the DOJ's investigation relates to the October 2002 call, given the fact that, during the call, the SEC never disclosed anything about the DOJ or its investigation; nor did the DOJ ever tell Petitioners which transactions it was investigating. There is nothing in the record, much less anything approaching clear and convincing evidence, to support the finding that at the time the conflict waiver letter was written, Petitioners knew that the DOJ was "investigating issues that had not been alleged in the SEC enforcement proceeding."

Even if the Bar's generic and vague allegation of not disclosing that Petitioners were giving "assistance" to the DOJ might now be claimed by the Bar as having sufficiently referenced the telephone call to the SEC five months earlier, it would still not have provided notice. The relevant charges underlying

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R 12,770 and R 12,774-12,776). The Bar's Trial Memorandum referred to the October 2002 phone call, but only in the Statement of Facts. (*See* Oregon State Bar's Trial Memorandum With Exhibit Citations at R 1,821 and R 1,828.) In the Argument section, the Bar argued that Petitioners failed to disclose in the March 3, 2003 letters that Fitzhenry and Muessle were "assisting" the DOJ (but did not mention Petitioners or the Swedish Drop Shipment). (*See id*. at R 1,847.) Petitioners addressed the issue in their testimony at the hearing to correct erroneous statements in the Bar's Trial Memorandum. (Ellis 2730:10-2732:7.)

that allegation—insufficient disclosure (under DR 10-101(B)) and misrepresentation by omission (under DR 1-102(A)(3)) in the 2003 conflict waiver letter—involve different legal standards and different evidence than the violation found by the Panel—*viz.*, a current client conflict (under DR 5-105(E)) in 2002. Rosenbaum had no notice that she should offer evidence to establish that her clients' objective interests in 2002 were not adverse. The Panel's action in choosing to amend the pleadings on its own, after the hearing closed, and without a motion by the Bar, denied Rosenbaum the opportunity to object based on prejudice, or to seek to reopen the record to offer additional evidence responsive to the unalleged charge.

Fourth, although the Trial Panel commended Petitioners for their "full and free disclosure to the Bar and a cooperative attitude towards the proceedings" (ER 215), the Trial Panel nevertheless contended that Petitioners' decision not to object to the admission of evidence relating to the October 2002 phone call somehow waived their right to notice of a new charge relating to it. The Panel's conclusion is inconsistent with this Court's precedent. In *In re Fulop*, *supra*, the Disciplinary Review Board determined that the accused lawyer had violated the disciplinary rules by representing a client in a transaction in which the lawyer had a personal interest (a friendship with a related party). 297 Or at 359. The fact that the transaction was in evidence did not give the Board license to find a violation not alleged by the Bar. As this

Court explained, "the cause was pleaded and tried on the theory that a 'financial' interest of the accused, rather than a 'personal' interest, was implicated." *Id*. at 359-60.

The Trial Panel's holding here is more egregious. At best, the Bar alleged that Petitioners were required to but did not disclose the October 2002 call in their March 2003 request for consent. Rather than change the theory of that existing charge, as the panel did in *Fulop*, the Panel here created *both* an entirely new theory and an entirely new charge—that Rosenbaum was precluded by a conflict of interest from making the call in the first place. As mentioned above, each theory involves a different legal standard and different evidence, and each theory first appeared six months after the hearing had ended and therefore gave Petitioners no opportunity to respond.

Fifth, the Trial Panel justified its finding by stating that written notice should not be strictly required, because disciplinary proceedings are governed by less rigid procedural and evidentiary rules than civil actions. The Trial Panel has it backwards. The relaxed evidentiary rules relate to what evidence can be considered; these rules do not do away with (or even relax) the fundamental statutory and constitutional requirement of notice and the opportunity to be heard. *See, e.g.,* ORS 9.534(2); *Fuentes v. Shevin*, 407 US 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in

order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.") (internal quotations and citation omitted); *Currin*, supra, 311 Or at 533 ("Adequate notice is a necessary component of due process of law."). The fact that certain trial panel matters are handled less rigidly in a Bar disciplinary hearing than they are in other forms of litigation makes it even *more* imperative that the rules for charging violations and for providing a lawyer with notice be strictly followed.

Sixth, the Trial Panel contended that, because the purpose of disciplinary sanctions is to protect the public, not to punish the attorney, the criminal law rule that a defendant cannot be convicted of a crime not specifically charged is not applicable. (ER 187-188.) That may be true, but it is not analytically helpful. The goal of protecting the public does not provide any reason why statutory, procedural, and constitutional notice requirements need not be followed. To the contrary, this Court has emphasized the importance of fairness in disciplinary proceedings:

> This court, if it were performing [the function of prosecuting disciplinary violations] itself, would make every attempt to see to it that, whatever the outcome, an accused lawyer would think that he or she was treated fairly in the process. We read the Bar Rules as promoting that same goal[.]

In re Hendrick, 346 Or 98, 106, 208 P3d 488 (2009).

When the issue involves a lawyer's professional reputation, trial panels should make sure the lawyer was given clear and unequivocal notice of what charges must be defended. Anything less is fundamentally unfair. The Trial Panel's finding of a violation of DR 5-105(C) or (E) by Rosenbaum under the Bar's Sixth Cause of Complaint should be rejected.[11]

3. The Bar did not allege that Petitioners were required to disclose to former clients that FLIR's compensation information had been requested by and produced to the DOJ.

Another instance of the Trial Panel finding a violation not alleged by the Bar is the Trial Panel's gratuitous creation of a charge concerning the DOJ's request for and FLIR's production of compensation data. One searches in vain for an allegation in either formal amended complaint on this topic. Undeterred, the Trial Panel held:

> [Petitioners] failed to disclose to Daltry or Samper or their respective criminal defense counsel Myers and Hoevet, respectively, prior to the request for consent to Ellis' and Rosenbaum's continued representation of FLIR during the criminal investigation * * * [t]he fact that compensation information pertaining, *inter alia*, to Daltry and Samper was requested by the DOJ, and provided to the FBI for the DOJ * * * prior to requesting consent.

(ER 199.)

[11] The Panel found only one violation, but it is not clear which rule the Panel found was violated. The Panel did not cite a rule and stated that Samper was "either a present or former client." (ER 180.)

The amended complaints did list 11 specifications of information that Petitioners allegedly did not disclose to their former clients. (ER 22-23 at ¶ 75; ER 88-89, ¶ 64.) As to each of those items, Petitioners testified whether the information was disclosed or, if it was not, why not. (*See, e.g.*, Ellis 2722:5-2732:7; Rosenbaum 2875:2-8.) FLIR's production of compensation information, however, does not appear anywhere in the list of alleged non-disclosures, and thus was not addressed in Petitioners' testimony. Because Petitioners had no notice of a claim relating to compensation data, they cannot be found to have violated the DRs based on such a claim.

4. The Bar did not allege that Petitioners were required to disclose to their former clients the February 14, 2003 letter from Garten.

The foregoing defect in the Trial Panel's Opinion applies to still another of the Trial Panel's holdings of a violation of the DRs. The Trial Panel held:

> [Petitioners] failed to disclose to Daltry or Samper or their respective criminal defense counsel Myers and Hoevet, respectively, prior to the request for consent to Ellis' and Rosenbaum's continued representation of FLIR during the criminal investigation * * * [t]he February 14, 2003, letter * * * from Garten of the DOJ to Ellis and Rosenbaum.

(ER 199.) The letter to which this finding refers is the letter Garten sent to Petitioners that sought Petitioners' assistance in helping the DOJ build its case—a demand that Garten promptly withdrew after Petitioners made clear to

him, not only that they could not ethically (and would not) honor his demands, but also why he should not want them to do so.

The amended formal complaints did reference and attach Garten's February 14, 2003 letter, but only with respect to the Bar's claim that Petitioners had failed to disclose, not the letter itself, but an alleged bargained-for "exchange" of cooperation by FLIR in return for non-prosecution, of which the letter supposedly was evidence. (*See* ER 22, ¶ 74; ER 88, ¶ 63; and Section II.B.3.b, below, responding to that claim.) The idea that Petitioners needed to provide their former clients with a *copy* of the February 14, 2003 letter even after Garten retracted his request for Petitioners' cooperation was first presented by the Bar in the final minutes of Bar counsel's closing argument on the twelfth day of the hearing, after the record had closed. (Tr. 2965:24-2966:7.) The Trial Panel then embraced this suggestion as the basis for its holding of a material omission, notwithstanding the fact the Bar never alleged that the entire letter should have been provided to the former clients. (ER 199.) Indeed, the Panel went even further, holding that the letter needed to be disclosed to Samper and Daltry for its content *unrelated* to the claimed "exchange":

> The Trial Panel finds, however, that Ellis and Rosenbaum did actually provide documents requested in that February 14th letter to the DOJ, including their clients' or former clients' compensation data (prior to requesting consent) and thus, Ellis and Rosenbaum did in fact respond at least in part to the DOJ's February 14th letter demands.

(ER 200.)

The allegation that the entire February 14, 2003 letter had to be disclosed, and for reasons unrelated to a purported "exchange" between FLIR and the DOJ, appears nowhere in the Bar's complaints.

5. The Bar did not allege in Ellis Causes 11 and 12 or in any Cause against Rosenbaum that consent of former clients was required in March 2003 for Ellis to represent FLIR's General Counsel in a potential Bar disciplinary matter.

In its discussion of Causes 11 and 12 against Ellis and Causes 9 and 10 against Rosenbaum, the Trial Panel four times stated that Petitioners "needed to obtain fully informed consent to the continued representation of Fitzhenry." (ER 202-205.) The Panel's contention that Petitioners were required to obtain their former clients' consent to represent Fitzhenry in a possible Bar disciplinary matter, as part of the ministerial role consent request, was not the subject of these counts against Ellis, and was not pled in any count against Rosenbaum.[12] Further, the Panel's holding is totally at odds with the Panel's earlier dismissal of Causes 9 and 10 against Ellis (alleging conflicts of interest related to Ellis's subsequent representation of Fitzhenry), and its holdings (1) that Ellis's representation of Fitzhenry in the Bar disciplinary matter was *not* a conflict with Samper or Daltry (ER 191, 196); (2) that Ellis's communications on behalf of Fitzhenry to the Bar were *not* adverse to the objective interests of

[12] Rosenbaum did not represent Fitzhenry in the Bar proceeding.

Samper or Daltry (ER 197); and (3) that Ellis's representation of Fitzhenry *did not, and was not likely to*, inflict injury or damage on Samper in the criminal proceedings (ER 197).

In sum, the Trial Panel in these four separate and distinct instances stepped outside of its designated role and exceeded its authority. By creating uncharged violations, the Trial Panel was acting as prosecutor, and by adjudicating them it was acting as judge and jury. The Trial Panel's actions abrogated the regulatory, statutory and constitutional scheme that surrounds disciplinary proceedings like the present one. The future and security of the profession require that such actions continue to be rejected by this Court today, as they consistently have been in the past.

B. Second Assignment of Error: The Trial Panel Erred in Holding there was a Conflict of Interest and Material Omissions Relating to Stoel Rives' Ministerial Role.

The Trial Panel held that Petitioners failed to disclose four "items of information" (ER 198-199) to their former clients, Samper and Daltry, that, according to the Panel, had to be disclosed to obtain the former clients' valid consent:

> The Panel concludes that the Bar has proved by clear and convincing evidence that [Petitioners] failed to make full disclosure in order to obtain consent from Samper and Daltry to the continued representation of FLIR by [Petitioners], which constituted conduct involving misrepresentation and an actual or likely current conflict of interest in violation of DR 1-102(A)(3) and DR 5-105(E).

> A. [Petitioners] failed to disclose to Daltry or Samper or their respective criminal defense counsel Myers and Hoevet, respectively, prior to the request for consent to Ellis' and Rosenbaum's continued representation of FLIR during the criminal investigation, the following:
>
> 1. The February 14, 2003, letter ("the February 14th letter") from Garten of the DOJ to Ellis and Rosenbaum (Ex. 97);
>
> 2. The fact that compensation information pertaining, inter alia, to Daltry and Samper was requested by the DOJ, and provided to the FBI for the DOJ by Ellis, prior to requesting consent;
>
> 3. That Ellis was representing Fitzhenry in a matter, before the Oregon State Bar, related to Fitzhenry's role in events at FLIR of which the SEC and the DOJ were both interested and investigated; and,
>
> 4. That with Ellis and Rosenbaum's assistance, the SEC and the DOJ were investigating FLIR's accounting of transactions that had not been alleged in the SEC civil enforcement proceeding.
>
> B. The information [Petitioners] failed to disclose to Daltry and Samper and their respective criminal defense counsel was relevant to enable, and reasonably indicated as important for criminal defense counsel to fully and adequately advise Daltry and Samper as to whether to consent to [Petitioners'] continued representation of FLIR. No persuasive evidence was presented that the assertion of relevance and importance of having the undisclosed information was unreasonable.

(ER 199.) The Trial Panel's foregoing holdings were erroneous because (1) former DR 5-105(E), on which the Trial Panel relied, did not apply to Samper and Daltry, who were *former* clients and not current clients in 2003; (2) Samper's and Daltry's consent was not required for Stoel Rives to perform the ministerial role that FLIR asked it to perform; (3) the information identified

by the Panel as having been omitted had no relevance to any "potential adverse impact" of Stoel Rives performing the ministerial role, which was the controlling DR standard for full disclosure; and (4) the Panel reversed the burden of proof by requiring Petitioners to prove that "assertion[s] of relevance and importance" were "unreasonable."

1. In 2003, Samper and Daltry were *former* clients, as to whom there was no continuing duty to disclose information just because it might be "of interest."

The Amended Complaints allege that during the DOJ investigation Samper and Daltry were *either current* clients (Ellis Eleventh Cause of Complaint, Rosenbaum Ninth Cause of Complaint) *or*, in the alternative, *former* clients (Ellis Twelfth Cause of Complaint, Rosenbaum Tenth Cause of Complaint). At the hearing, Bar counsel declined to elect which theory the Bar was asserting (Tr. 1913:17-1916:5), and the Trial Panel allowed the Bar to proceed on both theories (Tr. 1905:4-1910:12, 1916:7-10). The impact of the Panel's refusal to require adequate notice of the Bar's allegations was then exacerbated when the Panel in its Opinion made no finding on the issue, and vacillated between referring to Samper and Daltry as "former" clients and as "former or current" clients. (*See, e.g.*, ER 167, 168.) The Trial Panel did find, however, that, when Samper received a Wells Notice in February 2002, "for all practical purposes, the representation of Samper by Ellis and Rosenbaum ceased." (ER 160.) Daltry did not receive a Wells Notice.

(Rosenbaum 487:10-488:1.) The last service Petitioners performed for him in the SEC investigation was attending his sworn interview taken on October 24-25, 2001. (Ellis 2634:9-2636:2; Exs. 341, 342.) The class action in which both Samper and Daltry were defendants was settled in April 2001. (Ellis 1975:6-1977:23, 2630:6-2631:14.)

The Bar's and Trial Panel's vacillation notwithstanding, the record on this issue is clear: At the time Petitioners learned of the DOJ investigation in early 2003, both Samper and Daltry were former, not current, clients. All the evidence in the record shows that to be the case, and this Court's prior decisions support this common sense conclusion.

For an attorney-client relationship to exist, the client must evidence an objectively reasonable belief that such a relationship exists, supported by evidence that the lawyer should have understood that the relationship existed. *See In re Wyllie*, 331 Or 606, 615, 19 P3d 338 (2001) (so holding). The same standard applies where the issue is whether an attorney-client relationship that once existed continues to exist. *See In re Brandsness*, 299 Or 420, 427-28, 702 P2d 1098 (1985) (concluding that the lawyer's representation of his client concluded when the matters for which he was retained concluded); *In re Galton*, 289 Or 565, 581, 615 P2d 317 (1980) (concluding that attorney-client relationship continued where lawyer (1) continued to provide legal advice and (2) described his relationship with the client to others as ongoing); *see also*

Jarvis, "Multiple Client Conflicts," *The Ethical Oregon Lawyer* § 9.3 (2003) ("[I]f the lawyer was hired on a 'one matter' basis and that one matter has been completed, the client clearly is a former client.") (citing *Brandsness*, supra).

Petitioners each testified that they believed that their representation of Samper and Daltry, which was limited to the class action cases and the SEC investigation (Exs. 6, 7, 110, 597), ended when the work they had been retained to perform was completed (Ellis 1950:13-1952:13; Rosenbaum 631:3-12, 885:9-16). Contemporaneous notes and letters support their testimony. (*See, e.g.*, Exs. 101 and 418 (Rosenbaum's conflict waiver letters describing representations in the past tense and citing rule against former client conflicts), 191 (Stoel Rives associate's notes from conversation with Rosenbaum, stating "they do not want to take on a case against a former client").)

The Bar did not call either Samper or Daltry to testify, made no showing either was unavailable, and offered no evidence that either of them held or manifested an objectively reasonable (or even subjective) belief that they were current clients after their SEC matters ended. To the contrary, Samper signed an affidavit in this proceeding referring to Petitioners as his "former attorneys." (Ex. 592.) His independent counsel, Glade, testified that, although he had no opinion because he did not know all the facts (Glade 1379:2-24), he was not aware of any legal work performed by Ellis or Rosenbaum on behalf of Samper or any communications between Ellis or Rosenbaum and Samper after the SEC

matter ended (Glade 1377:25-1378:4, 1379:2-11). Similarly, Myers, Daltry's criminal defense counsel, testified that Daltry "knew [Myers] was representing him" and never indicated to Myers that Stoel Rives was representing him in connection with the DOJ investigation. (Myers 1079:10-17.)

The letters that Myers and Glade sent to Petitioners in March and April 2003 consenting to Stoel Rives' continued ministerial role further demonstrate that neither of their clients viewed Petitioners as their current lawyers. Myers' letter refers to "Stoel Rives' historical representation of Mr. Daltry on related matters." (Ex. 473.) And Glade's letter refers to Petitioners' "prior representation of Mark Samper in the class action lawsuit, the SEC civil investigation, and the SEC civil lawsuit." (Ex. 102.)

In the Trial Panel's "Decision" (ER 135), the only conflict of interest violation that the Trial Panel attempts to hold against Ellis with respect to the 11th and 12th Causes of Complaint, and against Rosenbaum with respect to the 9th and 10th Causes of Complaint, is of former DR 5-105(E), which related to conflicts between *current* clients.[13] (ER 135.) Accordingly, if this Court finds that in January to April 2003 Samper and Daltry were not current clients, the

[13] Former DR 5-105(E) stated: "Except as provided in DR 5-105(F) [addressing consent after full disclosure], a lawyer shall not represent multiple current clients in any matters when such representation would result in an actual or likely conflict."

Panel's holding of a conflict violation in these Causes of Complaint must be dismissed.

The distinction between a current client and a former client also is significant in determining the extent of the lawyer's disclosure obligations. Whereas a lawyer is obligated to keep a current client informed as to the representation, *In re Bourcier*, 325 Or 429, 434, 939 P2d 604 (1997), "[a] lawyer has no general continuing obligation to pass on to a former client information relating to the former representation," Restatement (Third) of Law Governing Lawyers § 33, cmt h (2000). A duty to disclose would arise only if there was a likely conflict of interest between the lawyer's former client and a current client, and the lawyer intended to proceed with the representation of the current client. DR 5-105(C) and (D).[14]

In short, on any particular matter, a person cannot be both a former client and a current client at the same moment in time. The Trial Panel's holding that Samper and Daltry were current clients was not correct and should be rejected. Petitioners owed to Samper and Daltry the obligations that a lawyer owes to former, not to current, clients.

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[14] Former DR 5-105(C) stated: "a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict." Former DR 5-105(D) provided an exception to that prohibition "when both the current client and the former client consent to the representation after full disclosure."

2. Because there was no conflict of interest between the Stoel Rives ministerial role for FLIR and Samper or Daltry, disclosure and consent were not required.

The Trial Panel Opinion (but not its Decision) stated that Petitioners violated the rule against former client conflicts because, in obtaining consent from Samper and Daltry, they did not disclose certain information.[15] (ER 197-208.) However, the Trial Panel failed to address the necessary threshold inquiry, *viz.*, whether there was a former client conflict of interest in the first place. "A 'likely conflict of interest' exists in * * * situations in which the objective personal, business or property interests of the clients are adverse." DR 5-105(A)(2). Therefore, a conflict could have existed here only if the interests of a current client represented by Petitioners (in this case, FLIR), as established by the scope of the representation of that current client, were adverse to Samper's or Daltry's "personal, business or property" interests. DR 5-105(A), (C).

That was not the case here. This Court has long recognized that rules against conflicts of interest are aimed at safeguarding a lawyer's ability to exercise independent, professional *judgment* on behalf of his client. *See In re Johnson*, 300 Or 52, 59, 707 P2d 573 (1985) (describing a "likely conflict" under prior disciplinary rules as "[w]here the lawyer's independent professional

[15] Petitioners include the discussion in this section in the event this Court elects to consider DR 5-105(C) relating to former clients.

judgment * * * is likely to be adversely affected"); *see also* Jarvis, "Multiple Client Conflicts," *The Ethical Oregon Lawyer* § 9.8 (discussing why the former disciplinary rules at issue in this case "are consistent with the results reached in *In re Johnson*"). Petitioners made it clear to FLIR, to the DOJ, and to the former clients that they would not substantively represent FLIR in connection with the DOJ investigation. (Exs. 101, 182, 418; Ellis 2711:19-2712:24; Wynne 2376:22-25.) They agreed to perform only the limited tasks of continuing to store and produce FLIR's documents (at FLIR's direction) and to schedule the date and time of interviews of witnesses specified by the DOJ. Indeed, the work was sufficiently ministerial and mechanical that it was expected to be, and was, performed largely by Stoel Rives paralegals. (Roberts 1804:2-7.) Thus, FLIR was a "current client" of Stoel Rives and Petitioners only to that extent. FLIR was substantively represented in connection with the DOJ investigation by another law firm. (Ellis 2717:17-22.) Because Petitioners were acting merely as a document depository, there was no risk of a compromise to their professional judgment.

Moreover, having Stoel Rives serve as a document depository was not "adverse" to Samper's and Daltry's interests; it was a benefit to them. *First*, Samper and Daltry could continue to have access to FLIR's documents—a benefit significant enough to Samper, at least, to be cited as a condition of consent in Samper's counsel's consent letter to Petitioners. (Ex. 102;

Ellis 2732:13-2734:1.) In fact, in the months following consent, Stoel Rives accommodated requests for substantial numbers of documents from Samper's attorneys. (Glade 1387:3-10; Roberts 1824:19-1827:19; Kaner 2081:19-2086:1; Ellis 2602:8-16; Exs. 165, 196, 201, 205, 427, 577, 593, 594, 595, 606.) Access to FLIR's documents would have been extremely difficult for them if normal criminal discovery rules had applied. (Ellis 2732:19-2733:15.)

Second, unlike other law firms that might manage the documents, Stoel Rives had a duty to Samper and Daltry, as former clients, to ensure that no personal confidences were voluntarily disclosed. DR 4-101. Petitioners made this clear in their conflict waiver letter (Exs. 101, 418) and put a system in place at Stoel Rives to ensure that it was followed (Roberts 1821:2-5). Therefore, it was to the advantage of the former clients that Stoel Rives be the document custodian, because Stoel Rives was in the best position to know as to which documents a former client might have a claim of confidentiality. (Rosenbaum 913:23-914:18, 923:9-19.)

If the foregoing arrangement were to create a conflict of interest, it would have to be because FLIR had an interest in producing documents, in response to specific requests from the DOJ (and subject to its subpoena power in any event), and scheduling the dates and times of witness interviews, again in response to specific requests from the DOJ (also subject to its subpoena power), that was adverse to the interests of Petitioners' former clients. The Bar offered

no evidence that Stoel Rives' ministerial role was in any way "adverse" to its former clients, or more generally that FLIR had an interest in seeing its former CFO or its former Chairman criminally prosecuted. In fact, Myers agreed that FLIR had no interest in seeing Daltry prosecuted. (Myers 1087:25-1088:2.) Similarly, Wynne testified that FLIR did not believe that it or its shareholders had been injured by Samper or Daltry, or that there was strong evidence of misconduct by them: "[T]he combination of the fact that * * * I did not think there was strong evidence of intentional misconduct and the fact that it's not clear that there were any victims given that the company had responded so well, I just didn't feel there was a strong case to be made * * * against anyone here." (Wynne 2439:13-19.) Wynne expressly told Garten that Garten did not have "much of a case." (Wynne 2367:1-3.)

As explained above, Garten first attempted to pressure Petitioners into an active role in the DOJ's investigation, but, after admonitions from Petitioners, did a *volte face* and thought Petitioners should play no role. (Wynne 2389:1-2390:15.) Then Garten agreed with Wynne that a limited role for Stoel Rives would be appropriate and not a conflict. (Wynne 2376:19-25, 2389:4-2390:15.) The assumption by each of those two lawyers that there would be no problem if the law firm's role were limited is further evidence that there was no "likely conflict."

There is even more evidence that there was no likely conflict between FLIR's use of Stoel Rives for the ministerial role and Samper's or Daltry's interests. None of the three Stoel Rives attorneys who discussed the matter, and neither of the former clients' attorneys, believed that Samper's and Daltry's consent to Stoel Rives' ministerial role was even required:

- Petitioners each testified that, due to the limited scope of Stoel Rives' continuing involvement, they did not believe a waiver letter was necessary. (Rosenbaum 901:1-14, 981:4-982:8; Ellis 2720:7-19.)
- Peter Jarvis, the head of Stoel Rives' Professional Practice Group and a recognized expert on Oregon legal ethics, whom Petitioners consulted to ensure they were acting consistently with their ethical obligations, said at the time and testified at the hearing that he did not believe a waiver letter was necessary. (Jarvis 1863:9-20, 1868:6-20, 1871:6-11; Rosenbaum 648:21-649:5.)
- Neither Glade nor Myers expressed any concern whatsoever when Petitioners informed them in February 2003 that Stoel Rives had been asked to perform, and was performing, the ministerial role. (Rosenbaum 2869:9-15; Myers 1033:24-1035:2, 1037:13-20, 1046:8-12, 1069:21-5, 1070:7-13, 1076:1-7, 1079:25-1080:15; Ellis 2725:1-5; Exs. 94, 99, 100, 151, 610.) To the contrary, Myers viewed the issue as "moot," because the documents that were to be produced belonged to FLIR and could be obtained by the DOJ in any event. (Myers 1041:20-1042:7.) Myers testified that he did not believe providing otherwise discoverable documents, or scheduling witnesses, impaired any ethical obligation Petitioners may have had to Daltry. (Myers 1115:8-20.)

In short, the Trial Panel ignored (1) the limited, non-substantive role Stoel Rives was asked to perform; (2) the significant benefit to Samper and

Daltry from Stoel Rives filling that role; (3) the fact that performing the ministerial role for FLIR involved no interest adverse to Samper and Daltry; and (4) the testimony and contemporaneous conduct of all the attorneys involved. In ignoring all of that evidence, the Panel missed the key point: because there was no likelihood of conflict, there was no need for any disclosure and, therefore, no possibility that any disclosure could be "incomplete" under former DR 10-101(B).

3. Although consent was not required, Petitioners provided an explanation clearly sufficient to receive their former clients' informed consent.

Even though neither Ellis nor Rosenbaum, nor Stoel Rives' professional ethics expert Peter Jarvis, thought consent from Samper or Daltry for Stoel Rives to perform its ministerial role was required, and even though neither of the former clients' independent counsel expressed concern, Petitioners sent detailed conflict waiver letters to Samper and Daltry on March 3, 2003. (Ellis 2803:7-2805:10; Exs. 101, 418.) After reviewing those letters, and on the advice of their independent counsel, both Samper and Daltry consented.[16] (Exs. 102, 473.) The Panel erred in holding that, if a likely conflict of interest existed (which it did not), Samper's and Daltry's consents were invalid, because Petitioners' disclosures in obtaining them were incomplete.

[16] The Bar's allegations pertain only to Samper and Daltry, but Petitioners sent conflict waiver letters to—and received consent from—each of their former clients who faced potential criminal exposure.

a. The Panel failed to apply the controlling standard for "full disclosure" for a former client consent, which only required an explanation of any potential adverse impact of Stoel Rives (as opposed to someone else) performing the ministerial role.

The Trial Panel's failure to acknowledge or discuss Petitioners' limited, ministerial role was compounded by its failure to address a second distinct and dispositive point: the omissions alleged by the Bar, and those added by the Panel, had no relevance to any "potential adverse impact" from Petitioners' ministerial role, and thus are incapable of being the basis for a material nondisclosure or misrepresentation.

Under the then-applicable disciplinary rules, in seeking a former client's consent to waive a conflict of interest, Petitioners were only required to provide:

> 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 10-101(B).[17] Petitioners were *not* required to disclose "all facts known to [them] that could be helpful to the former client." *In re Cobb*, 345 Or 106, 135, 190 P3d 1217 (2008).

[17] The rule also required that Petitioners recommend "that the recipient seek independent legal advice to determine if consent should be given." DR 10-101(B). There is no dispute that Petitioners did exactly that. Petitioners encouraged Samper and Daltry "to review these matters carefully and for yourself" and "urge[d]" that they "seek independent counsel to aid you in determining if consent should be given." (Exs. 101, 418.) In addition, they sent

The pervasive legal error invalidating all of the Trial Panel's holdings of insufficient disclosure is the Panel's inexplicable failure to apply, or even cite, former DR 10-101(B) and its three key elements:[18]

First, the standard under former DR 10-101(B) was forward-looking—the explanation must have related to the *potential* adverse impact on the former client.

Second, it was limited to the scope of the matter for which consent was requested—here, serving as a document depository and interview scheduler.

Third, the wording of the rule only called for an "explanation," not a universe of potentially "interesting" information.

Given those elements, the question that must be answered as to each alleged omission is: In view of the content in Petitioners' conflict waiver letters, was this omitted information necessary for the former client to evaluate "the potential adverse impact" of Stoel Rives, rather than someone else, acting in the ministerial role for FLIR going forward?

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the letters to Samper and Daltry in care of their independent counsel. (*Id.*) When Samper retained criminal defense counsel, Petitioners sent the conflict waiver letter to that lawyer, as well. (Ex. 574.)

[18] DR 10-101(B) was cited to the Panel in both the Bar's Trial Memorandum (R 1,839) and Petitioners' Hearing Brief (R 1,937), as well as in Petitioners' counsel's closing argument (Tr. 3077:16-3078:1).

The answer to that question is "no." The conflict waiver letters provided a more than sufficient explanation for the clients and their counsel to evaluate any potential adverse impact:

> (1) *Possibility of adverse representation*: "[T]he DOJ investigation is a 'related matter,' with potentially adverse consequences to you."
>
> (2) *Implications of adverse representation*: "[Y]ou should consider how our representation of FLIR * * * could affect you," including by considering that (a) FLIR is cooperating with the DOJ, has waived attorney-client privilege, and has been told by the AUSA that it was not a focus of the investigation and therefore does not expect to be a defendant, and (b) Petitioners will not represent any individual in connection with the DOJ investigation, do not intend to have further substantive contact with the DOJ, have "informed FLIR and the Assistant U.S. Attorney that Stoel Rives can cooperate only to the extent that doing so is consistent with our obligations arising from our past representation of you," and "under no circumstances" would "affirmatively assist the DOJ in developing his case."
>
> (3) *Possession of confidential information*: "[U]nder no circumstances will we voluntarily disclose confidences obtained from you personally during our representation" and "Stoel Rives will not voluntarily produce any information or materials that are arguably subject to a personal claim of confidentiality by you."
>
> (4) *Measures to protect against unwarranted disclosures*: "[W]e will inform your present counsel of any request by the DOJ for [the former client's confidential] information or materials so that your counsel will have the opportunity to object to their production."
>
> (5) *Right to refuse consent*: "Under DR 5-105(C) * * * a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former client are in conflict, unless the former and current clients consent, after full disclosure."

(Exs. 101, 418.) No Oregon decisions explicate the former rule for "full disclosure" in any helpful way. However, the five headings listed above, along with the corresponding excerpts from Petitioners' conflict waiver letters, are the five categories of information that the Restatement lists as appropriate for a consent request. *See* Restatement (Third) of Law Governing Lawyers § 122, cmt (c)(i). While the Restatement is not a substitute for the Oregon disciplinary rules, it is illustrative of the categories of information generally required. The former Oregon disciplinary rule contained no wording or implication that its scope was wider than the categories of information discussed in the Restatement. Petitioners' letters met or exceeded all of the relevant criteria.

Moreover, the letters were not sent in a vacuum. On March 6, 2003, three days after the letters were sent, Glade and Rosenbaum further discussed the consent request and Rosenbaum answered Glade's questions about it. (Ex. 103.) Glade's notes of that conversation indicate that Rosenbaum informed him that Garten had stated he wanted to "make FLIR the hero of [the] story" and that Petitioners had refused the DOJ's request that they help the DOJ prepare its case. (Rosenbaum 638:18-23, 926:5-926:17, 955:5-7; Ex. 103.)

b. The former clients were informed of all known material information relating to any "understanding" between FLIR and the DOJ.

The Trial Panel held:

> [A]fter hearing testimony by and assessing the credibility of numerous witnesses, including Ellis and Rosenbaum * * * there was at least an informal understanding between the DOJ and FLIR, which was known and understood by Ellis and Rosenbaum, that FLIR would not be indicted if FLIR cooperated with the DOJ in its investigation of Ellis's former clients. * * * The Trial Panel finds that such information was required to be disclosed to the clients, former clients and the clients' criminal attorneys when seeking their consent to [Petitioners'] continued representation of FLIR during the DOJ investigation.

(ER 200-201.)

This holding is in error, because (1) as a matter of law, the claimed omitted information was not material to the consent request; and (2) Petitioners adequately disclosed any information they had as to any "understanding" between FLIR and the DOJ.

(i) The only "understanding" between FLIR and the DOJ was that, pursuant to long-standing published DOJ policy, cooperation would be a factor weighing against indictment in any charging decision.

Contrary to the Trial Panel's Opinion, the Bar's complaints, and numerous suggestive questions from Bar counsel, FLIR did not have a quid pro quo agreement with the DOJ that FLIR would be immunized from prosecution in exchange for its cooperation. (Wynne 2441:23-2442:2; Ellis 2707:19-2709:1.) Nor did it have an informal "understanding" to that effect. (Wynne 2442:3-5.) As far as Petitioners were aware, FLIR understood (1) that its CEO had directed the company to cooperate with the DOJ (Wynne 2365:5-13;

Ellis 2706:10-18); (2) that long-standing (and self-evident) DOJ policy stated that a company's willingness to cooperate would be a factor the DOJ considered in deciding whether to bring charges (Exs. 105, 123); and (3) that Garten had said that he intended to follow the policy, and did not view FLIR as a focus or target of the investigation (Ex. 609). This was not a unique, secret or otherwise unknown situation—it was a textbook application of published, long-standing DOJ policy. The fact that FLIR (and Garten) each *understood* this information does not constitute an *understanding* in the sense of an agreement reached between them.

In their first meeting, on January 30, 2003, and in subsequent communications, Garten told Petitioners several times that he had no interest in prosecuting FLIR. (Rosenbaum 894:19-22; Ellis 2704:12-15; Ex. 566.) Garten also handed them a copy of the recently-published Thompson Memorandum, which (1) reiterated DOJ policy with respect to charging corporations criminally in situations of this kind; (2) described the factors to be considered; (3) explained that corporations are generally not prosecuted; and (4) warned that there are no guarantees. (Ex. 123.) Petitioners reported that meeting to Samper's counsel, Glade and Kaner, and faxed them a copy of the Thompson Memorandum. (Exs. 94, 151; Rosenbaum 886:9-887:25.) Once Daltry retained criminal counsel, Petitioners also reported to Daltry's counsel the substance of the DOJ meetings and Garten's view of Daltry's status—that Daltry was not a

primary target of the DOJ's investigation and might be offered immunity. (Ex. 610; Myers 1033:19-1038:5; Rosenbaum 894:10-18, 904:23-905:3.)

On February 4, 2003, Garten reiterated the policy stated in the Thompson Memorandum—that non-cooperation would not necessarily mean that the company would be indicted but that, when the DOJ ultimately made a charging decision, one of the factors that it would weigh would be whether FLIR had cooperated. (Ex. 567.) He also told Rosenbaum that he wanted to portray FLIR as the "hero of the War on Terrorism." (Ex. 567; Rosenbaum 902:8-903:14.)

On February 12, 2003, Ellis, Wynne, and FLIR's CEO Lewis met with the DOJ. Lewis told Garten at the outset that FLIR intended to cooperate fully. (Ellis 2706:10-18.) This statement was made without reference to any threat of prosecution if FLIR did not cooperate or promise of non-prosecution if FLIR did cooperate. (Ellis 2707:19-2709:1.) Lewis was not called as a witness by the Bar and, notwithstanding Bar counsel's repeated references in his questions to an "agreement," the Bar offered no evidence that Lewis's statement on cooperation was made in exchange for any promise or commitment of non-prosecution. Bar counsel frequently asked witnesses questions that assumed such an agreement (*see, e.g.,* Glade 1213:2-10; Myers 1044:16-22), but Bar counsel's questions do not constitute evidence of the (incorrect) assumptions on which they were premised.

In subsequent communications, Garten repeated that he had no intent to prosecute FLIR, but added the phrase "provided it cooperates." Garten included this qualification in the statement referenced in Rosenbaum's email of February 20, 2003 (Ex. 413), the sole evidence relied upon by the Trial Panel for its finding of a quid pro quo "understanding" between FLIR and the DOJ. Garten testified, however, that FLIR never sought immunity from the DOJ, and that any "informal understanding" between FLIR and the DOJ was simply following the DOJ policy stated in the Thompson Memorandum (and its predecessor, the Holder Memorandum)—cooperation would be a positive factor in any eventual charging decision. (Ex. 609 at ¶ 5.)[19] The Bar offered no evidence that Garten's statements in any way affected FLIR's prior, unqualified commitment to cooperate, which was made without any quid pro quo from the DOJ.

Moreover, the Panel did not explain what it meant by "cooperation" when it found there was "at least an informal understanding between the DOJ and FLIR * * * that FLIR would not be indicted if FLIR cooperated with the DOJ * * *." (ER 200.) Without additional explanation, "cooperation" is a vague and elastic concept. Indeed, the Thompson Memorandum contains eight

[19] The Thompson Memorandum lists a number of other factors the DOJ will consider with respect to charging a corporation. FLIR was not a likely candidate for prosecution under any of them. *Compare* Ex. 123 *with* Ex. 179.

separate paragraphs describing the DOJ's views as to what constitutes "cooperation." Garten's expectation of "cooperation" described in his February 14, 2003 letter (Ex. 97) was rejected by Petitioners both in writing (Ex. 98) and in person (Ellis 2712:9-2714:22). The Panel never describes the "cooperation" it believes Petitioners allegedly were aware of but did not disclose.

In sum, as far as Petitioners were aware, FLIR and the DOJ both understood (and Petitioners disclosed to Samper and Daltry) that FLIR had made an unqualified commitment to cooperate, DOJ policy was that cooperation (as defined by the Thompson Memorandum and its predecessor) would decrease the (already low) likelihood of an indictment of the company, and Garten intended to follow DOJ policy. Petitioners orally told Samper and Daltry and their individual attorneys all that they knew (Ellis 2722:5-2723:23), and then strove to write, with the assistance of ethics counsel, a detailed conflict waiver letter, specifically disclosing FLIR's intent to cooperate with the DOJ and the fact that it had been told that it likely would not be a defendant in the criminal case. (Rosenbaum 642:6-16; 981:5-10; Ellis 2720:20-2721:3.) That is all they could have done.

(ii) Any "understanding" between FLIR and the DOJ was not necessary to evaluate the consent request.

The Trial Panel held that disclosing an "informal understanding" between the DOJ and FLIR was

> highly relevant to * * * [the] decision whether to grant consent because the informal agreement * * * indicated [1] the DOJ's tenor in its investigation * * *, as well as [2] the DOJ's expectations of Ellis [and Rosenbaum] in acting as FLIR's counsel.

(ER 201.) Neither claim of relevance is an accurate reflection of the facts or application of former DR 10-101(B).

First, as to the "tenor" of the DOJ investigation, any "informal understanding" between FLIR and the DOJ, as far as Petitioners were aware, was a straightforward application of published DOJ policy. There was no separate "understanding" and no witness testified that there was.

Second, no one—not the Bar, not the Panel, not any witness—has articulated how the "tenor" of the investigation—whatever that means—was relevant to any "potential adverse impact" of Stoel Rives, rather than someone else, performing the ministerial role. *See* DR 10-101(B) (requiring "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"). The Bar never called Samper or Daltry to testify, so no evidence was presented about the former clients' views, but instead relied entirely on testimony from their former independent counsel. Glade testified that if "FLIR was cooperating in exchange for not being indicted," he would have wanted to know that. (Glade 1213:2-10) When asked why, Glade answered, "[w]ell, I just think that affects FLIR's motivation with respect to Mr. Samper." (*Id.*) But Glade's answer says nothing

about a potential adverse impact of Stoel Rives, rather than someone else, acting as a depository; nor does it suggest that his advice to his client regarding consent would have changed. The two subjects simply do not connect. Indeed, Glade's partner, Kaner, testified that she was uncertain whether an informal understanding would be material, explaining that even "if [she] had been specifically told that FLIR had reached a deal with the DOJ * * * not to indict FLIR in exchange for cooperation," she "d[i]dn't know" whether that would have altered her opinion as to whether to recommend that Samper consent. (Kaner 2151:3-23.)

Glade and Kaner further testified that they were not the primary decision-makers regarding whether to recommend that Samper consent. That role was played by Hoevet, Samper's criminal defense attorney. Glade testified that Hoevet was "intimately involved in going through the waiver letter before [Samper] consented" and was the "lead lawyer" on the criminal matter, "the one that really would have been calling the shots[.]" (Glade 1386:12-16, 1408:17-23.) Kaner explained: "in many respects I would be reliant on Mr. Hoevet's view" of what factors were material in deciding whether to consent. (Kaner 2151:3-23.)

Hoevet's time sheets during the period that the consent request was under consideration confirm that he was actively involved in the decision. (Ex. 167.) On March 17, 2003, Petitioners faxed Hoevet the consent request. (Ex. 574;

Rosenbaum 924:17-25.) He then spent 4.0 hours on the issue, including an entry, "Read Attorney Lisa Kaner's e-mail regarding Flir's cooperation with government," an obviously pertinent email not offered by, or its absence explained by, the Bar. The time sheets also reference a 2.0 hour meeting on April 11, 2003 with Samper, Glade and Kaner. Samper's consent was sent by Glade later that day, after review by Hoevet (Ex. 167), with a cover letter specifying Samper's understanding of the limited role Stoel Rives would play—"assisting FLIR in producing documents and arranging for interviews of witnesses requested by the DOJ" (Ex. 102).

Thus, if anyone was in a position to testify that there was less than a complete understanding of the relationship between the DOJ and FLIR and any effect it might have on the potential risk from Stoel Rives' ministerial role, it was Hoevet. But the Bar chose not to call him. Given Hoevet's central role in connection with the decision to consent, as well as his hostility towards Rosenbaum in a subsequent hearing in Samper's criminal case (Rosenbaum 977:2-13; *e.g.*, Ex. 351 at R 8,015:5-10; R 8,016:18-8017:15; R 7,935:16-22), and towards Ellis after he accused Hoevet of making false statements to the Ninth Circuit (Ex. 588), this Court can only infer that his testimony would not have been supportive of the Bar's position. *See Cler v. Providence Health System-Oregon*, 349 Or 481, 489, 245 P3d 642 (2010) (explaining that the "missing witness inference * * * provides that when it

would be natural under the circumstances for a party to call a particular witness and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference") (internal punctuation omitted), *citing* 2 McCormick on Evidence § 264 (7th ed.).

That leaves the testimony of Myers, Daltry's criminal defense lawyer. Without any explanation, Myers responded to a question from Bar counsel that, had he known "of [a] formal or informal agreement * * * for FLIR's cooperation," such knowledge on his part "might have made a difference" in the decision to consent. (Myers 1044:16-22.) Because the question was in the disjunctive, Myers' answer does not indicate whether he was assuming a "formal" agreement—which the Panel did not find—or only some undefined "informal" agreement. When asked a more focused question about the ministerial role that Stoel Rives intended to play, Myers testified that having Stoel Rives produce documents was "sort of a moot issue, frankly," because the DOJ could subpoena the documents anyway. (Myers 1041:20-1042:7.) At best, Myers' testimony was inconsistent, and inconsistent testimony does not meet the "clear and convincing" standard. *See Riley Hill General Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 397, 737 P2d 595 (1987) ("In short, 'clear' describes the character of unambiguous evidence, whether true or false; 'convincing' describes the effect of the evidence on an observer.").

As Ellis explained at the hearing: "in my mind * * * [w]hat's material is what was our law firm going to do, not what FLIR was going to do. * * * And the measure of materiality * * * is would it matter if we did it or some other firm did it." (Ellis 2723:3-9.) Jarvis, who was specifically consulted to ensure that any necessary disclosures related to Stoel Rives' ministerial role were made to the former clients, testified that in assessing Petitioners' conflict waiver letter, he did not believe he needed to see any communications from the DOJ. (Jarvis 1864:6-20.) This testimony from an acknowledged expert in the field of Oregon legal ethics is further evidence that the communications between FLIR and the DOJ were not relevant to any "potential adverse impact" of Stoel Rives acting as a document depository.

With respect to the Panel's reference to "DOJ's expectations of [Petitioners]" (ER 201), the uncontradicted evidence at the hearing established that after the meeting with Petitioners on February 19, 2003, the DOJ had *no* expectation that Petitioners would play any substantive role in the investigation, and certainly not the role described by Garten in his February 14, 2003 letter. At the meeting, Petitioners explained to Garten that they could not comply with his requests for their active cooperation. (Ellis 2712:14-2714:22.) After the meeting, Garten abandoned his request that Petitioners assist the DOJ. (Exs. 163, 609 at ¶ 7.) In the conflict waiver letters sent to Samper and Daltry, Petitioners expressly and accurately disclaimed any substantive involvement by

Stoel Rives in the DOJ investigation. (Exs. 101, 418.) In fact, Rosenbaum told Glade that the DOJ had requested Petitioners' assistance and they had refused the DOJ's request. (Rosenbaum 638:18-23, 926:13-926:17, 955:5-7; Ex. 103.)

(iii) Any "understanding" between FLIR and the DOJ was reflected in the conflict waiver letters and the long-standing and well-known DOJ policy on cooperation.

All of the information that Petitioners knew regarding any "understanding" between FLIR and the DOJ was contained in the March 3, 2003 conflict waiver letters and the DOJ's long-standing policy, most recently published in the Thompson Memorandum. The conflict waiver letters explicitly stated that FLIR "is cooperating with the investigation," "has agreed to waive the attorney-client privilege," and was producing documents and making witnesses available. (Exs. 101, 418.) The letters also explained FLIR's understanding of the DOJ's position towards it, saying that FLIR "is not a focus of the investigation and therefore does not expect to be a defendant." (Exs. 101, 418.) Both Samper and Daltry were represented by independent criminal defense lawyers, and the Thompson Memorandum "was well known among prosecutors and the entire criminal defense bar."[20] (Ex. 609 at ¶ 4.)

[20] Myers testified that he was unfamiliar with the Thompson Memorandum. (Myers 1067:22-1068:4, 1071:2-8.) But, given that Myers held himself out as a qualified criminal defense lawyer with 16 years' experience (Myers 1030:4-1031:2, 1088:13-19), it was reasonable to assume that he was familiar with something as salient and current in that field as the Thompson Memorandum, or

In sum, the Trial Panel erred in holding that Petitioners were required to disclose to Samper and Daltry an "informal understanding" between FLIR and the DOJ because (1) the fact that FLIR and the DOJ understood the highly-publicized, well-known, and common-sense DOJ policy that cooperation is a factor in criminal charging decisions did not constitute an agreement or "understanding" of any special arrangement between them, (2) Petitioners disclosed that FLIR was cooperating and did not expect to be a defendant, (3) FLIR's understanding of DOJ policy was not relevant to any potential adverse impact of Stoel Rives acting in the ministerial role, and (4) the underlying DOJ policy could reasonably be assumed to be known to the two experienced criminal defense lawyers evaluating Petitioners' consent request.

c. Petitioners informed their former clients that the DOJ was requesting and FLIR was producing documents; they were not required to specify that one of those documents was a compensation schedule.

The Trial Panel held:

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if he was not aware of that particular document by name, he nevertheless knew of the well-established DOJ practices regarding cooperation as a factor in its charging decisions. *See* Ex. 105 (the 1999 DOJ Holder Memorandum, which preceded the Thompson Memorandum and also stated that a corporation's cooperation is a factor in charging decisions). Thus, this matter is distinguishable from *In re Brandt*, 331 Or 113, 10 P3d 906 (2000), which held that the lawyers' disclosures were not adequate to inform independent counsel where the lawyers could not have expected independent counsel to be familiar with the issues or to have had time to familiarize himself. In *Brandt*, the information was case-specific. Here, the Thompson Memorandum and DOJ practice were tools of the trade of the criminal defense bar.

> [T]he DOJ's demand to FLIR's counsel, Ellis and Rosenbaum, for compensation data indicated the DOJ may have had particular issues with respect to equity compensation or illegal equity compensation, which are individual issues as compared to requests having to do with income recognition which is a corporate issue. Thus, the information (the request for compensation data) was relevant regardless of whether compensation data was available in public records. The Trial Panel finds that such information was required to be disclosed to the clients, former clients and the clients' criminal attorneys when seeking their consent to [Petitioners'] continued representation of FLIR during the DOJ investigation.

(ER 202.) As discussed in Section II.A.3 above, this charge was not alleged by the Bar, and therefore was not a proper basis for finding a violation of the disciplinary rules. But if the merits are to be considered, the Panel's finding was error for the following additional reasons:

First, the Trial Panel again applied an incorrect legal standard. The Trial Panel found that the DOJ's request for FLIR compensation data "was relevant to (and there was a reasonable need for) disclosure of the information to obtain informed consent." (ER 201.) But former DR 10-101(B) only required an explanation "sufficient to apprise the recipient of the potential adverse impact * * * of the matter to which the recipient is asked to consent." Past production of a compensation schedule had no relevance to any "potential adverse impact" of Stoel Rives acting as a conduit going forward.

Second, the evidence does not support the Panel's finding of relevance, which relies exclusively on the testimony of Myers. Myers testified that the

DOJ's request for FLIR's compensation data would have "been of interest" because he believed the investigation related to revenue recognition and the DOJ's request would have signaled to him that "equity compensation" was also at issue. (Myers 1047:22-1048:15, 1093:3-14.) Myers stated that while revenue recognition "is sort of a corporate matter," equity compensation "is sort of an individual issue as well as a corporate issue." (Myers 1048:6-15.) The Trial Panel adopted Myers' reasoning verbatim. (ER 202.)

But neither Myers nor the Panel ever explained why knowledge that the DOJ had requested a compensation schedule would be relevant to the potential adverse impact of the activity as to which Petitioners sought consent, *viz*. Stoel Rives being the firm to serve in the ministerial role. There was never any dispute about the accuracy of the compensation data or any possible argument of privilege. (Wynne 2393:6-2394:9.) To the contrary, the compensation data was readily available to the DOJ, through public sources and the former clients' prior production to the SEC. (Exs. 424, 628; Myers 1092:20-25; Ellis 2726:11-24; Kaner 2047:15-2049:2; *see also* 17 CFR § 229.402 (public disclosure requirements regarding executive pay).)

Moreover, Myers' testimony that revenue recognition "is sort of a corporate matter" while equity compensation "is sort of an individual issue as well as a corporate issue" is inconsistent with basic securities law, whether civil or criminal. Myers acknowledged that he had no background or experience in

securities law. (Myers 1082:25-1083:8.) As every phase involved in this case (the class action lawsuits, the SEC investigation, the DOJ investigation, the Fitzhenry Bar proceeding) demonstrates, revenue recognition decisions concern both individuals and companies.

Third, Myers' hearing testimony in 2012, that the content of the DOJ's requests would have been of interest to him, is inconsistent with his conduct in 2003. Although he had been told on at least three occasions that the DOJ was requesting and FLIR was producing documents, Myers did not ask Petitioners for any further information about the content of the documents that FLIR was producing. He recommended to Daltry that he consent to Stoel Rives acting as FLIR's document depository without any qualification whatsoever as to the scope, content, or nature of the documents to be produced, other than that they could not include Daltry's privileged documents or information—a limitation Petitioners had themselves proposed. (Exs. 418, 473.) In his letter consenting to Stoel Rives' ministerial role on behalf of his client, Myers did not request that he be informed of what documents DOJ requested or that he be provided copies. (Ex. 473.) Apparently, Myers did not believe in 2003 that knowing the specific nature of the DOJ's document requests and FLIR's production was necessary to evaluate the consent request, and neither did Ellis or Rosenbaum.[21]

[21] The same is true for Samper's counsel, Glade. A week before forwarding the compensation schedule that FLIR had prepared, Rosenbaum sent a letter to

Finally, the Trial Panel's Opinion erred in assuming that Petitioners would know or should have known that Myers would view the DOJ's request for compensation as "of interest." The DOJ had told Petitioners that its investigation would focus, like the SEC's, on revenue recognition and would not expand the scope of the SEC's investigation. (Exs. 190 at R 6,930-6,931; 101.) The request for a schedule of FLIR's officers' compensation, which had also been encompassed in SEC document requests (*see, e.g.*, Exs. 14 and 547), was thus not inconsistent with that understanding. There is no evidence that Petitioners knew or should have known that a request for FLIR's compensation data might be interpreted as a signal that the DOJ was investigating a new issue. Nor is there any evidence to support Myers' conjecture that "equity compensation" *was* an issue in the DOJ investigation. The carefully-crafted standard of "full disclosure" in former DR 10-101(B), limited as it was to the "potential adverse impact," would be converted to one of "unlimited disclosure," and compliance would become unattainable, if an attorney were also required to anticipate and disclose any information that his former client's

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Glade reminding him that FLIR was producing documents through Stoel Rives. (Ex. 99.) This information was also reiterated in the conflict waiver letter to Samper. (Ex. 101.) Like Myers, Glade never asked for further information about or requested restrictions on the nature of the company documents being produced. Unlike Myers, neither Glade nor Kaner testified that they had any interest in or concern about the DOJ's request for a compensation schedule.

criminal defense attorney might take as a signal about the scope (or "tenor") of an investigation.[22]

d. No disclosure was required with respect to Fitzhenry's potential Bar matter, because it was not material to any potential adverse impact from Stoel Rives' ministerial role.

The Trial Panel held:

> [Ellis's representation of Fitzhenry] was relevant, as testified to by, among others, Myers and reasonably needed to obtain fully informed consent to the continued representation of Fitzhenry * * *. Specifically, Myers testified that he was not informed of Ellis's continued representation of Fitzhenry in the OSB matter or that Fitzhenry claimed he relied on Daltry's representations to defend Fitzhenry in the bar matter. * * * The Trial Panel finds that [Petitioners] failed to convincingly counter Myers' statements, and provided no criminal defense counsel expert testimony or other evidence demonstrating that the need to have such information in representing the former client in the criminal investigation was unreasonable. The Trial Panel finds through testimony of and based on the credibility of various witnesses that such information would have been of relevance in representing Daltry and Samper in the criminal investigation and that such knowledge would have been important to criminal counsel in advising Daltry and Samper about whether to consent to Ellis's continued representation of FLIR.

(ER 202-203.) The Panel's holding is error for each of the following reasons:

[22] Petitioners acknowledge, as a matter generally understood throughout the bar, that criminal defense attorneys virtually always assert that they wish they had known anything that someone else knew. But, aside from feeding that institutional reflex, there is nothing in this record to suggest that Petitioners should have recognized anything peculiar about the compensation data that made it different from the information that FLIR was producing routinely.

First, no disclosure was required based on the Panel's own specific, clear, and direct holdings earlier in its Opinion that (1) Ellis's representation of Fitzhenry in the potential Bar disciplinary matter was not an actual or likely conflict with Samper or Daltry (ER 191, 196);[23] (2) Ellis's communications on behalf of Fitzhenry to the Bar were not adverse to the objective interest of Samper or Daltry (ER 197);[24] and (3) Ellis's representation of Fitzhenry did not, and was not likely to, inflict injury or damage on Samper in the criminal investigation (ER 197).[25] Those holdings are consistent with the actions of Samper's lawyers, Glade and Kaner, who a year before the Fitzhenry Bar hearing had reviewed Ellis's correspondence with the Bar and did not object. (Glade 1391:3-8; Kaner 2087:20-2088:18; Ex. 504 at ER 336.) Similarly, Jarvis, Stoel Rives' in-house ethics expert, who knew of Ellis's contact with the Bar regarding Fitzhenry (Ellis 2737:17-2738:1), did not advise including any

[23] The Trial Panel wrote: "The Trial Panel concludes that the Bar has failed to prove by clear and convincing evidence that Ellis's representation of Fitzhenry in the Bar's disciplinary proceedings constituted an actual or likely current client conflict of interest between Fitzhenry and Samper and Daltry." (ER 191.)

[24] The Trial Panel wrote: "It is true that Ellis was communicating with the Bar on behalf of Fitzhenry prior to November 7, 2003, but the Bar has failed to prove that any communication by Ellis to the Bar on behalf of Fitzhenry was or was likely to be adverse to the objective interest of Samper or Daltry." (ER 197.)

[25] The Trial Panel wrote: "The Trial Panel also concludes that the Bar has failed to prove by clear and convincing evidence that Ellis's representation of Fitzhenry in the lawyer disciplinary matter would or would likely inflict injury or damage upon Samper in the criminal investigation." (ER 197.)

reference to that contact in the conflict waiver letter, which he participated in drafting (Ex. 211; Jarvis 1854:21-23).

Second, the controlling standard of "full disclosure" in connection with the consent request, former DR 10-101(B)(1), was limited to an explanation sufficient to apprise the former client of any "potential adverse impact" of "the matter to which the recipient is asked to consent," *viz.*, Stoel Rives acting in the ministerial role. As just discussed, the Panel held the clients' interests were not adverse, and neither Myers nor the Panel ever explained how Fitzhenry's Bar matter was even relevant under this standard.

Third, the Trial Panel reversed the burden of proof. In Bar disciplinary proceedings, "[t]he Bar shall have the burden of establishing misconduct by clear and convincing evidence." BR 5.2. The Trial Panel did not find Myers' testimony clear and convincing evidence, only that:

> Ellis failed to convincingly counter Myers' statements, and provided no criminal defense counsel expert testimony or other evidence demonstrating that the need to have such information in representing the former client in the criminal investigation was unreasonable.

(ER 203.) The Panel's assumption that Petitioners had the burden to prove, by expert testimony or otherwise, that Myers' interest in the Fitzhenry

representation was unreasonable turns the requirement of "clear and convincing" on its head.[26]

Fourth, because Myers' knowledge of the Fitzhenry Bar matter was extremely limited, his testimony does not support a finding of a violation of the disciplinary rules. The extent of Myers' knowledge about the Fitzhenry Bar matter was that "there was ultimately a bar matter with respect to Mr. Fitzhenry" (Myers 1085:24-1085:4), and, more importantly, he testified that he did not know whether his client, Daltry, had any interest in the Bar matter (Myers 1086:1-3, 11-17). Myers' apparent interest in Fitzhenry related only to the make-up of the criminal investigation generally—namely, that "the U.S. attorney [was] viewing [Fitzhenry] as a target." (Myers 1057:1-10.) But Petitioners did not represent Fitzhenry in the criminal investigation, and deliberately had no communication with Fitzhenry regarding it. (Rosenbaum 2901:22-2902:12, 2903:3-12; Ellis 2019:18-22, 2729:13-2730:9;

[26] The Panel's criticism of Petitioners' failure to call a criminal defense expert is especially confounding, given that (1) the Bar did not call an expert, and (2) Petitioners *did* call experts, but the Panel prohibited Petitioners' experts from commenting on the facts of the underlying representations. (Tr. 1901:7-1902:24.) (Although erroneous, the Panel's evidentiary ruling does not bear directly on the specific assignments of error raised in this opening brief.) The Panel's criticism also compounds the notice concerns discussed above, as Petitioners had no notice that they would be held to the specialized knowledge of an experienced criminal defense attorney. Neither Ellis nor Rosenbaum held themselves out as expert in criminal practice. (Ellis 2717:17-2718:12; Rosenbaum 2859:8-10.)

Fitzhenry 2201:23-2202:3.) Thus, Myers' generalized and uninformed observations simply cannot provide clear and convincing evidence of any violation of the DRs, and there is nothing else in the record that would permit such a holding.[27]

Fifth, as of March and April 2003, when the two former clients' consent was sought and obtained, there *was no* Bar proceeding against Fitzhenry. (Rosenbaum 983:3-7; Ex. 250.) Four months earlier, at Fitzhenry's request, Ellis had reported Fitzhenry's SEC settlement and had written two letters of explanation to the Bar. (Exs. 160, 161.) But nothing other than a request for additional information (Ex. 246), to which Ellis had responded (Ex. 161), had occurred, and Ellis did not expect Fitzhenry's self-reporting would develop into a Bar proceeding. (Ellis 2727:7-14.) The Bar did not file its complaint against Fitzhenry until November 7, 2003—eight months *after* Petitioners sought and obtained Daltry's consent. (Ex. 250; Ellis 2738:17-21.) The Trial Panel's attempt to hold Ellis responsible for failing to tell Daltry and Samper about something that had not even occurred yet should be rejected.

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[27] The Panel stated that it relied upon the testimony of Myers, "among others." (ER 202.) The Panel also referred to the "testimony of * * * various witnesses that such information would have been of relevance in representing Daltry and Samper." (*Id*.) There is nothing in the record to suggest that any "others" shared Myers' view, and the Panel does not identify the other "witnesses" to whom it was referring.

Sixth, the Panel held that Petitioners were required to disclose that Fitzhenry "claimed he relied on Daltry's representations to defend Fitzhenry in the bar matter." (ER 203.) No such disclosure was made—or required—because it would have been false. Fitzhenry never claimed reliance on or wrongdoing by Daltry (Ellis 2728:10-22, 2753:10-18; Fitzhenry 2252:5-8), a fact the Panel elsewhere in its Opinion correctly found (ER 172-173, 195, 197). The contention that Fitzhenry "blamed everything on Daltry" was a fiction that Bar counsel represented to Myers in their initial interview of him (Myers 1094:21-1096:1, 1098:19-1101:19; Ex. 611), repeated throughout the Amended Complaint against Ellis (*see* ER 9-10, 17-18, 22-23, ¶¶ 31, 59, 75(g) and (h)), and asserted in the Bar's Trial Memorandum (*see* R 1,826; 1,836; 1,846).[28] This fiction never found any support in testimony in the record.

e. No disclosure was required with respect to the call to the SEC five months earlier because it was not material to any potential adverse impact of Stoel Rives' ministerial role and was not a conflict of interest.

We next turn to the issues surrounding the telephone call to the SEC, which occurred five months before Petitioners sought Samper's and Daltry's

[28] Myers wrote an office memorandum dated December 8, 2011 immediately after Bar counsel first interviewed him regarding these matters, in which he stated: "Also [Bar counsel] advised me that the Stoel Rives firm was representing Patrick [sic] Fitzhenry in a Bar complaint on SEC matter and that it was their position in the course of the Bar/SEC matter that they were going to shift all the blame onto Daltry." (Ex. 611.)

consent to Stoel Rives acting in the ministerial role. (*See* Section I.F.3.a, above.) The Trial Panel held:

> [I]t would have been important for Samper and his criminal defense attorney, as well as Glade, to know that Rosenbaum had contacted the SEC to specifically report to it the Swedish drop shipment transaction, and provided records to the SEC of that transaction. This failure to disclose was in conflict with the objective personal, business or property interests of Samper. This is because Rosenbaum contended with the SEC that Stringer was responsible for an improper and even fraudulent transaction when she and Ellis knew that Samper was involved in that same transaction.

(ER 204-205.) The Panel's holding of non-disclosure, as well as its holding of a conflict of interest at the time of the call (excerpted above in Section II.A.2), were based on errors of both fact and law.

With respect to the facts, the Panel is incorrect as to all three of the facts on which its conclusions rest:

First, the record demonstrates that Rosenbaum did not "report" the Swedish Drop Shipment to the SEC. The Swedish Drop Shipment was the subject of a public restatement of FLIR's financials in November 2000. (Ex. 43; Ellis 2527:15-20.) Moreover, the person who first discussed the transactions with the SEC was *Samper*, who in his SEC interview in October 2001 raised the issue voluntarily and testified about it at length, in Glade's presence. (Ex. 140 at ER 242-243) A year later, in a conversation about the SEC's case against former CEO Stringer, Rosenbaum simply conveyed, at

Wynne's request, Wynne's surprise at not seeing the Swedish Drop Shipment mentioned in the complaint against Stringer. The call "focused exclusively on Ken Stringer." (Ex. 171; Rosenbaum 849:12-850:1.)

Second, the Panel is incorrect in twice stating that Rosenbaum provided the SEC with records relating to the Swedish Drop Shipment in connection with the phone call. (ER 204.) The allegation that she did, or that she told the SEC where to look, appeared, without record citation, in the Bar's Trial Memorandum (*see* R 1,821 n. 18), but the Bar did not (and could not) offer any evidence at the hearing to support that statement, because it is not true.

Third, the Panel is incorrect that on October 3, 2002, Rosenbaum knew or should have known that Samper was at material risk of a criminal charge based on the Swedish Drop Shipment. The Panel found: "Rosenbaum had to know that there was a possibility that the analysis of [the Swedish Drop Shipment] by the SEC might lead to charges being brought against Samper by the DOJ. And, of course, that is precisely what transpired." (ER 180.) The Panel's hindsight-based speculation is directly contradicted by the record:

- The evidence was uncontradicted that Petitioners reasonably believed that the Swedish Drop Shipment did not involve fraud by Samper. (Rosenbaum 751:15-753:1, 847:16-23; Ellis 2530:5-9, 2534:22-2535:3.) In November 2000, Petitioners discussed the Swedish Drop Shipment with Glade, and Glade recorded, "[Rosenbaum] believes Mark [Samper]." (Ex. 39, p. 1.) Glade later communicated to Rosenbaum that he, too, agreed that the Swedish Drop Shipment was unlikely to be a problem for Samper. (Ex. 42; Rosenbaum 2840:14-2841:14.) In October 2001, Samper voluntarily raised the issue with

the SEC, reiterating the explanation he had given FLIR and Petitioners. (Ex. 140; Rosenbaum 847:16-23; Ellis 2531:10-2532:12.)

- The evidence was uncontradicted that neither Ellis, Rosenbaum, Neil, Kaner, nor Glade anticipated that a criminal investigation would follow the SEC investigation. (Rosenbaum 692:4-10, 850:16-851:23; Neil 2278:12-16; Glade 1269:18-22; Kaner 2092:16-19; Ellis 2547:20-2548:19, 2705:6-11.)

- The SEC and DOJ actively concealed the DOJ's interest in the case from Petitioners. (Ellis 2693:10-2694:14; Exs. 529, 590.)
- Many objective factors indicated that the FLIR situation was very unlikely to lead to a criminal investigation: (1) FLIR was a small company; (2) there was no evidence of insider trading, embezzlement, bribery or a Ponzi scheme; (3) FLIR's management had been stable during the period of accounting errors; (4) FLIR had eight consecutive years of clean audits from Pricewaterhouse Coopers; (5) FLIR's stock price was flat; and (6) the DOJ had not intervened in the SEC investigation to stay the investigation (as it almost always does when investigating the same matter as the SEC) so it may proceed under the rules for criminal investigations. (Maletta 1630:9-1631:5, 1671:3-18, 1772:9-19, 1773:24-1775:10; Ellis 2547:20-2548:19.)
- Throughout 2001, Garten and the DOJ were also of the view that the evidence was insufficient to justify a criminal case. (Ex. 545; Ellis 2694:15-2695:12.)

In short, the evidence at the hearing established overwhelmingly that the criminal investigation was not and should not have been anticipated by the lawyers involved.

As to the errors of law, the Panel again failed to apply the correct standard of "full disclosure" in former DR 10-101(B), or otherwise explain why or how the phone call was pertinent to any "potential adverse impact" that could arise out of Stoel Rives' ministerial role. Neither did any witness. The Bar did not call either Samper or his criminal defense attorney, Hoevet, to testify. And,

although both of Samper's civil law attorneys, Glade and Kaner, testified, neither was even asked about the call.

The 2002 call was not relevant to any "potential adverse impact" to Samper arising out of Stoel Rives' ministerial role. The call did not convey any new information to the SEC, which had examined both Samper and Stringer regarding it. (Ex. 140; Martson 301:7-9.) Neither could it have conveyed new information to Samper and his lawyers. Glade and Kaner were well aware of the Swedish Drop Shipment and FLIR's restatement of the entry. On November 3, 2000, Kaner had attended a meeting with FLIR's controller specifically to discuss the issue (Ex. 523), and on November 10, 2000, Glade received a detailed report from Petitioners (Ex. 39). Certainly Glade and Kaner knew that the SEC had notice of the issue because in October 2001, Glade had attended Samper's SEC interview in which Samper brought up and discussed it with the SEC staff. (Ex. 140 at ER 240, 242-243.) Petitioners reasonably believed, as did Samper, that the Swedish Drop Shipment was the responsibility of former CEO Stringer, not Samper. (Ellis 2530:5-9, 2534:22-2535:3.) This view was shared by FLIR (Wynne 2397:3-2400:24, 2406:13-18; Muessle 2498:2-7, 2504:24-2505:17), which is why FLIR asked Rosenbaum to make the call in the first place (Wynne 2351:6-2352:14; Rosenbaum 848:3-12).

In any event, the Trial Panel's preoccupation with the Swedish Drop Shipment and the October 2002 call appears to be based on the erroneous

assumption that the call *caused* the DOJ to bring a criminal charge against Samper regarding the Swedish Drop Shipment entry. (ER 180.) But that premise was unsupported by any evidence and was expressly refuted by Garten (Ex. 609 at ¶ 3).

The Trial Panel's holding that the call itself violated the rules against conflicts of interest, a charge that the Bar did not allege, was erroneous for many of the same reasons. Specifically, FLIR's interest in discussing with the SEC the SEC's case against Stringer was not adverse to Samper. Samper had already settled with the SEC and was not subject to any known or expected legal claims against him relating to his work at FLIR. (Rosenbaum 846:12-848:2; Ellis 2731:3-7.) Further, as the Panel held elsewhere in its Opinion, FLIR had no interest in seeing Samper subject to a penalty by the SEC, let alone criminally prosecuted. (*See, e.g.*, ER 158 ("[I]t would make no sense for the corporation to [point the finger of blame] against its former or current officers.") And third, the call related exclusively to Stringer (Ex. 171; Rosenbaum 849:12-850:1), who had sued FLIR (Rosenbaum 847:5-15), had attempted to cast blame on Samper (Ellis 2687:3-13), and who was reasonably believed by Petitioners to have been responsible for the inaccurate Swedish Drop Shipment entry, which Samper had subsequently reversed and FLIR had restated (Rosenbaum 847:16-23; Ellis 2531:10-2532:12).

f. Petitioners' production of FLIR documents at FLIR's direction, prior to obtaining written consent from Samper and Daltry, was not a conflict of interest.

In its Opinion, the Panel several times refers to the fact that Petitioners produced some FLIR documents prior to receiving the written consents from Samper and Daltry. (ER 199-201 (excerpted above) and 211-212.) The Panel does not say one way or the other whether the timing of that production is the basis for its holding of a violation, but for each of the following reasons such a conclusion—if the Trial Panel reached it—would be error:

First, as explained in Section II.B.2 above, there was no former client conflict of interest in Stoel Rives performing the ministerial role for FLIR.

Second, Petitioners made it clear to Samper and Daltry, through Glade, Kaner and Myers, orally and in writing, that Petitioners were producing documents at FLIR's request to the DOJ. (Myers 1033:24-1035:22, 1037:13-20, 1046:8-12, 1068:21-1069:5, 1070:7-13, 1076:1-7, 1079:25-1080:15; Ellis 2725:1-5; Exs. 94, 99, 100, 151, 610.) At no time did Glade, Kaner, or Myers object or raise any questions regarding the production of documents (Rosenbaum 2869:9-15), which is powerful evidence that those lawyers believed that there was no conflict with their clients' interests. Indeed, Myers testified that Petitioners' subsequent request for consent to produce FLIR's documents at FLIR's direction was "moot," because the DOJ had a right to obtain the documents anyway. (Myers 1041:20-1042:7.)

Third, the documents belonged to FLIR, and Petitioners understood that it would have been unethical for them not to follow FLIR's instructions with respect to them. (Ellis 2717:5-16; Rosenbaum 888:23-889:7.) Petitioners put in place a system to ensure that no personal documents of the former clients, and no confidences obtained personally from them, were disclosed. (Roberts 1820:18-1821:5.)

Fourth, in light of the former clients' knowledge of prior production, when Samper and Daltry consented in writing to Stoel Rives' ministerial role (Exs. 102, 473), they each waived, after full disclosure, any issue with respect to prior production. DR 5-105(D).

C. Third Assignment of Error: The Trial Panel Erred in Holding there were Knowing Omissions of Material Fact.

The Trial Panel held:

> [I]n each instance of non-disclosure, Ellis and Rosenbaum had the facts in mind, they knew they were material, and the disclosure of those facts may have influenced the decision-making process significantly.

(ER 205.) The Trial Panel's holding of a knowing misrepresentation under former DR 1-102(A)(3) is baffling, given that (1) the holding relates to the same four factual matters that, as explained above, cannot be sustained under DR 10-101(B); (2) the Panel does not cite any evidence (nor was there any) to support its holding; and (3) the Panel holds later in the Opinion that Petitioners' alleged omissions were "negligent" (ER 215), which means they could not be in

violation of DR 1-102(A)(3). Indeed, the Trial Panel's finding of a knowing misrepresentation by omission simply compounds the many errors and inconsistencies previously discussed.

1. A misrepresentation by omission requires that the omitted information be in the lawyer's mind at the time of omission and that the lawyer knows it could significantly influence the former client's decision.

The Bar's complaints do not allege that Petitioners' communications with their former clients contained any misstatements or that any statement made was misleading as a half-truth; nor does the Bar allege that either of the Petitioners, having received their former clients' (and FLIR's) consents, ever exceeded the limited scope of the activities described in the consent requests. (Ellis 2127:4-18.) Other than when consent was requested, the Panel never found that Petitioners had any duty to speak at all. And, if no consent was required (*see* Section II.B.2, above), there *was* no duty to speak, and thus no basis for a violation of former DR 1-102(A)(3).[29]

Moreover, and even if this Court were to find that a duty to speak existed prior to the consent request, or as a part of that request, the Bar had a heavy burden:

> To establish misrepresentation by nondisclosure, the Bar must meet a high standard of proof: The Bar must establish that the

[29] Former DR 1-102(A)(3) stated that "[i]t is professional misconduct for a lawyer to * * * [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation."

> accused lawyer *knowingly* failed to disclose a fact that [1] the accused lawyer *had in mind* and [2] *knew* to be material.

In re Huffman, 331 Or 209, 218, 13 P3d 994 (2000) (internal citation omitted) (emphasis added). Whether information is material is determined by both *Huffman* and, in the consent context, former DR 10-101(B). Under *Huffman*, "'[m]aterial' facts are those that, 'had [they] been known by the court or other decision-maker, would or could have *influenced the decision-making process significantly*.'" 331 Or at 218 (emphasis added). The key word is "significantly"—which neither Daltry's nor Samper's lawyers claimed.[30] (Myers 1044:16-22; Kaner 2151:3-23.) When the decision is whether to consent to waive a potential conflict (the only decision the former clients here were ever asked to make), former DR 10-101(B) explained that the scope of "full disclosure" was defined by "the potential adverse impact on the recipient, *of the matter to which the recipient is asked to consent*." (Emphasis added.) Thus, *Huffman* established the degree of materiality and scienter required; former DR 10-101(B) established the relevance parameters of materiality for requests to waive conflicts.

As applied to the facts of this case, and in order to prove a violation of former DR 1-102(A)(3) by omission, the Bar was required to prove by clear and convincing evidence that, at the time that they sought consent from the former

[30] The Bar called neither of the former clients themselves to testify in support of its Complaints.

clients, Petitioners had a duty to speak because (1) Petitioners each had the allegedly omitted information in mind; (2) they did not disclose the information; and (3) each knew that the information, if disclosed, could significantly influence their former clients' decision.

2. There was no evidence that Petitioners deliberately withheld information that they had in mind and knew to be material.

Despite the "high standard of proof" required under *Huffman* for proving a knowing misrepresentation by omission, the Trial Panel explained its holding for all four assumed omissions in the single, conclusory sentence excerpted above, without a single citation to evidence. (ER 205.) Depending on which alleged omission is at issue, the information that the Trial Panel held that Petitioners knowingly omitted either was disclosed, was not alleged, did not exist, was not in mind, or was not material under either the *Huffman* standard or former DR 10-101(B), let alone both.

There was no evidence that Petitioners had the omitted information in mind or thought the information to be material when they sought their former clients' consent:

- Petitioners each testified that they considered Garten's February 14, 2003, letter a nullity after February 19, 2003, when Garten abandoned his request for their assistance. (Rosenbaum 640:17-23, 964:11-21, Ellis 2026:19-2027:1, 2722:21-2723:20.)
- The call to the SEC occurred five months prior to the consent request and related to Stringer, not Samper. Samper was never mentioned

during the call, nor is he mentioned in the SEC's internal email summarizing the call that the Panel cited. (Rosenbaum 751:15-753:1, 849:12-850:1; Ex. 171; ER 178.) Ellis never knew of the call. (Ellis 2730:25-2731:2.)

- The officer compensation information was routinely included in published proxy statements. (Ellis 2726:11-24.)

- Neither Petitioner saw any connection between the Fitzhenry Bar correspondence and the DOJ investigation. (Ellis 2730:25-2731:2; Exs. 160, 161.)

- Although the Trial Panel excerpted the standard stated in *Huffman*, which makes it clear that any omission must be "knowing" to violate DR 1-102(A), the Panel itself concluded in connection with its sanctions analysis that the purported non-disclosures were, at most, negligent: "[T]he Trial Panel concludes that Ellis and Rosenbaum *negligently* failed to provide information that they incorrectly concluded was not necessary to disclose." (ER 215 (emphasis added).)

The Trial Panel's speculation that Petitioners would knowingly deceive their clients clashes with the overwhelming evidence of Petitioners' consistent sensitivity to their ethical duties to these clients throughout their representation, and indeed to all clients throughout their combined careers of nearly 90 years of unblemished practice:

- Petitioners proactively sought the advice of two of their partners, Per Ramfjord, a former AUSA experienced in federal white collar criminal law and procedure, and Peter Jarvis, a recognized expert on ethical issues, to ensure that their actions and disclosures were consistent with their ethical obligations. (Ramfjord 880:8-19; Jarvis 1857:11-14, 1860:22-25; Rosenbaum 913:16-22; Ellis 2716:13-25.)

- Petitioners prepared and sent detailed conflict waiver letters even though neither of them, nor their in-house ethics expert Jarvis,

believed the letters were required. (Rosenbaum 981:5-10; Jarvis 1863:9-20, 1869:5-11; Ellis 2720:12-19.)

- Rosenbaum testified, "I was trying to be as full as—disclosing everything I thought they needed to know in order to make [the consent] decision." (Rosenbaum 642:6-16; 981:5-10.)

- Throughout the SEC proceedings and their meetings with the DOJ, Petitioners promptly curtailed the scope of their representation whenever it appeared that there might be conflicts. (Wynne 2376:19-25; Ellis 2675:14-2678:6; Exs. 47, 539.)

- Every witness who was asked to comment on Petitioners' reputation for truthfulness (including those called by the Bar) testified that Petitioners have outstanding reputations for integrity and character. (Ramfjord 882:5-17; Glade 1246:18-1247:11; Roberts 1828:20-1829:7; Houser 1911:16-20; Jarvis 1882:21-1884:20; Fitzhenry 2252:12-18; Neil 2281:6-9; Wynne 2449:5-24.)

- Petitioners cared deeply about their clients and were dedicated to keeping them informed, including by finding independent counsel for them, assisting their independent counsel in getting up to speed, and continuing to work with and supply information to the former clients' independent counsel after Stoel Rives' representation ended. (Rosenbaum 678:25-679:19, 901:11-14, 914:23-915:8; Myers 1062:21-1063:11; Ellis 2605:22-2606:19, 2611:4-21, 2705:4-11; Neil 2277:5-8; Exs. 99, 552.)

- Petitioners have remarkable records of public service to the profession. (Ex. 500; Ellis 2758:11-2775:3; Rosenbaum 657:23-662:17.)

In view of the foregoing, the Trial Panel's holding of violations of former DR 1-102(A)(3) cannot stand.

D. Fourth Assignment of Error: The Trial Panel Erred in Finding a Likely Conflict of Interest Based on its Interpretation of a Single Sentence in the FLIR Wells Submission.

On March 8, 2002, FLIR submitted its Wells Submission to the SEC staff. (Ex. 179.) The Panel correctly determined that, contrary to the Bar's allegations, the submission did not identify anyone other than Stringer and Martin, neither of whom Petitioners represented, as having been "removed" from their positions or "responsible [for] the accounting and management problems" at FLIR. (ER 166-168.) The Panel also correctly determined that the submission "did not argue that any [members of] prior management did anything fraudulent" and that the submission "referred to errors," not fraud. (ER 161.) But, later in the opinion, the Panel unaccountably and inconsistently held that a single sentence within the submission conflicted with the interests of Petitioners' individual clients Samper, Fitzhenry, and Eagleburger:

> Ellis and Rosenbaum wrote: "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." This statement tells the SEC that FLIR believes that wrong-doing may have occurred, and suggests that it is appropriate for the SEC to pursue fraud claims against one or more responsible individuals. * * * The Trial Panel concludes that the Bar has proven, by clear and convincing evidence, that this statement is adverse to the objective personal, business or property interest of Samper, Fitzhenry, and Eagleburger. Although the sentence does not refer to these individuals specifically, it must refer to Eagleburger and Samper because they were responsible, and action was taken against Eagleburger and Samper who immediately resigned. * * *

> The Trial Panel concludes that a likely conflict of interest did exist * * * because FLIR was trying to encourage the SEC to accept FLIR's offer of settlement and the quote was made, perhaps, in an effort to mollify the SEC. However, Samper, Fitzhenry, and Eagleburger had an objective personal, business or property interest not to have FLIR and their former lawyer state that a wrong-doing may have occurred, and that fraud claims are being pursued against the individuals responsible.

(ER 168-169.) The Panel's holding should be rejected for three independent reasons, any one of which, standing alone, is sufficient to justify that disposition.

1. FLIR's interests were not adverse to those of Samper, Eagleburger, or Fitzhenry.

There was no likely (let alone actual) conflict of interest between FLIR and Eagleburger, Fitzhenry, or Samper. The Trial Panel correctly held that it "would make no sense for the corporation * * * to point the finger of blame" at its former officers because to do so "would be to point the finger of blame at itself." (ER 158.) This was the testimony of every witness knowledgeable in the area. (Maletta 1583:4-1584:5; Rosenbaum 686:25-687:3; Ellis 2640:10-15; Wynne 2333:13-2334:13, 2435:9-22.) That view was further reflected in FLIR's efforts in its Wells Submission to describe the underlying accounting issues as "errors" and "problems," words that lawyers and regulators familiar with SEC practice understand are not admissions of fraud. (Maletta 1700:4-18, 1702:8-1703:11; Ellis 2660:23-2661:2.) In Wynne's words, FLIR's strategy in drafting its Wells Submission was not to point fingers, but "to position the

company as having fixed its problems." (Wynne 2424:10-20.) The sentence in question does not create a conflict.

2. The sentence does not suggest that any client committed fraud or encourage the SEC to act against any client.

The Trial Panel determined that the sentence at issue "must" refer to Eagleburger, Fitzhenry, and Samper (ER 169), because they had received Wells notices and therefore "must" be the individuals against whom "the SEC is pursuing fraud claims." (ER 168.)

First, the Trial Panel does not mention that Stringer and Martin, neither of whom Petitioners represented, had also received Wells Notices (Martin 366:7-18; Martson 301:7-9) and were the two former managers who had been "removed" (Ellis 1988:24-1989:14, 2653:25-2655:7, 2660:14-2661:10).

Second, the Panel erroneously assumed that Eagleburger had received a Wells notice by the date of the FLIR submission on March 8, 2002. In fact, Eagleburger did not receive a Wells notice until March 14, 2002 (Ex. 454), and, when he did, that event was a surprise to Ellis (Ellis 2604:17-19, 2606:5-10) and Rosenbaum (Rosenbaum 825:14-17). Although both Eagleburger and his counsel, Neil, testified, neither was asked whether he believed the sentence (or any other aspect of the FLIR Wells Submission) was adverse to Eagleburger's interests.

Third, Fitzhenry was a co-author of the FLIR Wells Submission (Ellis 2650:13-21), and could hardly be thought to have approved a sentence "suggest[ing] that it is appropriate for the SEC to pursue fraud claims" against himself. He was also the subject of a footnote in the submission that made it clear that FLIR management did not consider him in any way responsible for its problems. (Ex. 179 at ER 253.) Indeed, the Bar construed the document exactly opposite to the Panel's conclusion—the Bar complained that the FLIR Wells Submission had "identified Fitzhenry as *not* responsible" for the accounting misstatements. (*See* ER 7-8, ¶ 25 (emphasis added).) Furthermore, although the Bar called Fitzhenry to testify, he was never asked whether he considered this sentence (or any other aspect of the FLIR Wells Submission) adverse to his interests. Under such circumstances, it is baseless to suggest, much less to purport to find by clear and convincing evidence, that the single sentence in the FLIR Wells Submission created a conflict of interest between Fitzhenry and FLIR.

Finally, with respect to Samper, the finding of a conflict is in error for each of the following reasons:[31]

First, by its own terms, the sentence does not say or imply that FLIR had concluded that *anyone* in prior management had engaged in fraud. The drafters

[31] Each of these reasons would also apply to Eagleburger and Fitzhenry, if the Panel's holding were not already foreclosed by the arguments raised above.

of the FLIR Wells Submission testified that its references to "errors" and "problems" were deliberate because, in SEC practice, these words are not concessions of wrongdoing. (Ellis 2660:18-2661:2; Wynne 2425:6-12.) SEC defense expert Maletta agreed (Maletta 1700:4-18), as did Glade (Glade 1366:16-24) and, remarkably enough, the Trial Panel as well (ER 161).[32] Under the circumstances, it was innocuous for FLIR to reflect its "understanding" (based on what the SEC had communicated) that, "to the extent wrong-doing may have occurred," the SEC was pursuing claims against one or more individuals who "may have been responsible." The sentence's double use of the word "may" emphasized that FLIR was *not* endorsing any notion of illegality.

Second, the contention that the sentence "must have" referred to Samper directly conflicts with the Trial Panel's own earlier holding that the statements in the submission regarding executives who had been "removed" and were responsible for the "problems" were ambiguous and could be read to refer only to Stringer and Martin, neither of whom was represented by Petitioners.[33]

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[32] The Trial Panel wrote: "However, FLIR did not argue that any prior management did anything fraudulent. FLIR's Wells' [sic] response referred to errors." (ER 161.)

[33] The Trial Panel wrote: "The Trial Panel concludes that the Bar has failed to prove by clear and convincing evidence that this statement [that FLIR took immediate action against individuals it deemed "responsible"] did refer to [Petitioners'] former individual clients. The statement could be construed to

(ER 167-168.) An ambiguous sentence cannot constitute "clear and convincing evidence" of a conflict. *See, e.g., In re Lawrence*, 337 Or 450, 468-69, 98 P3d 366 (2004) (holding that because the evidence was ambiguous, it could not have been "clear and convincing").

Further, Ellis testified that use of the word "removed" in connection with those considered responsible for the errors was deliberate, and that "it could not apply, did not apply, and was not intended to apply to Samper," who had not been removed—he had voluntarily resigned. (Ellis 2661:3-10.) As a matter of English usage, Ellis's statement is unimpeachable. Samper had voluntarily resigned; he was not "removed," and no "action was taken against" him. Further, the FLIR Wells Submission was written, and needs to be read as, an integrated whole, not as a statement that may be parsed for a single sentence that, when read in isolation and with a studied ignorance of the surrounding circumstances, *might* uncharitably be read as *perhaps* referencing Samper, Eagleburger, and/or Fitzhenry.

Third, the understanding of the sentence by the SEC staff, to whom the FLIR Wells Submission was addressed, contradicts the Panel's interpretation. The SEC staff criticized FLIR's Wells Submission for *not* conceding fraud by

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refer only to Stringer and Martin, neither of whom were substantively represented by Ellis and Rosenbaum." (ER 167-168.)

former officers, as recorded in Rosenbaum's contemporaneous notes of FLIR's April 2002 meeting with the SEC:

> Sense that Co. not prepared to admit fraud occurred – cf. Wells submission. Refers to "acctg. errors". Didn't admit Sr. officers had committed fraud. His [SEC Division Head Randall Lee] reaction—Co. still doesn't get it.

(Ex. 555.) All of those who attended the meeting to which Rosenbaum's notes referred and who testified at the hearing recalled the same criticism. (Ellis 2667:14-2668:2; Wynne 2425:13-16; Rosenbaum 829:17-830:7.)

The Trial Panel cites testimony by Samper's lawyer, Glade, that, when he read the FLIR Wells, he initially was "kind of upset." (ER 170; Glade 1197:7-8.) The Panel then unaccountably omits Glade's clarifying testimony that this was a "first impression." (Glade 1198:1-4.) Glade testified that he then spoke with Ellis regarding the FLIR Wells Submission, and that Ellis explained that Samper was not included as a culpable party—"that was not their intent; that he [Ellis] didn't think they had done that literally." (Glade 1200:11-1201:3.) Moreover, after speaking with Ellis, Glade told his partner, Kaner, that he "was satisfied there [were] no conflicts between FLIR and Mark Samper's position." (Kaner 1522:2-11; *see also* Glade 1368:9-17, 1374:16-23.) Kaner agreed. (Kaner 1463:24-1464:13; 2147:5-7.) Glade and Kaner also decided that it was in Samper's "best interest" to continue the joint representation. (Kaner 1522:16-1523:1.) In an email exchange with Rosenbaum approximately

a week after Glade spoke with Ellis, Glade raised no concerns about the FLIR Wells Submission, and continued to discuss Samper's position and strategy with her. (Ex. 552.) Although both Glade and Kaner were called as witnesses by the Bar, neither was asked any questions about the sentence at issue.

Surely, where all the interested parties—the SEC Division Chief, both of Samper's independent lawyers, Wynne, and Petitioners—understood the FLIR Wells Submission as not asserting or implying fraud by Samper, the contrary interpretation by a Trial Panel *eleven years later* cannot be said to meet the "clear and convincing" evidence standard. This proposition becomes all the more true when one considers the fact that no witness at the hearing was asked any questions about the sentence, and the sentence was not referenced in the 50 pages of the Amended Complaints, or the 57 pages of the Bar's Trial Memorandum, or the 110 pages of Bar counsel's opening statement and closing argument.)[34] The Trial Panel, once again, forgot its function and found a violation based on a charge of its own creation.

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[34] The Trial Panel cites testimony of Rosenbaum, who had been subpoenaed to testify at a 2005 hearing in the criminal case. (ER 169, citing Ex. 351.) The Panel incorrectly stated that Rosenbaum testified that the sentence in the FLIR Wells Submission suggested that the SEC not pursue FLIR because it "was going to come after the individuals who are responsible which could include Rosenbaum's client, Samper." What Rosenbaum actually testified to was that in including the sentence, FLIR (1) did not have "anyone other than Mr. Stringer" in mind and (2) "didn't tell [the SEC] to go after people who were responsible for the fraud," (3) that the sentence applied only if *the SEC* believed an individual had engaged in fraud, and (4) was "[a]bsolutely not" a statement

3. Samper, through his lawyers, after disclosure, waived any objection.

Finally, it should be noted that the Trial Panel's finding of a conflict of interest should also be rejected because Glade's and Kaner's decision on behalf of Samper to continue the joint representation after both had reviewed the FLIR Wells Submission and Glade had discussed it with Ellis would constitute a deliberate and informed waiver and consent under former DR 5-105(F), if any such waiver and consent were necessary.

III. CONCLUSION

These cases were brought on the Bar staff's own initiative—no client had complained to the Bar (Ellis 2759:10-12; ER 213), and none has joined its case (*see, e.g.*, Glade 1408:24-1409:7).

At the hearing, the Bar called no expert witness knowledgeable in this specialized area of practice. By contrast, Petitioners' evidence at the hearing, including testimony from a recognized national expert in the field, demonstrated that at all times Petitioners handled the matters entrusted to their professional care consistently with both Oregon and national practice and with vigilant adherence to their ethical duties, including providing copious amounts of information to their clients, monitoring potential conflicts of interest, and ensuring that each client at risk had informed counsel to advocate on that

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giving preference to the company over Samper. (Ex. 351 at R 8,035-8,036.) The Panel's statement is inexcusably wrong.

client's individual behalf. As soon as it became clear that individual criminal charges might arise, Petitioners withdrew from any substantive involvement, acting thereafter solely in the ministerial role of document depository and interview scheduler—with the informed consent of all involved.

Thirteen years after the conduct at issue began, and more than 10 years after it concluded, these cases have taken on a life of their own. The proceedings have consumed 64 months—and counting. The reputational and emotional costs to Petitioners have been substantial. Each of the Trial Panel's holdings of violation should be overturned because they are based on the demonstrable errors of fact and law, and glaring internal inconsistencies, detailed in this brief. Justice requires that the Court put these matters to an end, and vindicate these two outstanding lawyers with an order of dismissal of all counts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH, TYPE SIZE REQUIREMENTS AND PDF TRANSMISSION REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation set forth in the Court's Order dated August 15, 2013and (2) the word-count of this brief is 24, 306 words.

Type size

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 5.05(4)(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2013, I served a true copy of this **PETITION FOR REVIEW AND OPENING BRIEF** via electronic notification on:

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CERTIFICATE OF FILING

I hereby certify that on August 26, 2013, I efiled the original of this **PETITION FOR REVIEW AND OPENING BRIEF** with the State Court Administrator via the Oregon Judicial Department's Appellate e-File system to:

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