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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

AMENDED REPLY BRIEF OF BARNES H. ELLIS AND LOIS O. ROSENBAUM

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I. INTRODUCTION

For reasons that are unclear to Petitioners, the Oregon State Bar ("Bar") has filed a Respondent's Brief that is laden with factual errors, new theories neither pled nor tried, strained legal arguments, and a conspicuous avoidance of the wording of the disciplinary rules it purports to be enforcing. The Bar has no answer for the points that Petitioners have made, and—as Petitioners will show—no justification for the points that it instead seeks to advance.

Eschewing the customary appellate practice of responding in sequence to Petitioners' four assignments of error, the Bar comingles its responses to those assignments with a hodge-podge of additional claims. The Bar's brief appears to reflect a dissatisfaction with the Trial Panel Opinion and, additionally, with the theories that the Bar itself presented at trial. Petitioners decline to follow the Bar's approach. Petitioners will first reply to the Bar's treatment of the assignments of error identified in Petitioners' Opening Brief, and then will address the Bar's "Additional Questions on Review."[1]

[1] Because the Bar has adopted an unorthodox approach, it is impossible for Petitioners to provide the customary "Statement of the Case" in response. *See* Oregon Rule of Appellate Procedure (ORAP) 5.55(2). Petitioners nonetheless have attempted to provide portions of the information normally found in such a statement at the various points in this Reply where they are applicable.

II. REPLY BRIEF ON APPEAL

A. Reply to Bar's Response to Statement of Facts.

In its opening sentence, the Bar unequivocally "accepts the Statement of the Case offered by Appellants," which included a 19-page Summary of Facts. (Oregon State Bar's Respondent's Brief ("Resp.") at 1.) As required by this Court's rules, those facts were carefully annotated to the record and were presented in a non-argumentative, objective manner.[2]

By contrast, the Bar's 30-page "Statement of Facts" is filled with inaccuracies. In fact, the record cited by the Bar often reflects the opposite of the fact claimed. Many of those errors will be addressed in this Reply Argument, others in Petitioners' Response to the Bar's Additional Questions. Petitioners respectfully urge the Court not to accept any fact claimed by the Bar without reading for itself the record it cites in support.[3]

B. Reply to Bar's Response to Petitioners' First Assignment of Error.

In their Opening Brief, Petitioners argued that a number of the Trial Panel's findings of violation must be dismissed, because the supposed "violations" were not alleged by the Bar and Petitioners therefore had no notice

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[2] *See* ORAP 5.40(9) (requiring briefs to contain "[a] concise summary, without argument, of all the facts of the case material to determination of the appeal").

[3] Throughout its Brief, the Bar refers to Ellis and Rosenbaum as "the Accused," and generally does not identify whether it is referring to one, the other, or both. The Bar must prove its case by clear and convincing evidence as to each individual lawyer on each claim. Failing to distinguish between the two lawyers leads to inaccuracies and reflects an inappropriate attempt to relieve the Bar of its burden of proof.

or opportunity to defend against them. (Petition for Review and Opening Brief of Barnes H. Ellis and Lois O. Rosenbaum ("Pet.") at 25-41.) The Bar acknowledges (as it must) that the Court can only find violations that the Bar has fairly pled. (Resp. at 55, citing *In re Magar*, 296 Or 799, 806 n 3, 681 P2d 93 (1984).) But, with one exception, the Bar refuses to agree to the dismissal of the Panel's findings on the unalleged claims.

1. The October 2002 phone call.

The Bar concedes that it "did not plead—and has never contended—that Rosenbaum's October 3, 2002 telephone call [to the Securities and Exchange Commission ("SEC")] constituted a separate conflicts violation." (Resp. at 55.) Accordingly, the Trial Panel's holding that this call constituted a violation of former DR 5-105(C) or (E) must be rejected.

Having noted the Bar's single concession, Petitioners turn to those issues as to which the Bar should also have conceded error, all of which relate to purported material omissions in Petitioners' March 3, 2003 conflict waiver letters (Exs. 101, 418, 605, 624 (collectively, the "2003 Consent Letters")).

2. The FLIR officer compensation schedule.

Petitioners argued that the Bar did not allege that "full disclosure" required Petitioners to advise former clients Samper and Daltry that the Department of Justice ("DOJ") had requested, and, at FLIR's direction, Petitioners had produced, a FLIR document listing the compensation of FLIR's

officers. (Pet. at 37-38.) The Bar's only response is that it "need not plead every fact upon which it intends to rely," and that the compensation document fell within the generic allegation that Petitioners failed to disclose that Petitioners had "produced FLIR documents." (Resp. at 71, n 34.)

The Bar's argument is nonresponsive. The issue is not whether the Bar must "plead every fact," but whether the Bar's allegations "enable[d] [Petitioners] to know the nature of the charge or charges" against them. Bar Rule of Procedure ("BR") 4.1(c). It did not. The Amended Complaints made a general allegation: that Petitioners did not disclose that they "had already produced FLIR documents." (ER 22, 88.) Both legally and logically, a general allegation of that kind is defeated by a showing that Petitioners *did* disclose—on numerous occasions—that FLIR documents had been produced. The undisputed evidence was that Petitioners repeatedly told Myers, Glade, and Kaner (the former clients' independent counsel) that FLIR documents were being produced, and that those lawyers expressed no objection. (Myers 1034:8-20, 1037:13-20, 1069:25-1070:13, 1080:6-15; Ellis 2725:1-5; Exs. 99, 610.[4])

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[4] As in the Opening Brief, Petitioners refer to the hearing transcript 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 Trial Panel or lawyers, a generic "Tr." cite is used. An index of testimony is attached to the Opening Brief as App 6-10. Also as in the Opening Brief, references to exhibits are by the exhibit number used at the hearing. A comprehensive index of exhibits cited in either Petitioners' Opening Brief or Reply Brief, including corresponding page numbers in the Excerpt of Record and the Bar's Corrected Record, is attached as App 21-37.

Because the Bar's allegation as stated was shown to be false, the Panel did *not* find a violation of the charge as pled. Instead, the Panel found that Petitioners were required to disclose in their 2003 Consent Letters the DOJ's specific request for compensation information. The Amended Complaints contain no allegation that would put Petitioners on notice that they had to defend, not the *fact* that they had disclosed the production of FLIR documents, but the specific *contents* of one specific document produced—a document that is never mentioned in the Amended Complaints.[5] The Panel's rewrite of a charge against Petitioners, followed by a finding of guilty on the charge, was impermissible.

3. The February 14, 2003 letter.

Petitioners argued that the Bar did not allege that "full disclosure" required Petitioners to forward a copy of the entire six-page February 14, 2003 letter from Assistant U.S. Attorney Alan Garten. (Pet. at 38-40.) The Bar responds that Petitioners were given sufficient notice of this charge by the general allegation that the 2003 Consent Letters omitted "the nature or extent of Garten's demands for FLIR's cooperation" and the purported fact that FLIR "exchange[d] [its] cooperation for immunity." (Resp. at 71, n 34.) Once again,

[5] Indeed, the Amended Complaints say nothing at all about compensation information, and the Panel's charge was especially surprising given that, as a public company, FLIR's officers' compensation was (and still is) publicly reported pursuant to SEC rules. (Pet. at 71.)

the allegations in the Amended Complaints are materially different from the Panel's finding.

Petitioners presented substantial evidence that they disclosed on multiple occasions—before, in, and after the 2003 Consent Letters—their understanding of the communications between the DOJ and FLIR, including FLIR's unilateral agreement to cooperate and the DOJ's statement that it did not expect to indict FLIR. (Pet. at 57-69.) The Amended Complaints' generic references to the DOJ's demands for (or terms of) FLIR's cooperation did not give Petitioners notice that they would need to address whether, notwithstanding Petitioners' multiple disclosures, a copy of the Garten letter *itself* had to be forwarded to their former clients, especially since Petitioners rejected and the DOJ quickly abandoned the most material part of the letter—the DOJ's demand for Petitioners' personal involvement in FLIR's cooperation. (Ellis 2025:4-2027:1; Pet. at 19-21.)[6]

4. The Fitzhenry Representation.

Petitioners argued that the Trial Panel's finding that Petitioners were required to obtain consent from their former clients for Ellis to represent former FLIR General Counsel Fitzhenry in a potential Bar disciplinary matter was not

[6] In fact, the Bar's claim (that the Amended Complaints' references to demands for cooperation and a purported "exchange" must have referred to the February 14, 2003 letter) does not even match the Bar's own current version of events. The Bar now argues that the purported "exchange" between FLIR and the DOJ occurred in a meeting on January 30, 2003, and that Garten's demands were communicated in a meeting on February 12, 2003. (Resp. at 69.)

alleged and should be dismissed. (Pet. at 40-41.) The Bar concedes that the Trial Panel's finding of an omission was erroneous if the Panel was correct (and it was) that Ellis's representation of Fitzhenry in his Bar matter was not a former client conflict. (Resp. at 72 n 35.) The Bar does not acknowledge or address the fact that the claim was *not even pled* against Rosenbaum (which necessitates dismissal as to her forthwith), and was not pled in Causes 11 and 12 against Ellis, which were the stated bases of the Panel's finding.

C. Reply to Bar's Response to Petitioners' Second Assignment of Error.

Petitioners argued that the Trial Panel erred in finding that Petitioners' ministerial role of producing FLIR's documents and scheduling the dates of witness interviews of FLIR employees, at FLIR's direction and in response to specific requests from the DOJ (which had the power to subpoena documents and witnesses), was a conflict of interest. (Pet. at 41-53.) Petitioners also argued that the Trial Panel erred in finding that their disclosures to their former clients were insufficient for valid consent. (Pet. at 53-86.)

The Bar concedes that, by January 2003, Samper, Daltry, and Eagleburger were former clients, and that the applicable disciplinary rule is therefore former DR 5-105(C) (former client conflicts). (Resp. at 56.) The Bar does not acknowledge, however, that the only conflicts violation found by the Trial Panel was of former DR 5-105(*E*) (current client conflicts), which all

parties now agree is inapplicable. Based on the Bar's concession, the finding of this violation should be rejected.

Even if the Panel's findings of a conflict of interest and invalid consent are not rejected on this basis, none of the Bar's arguments provides any reason the findings should not also be rejected for the other reasons explained in Petitioners' Opening Brief:

1. Petitioners' 2003 Consent Letters stated that the DOJ investigation was related to the SEC matter, not that a conflict existed.

The Bar first argues that Petitioners' 2003 Consent Letters admitted both a "matter specific conflict" and an "information specific conflict." (Resp. at 56-59.) The Bar is incorrect.

The Bar misuses the "matter specific" and "information specific" framework. Neither term is, in and of itself, a test for whether a conflict of interest exists. Instead, each is designed to help determine whether two matters are "significantly related." *See In re Brandsness*, 299 Or 420, 430-31, 702 P2d 1098 (1985). And, establishing that two matters are "significantly related" is only the first of two steps necessary to establish a former client conflict, whether "matter specific" or "information specific":

> [A] lawyer who has represented a client in a matter shall not subsequently represent another client [1] in the same or a significantly related matter [2] when the interest of the current and former client are in actual or likely conflict.

DR 5-105(C). By focusing on the "matter specific" and "information specific" question, the Bar consistently and improperly ignores the critical requirement that, to find a violation, the Bar must prove that the clients' "interests" were in "actual or likely conflict."

Petitioners have never argued that the DOJ investigation was not "significantly related" to the SEC investigation—they so stated in the 2003 Consent Letters. However, given the scope of their limited ministerial role, FLIR's interests and Petitioners' former clients' interests were not "in actual or likely conflict." (*See* Pet. at 41-53; pp. 20-22, below.[7])

2. The Bar's new conspiracy theory.

Petitioners demonstrated in their Opening Brief that, as related to Stoel Rives' ministerial role, FLIR's interests and the interests of their former clients were not adverse. (Pet. at 48-53.) That is the crucial issue for determining whether a conflict of interest existed. *See* DR 5-105(C); *see also In re Hostetter*, 348 Or 574, 584, 238 P3d 13 (2010) ("The wording of [the conflicts rules] focuses on the *interests* of the former client. * * * But it is not just any *interests* of the former client that must survive. In the context of the disciplinary rule, it is the former client's interests that pertain to the matter in which the lawyer previously represented the former client.") (emphasis in original).

[7] Citations to other parts of this Reply Brief will be by page numbers.

The Bar responds with the astounding statement that "the Accused were helping FLIR help the DOJ build a criminal case against [their former clients]." (Resp. at 58.) The centerpiece of the Bar's argument is the Bar's never-before-alleged (and frankly preposterous) theory that Petitioners conspired with FLIR, the DOJ, and the SEC to funnel evidence against Petitioners' former clients to the DOJ through an artificial SEC case, all the while surreptitiously billing their time to the FLIR SEC matter, rather than to the FLIR DOJ matter. The Bar's new "conspiracy" theory not only was not alleged, it is completely contradicted by the record, the facts, and common sense.

a. Events occurring after April 11, 2003, were never pled.

The Bar's new theory focuses on events that purportedly occurred in connection with the SEC litigation and DOJ investigation after April 11, 2003, the date of Samper's consent to Petitioners' ministerial role with respect to FLIR. But the Amended Complaints do not contain any allegations relating to either the SEC or DOJ matters after April 11, 2003. In its Trial Memorandum, the Bar's Statement of Facts stopped at April 11, 2003. (R 1,726-1,755.) On appeal, however, the Bar now defines the DOJ phase to be from "January to September 2003." (Resp. at 4.) The Bar's attempt to introduce new allegations, after the evidence has closed, conflicts with a lawyer's right to notice and an opportunity to be heard (Pet. at 28-30), as well as this Court's admonition that the lawyer disciplinary process be conducted in a way "that, whatever the

outcome, an accused lawyer would think that he or she was treated fairly." *In re Hendrick*, 346 Or 98, 106, 208 P3d 488 (2009). Because Petitioners had no notice that the post-April 11, 2003, time period was at issue, and because it was not at issue before the Trial Panel, it is not properly before this Court. (*See* Pet. at 25-30; Resp. at 55 ("[T]he court can only find violations that the Bar has fairly pled.").

b. Petitioners refused to and did not assist the DOJ in building a case against their former clients.

Even the Bar acknowledges that "virtually all" of Petitioners' substantive work on the DOJ matter stopped "almost immediately" after Petitioners sent the 2003 Consent Letters. (Resp. at 61.) The Bar now conjectures, however, that Petitioners conspired with FLIR, the DOJ, and the SEC to assist the DOJ in building a criminal case against their former clients. (Resp. at 61-68.) For the reasons explained below, the Bar's theory is nothing short of absurd.[8]

[8] Apparently critical to the Bar's theory is proof that the DOJ and SEC had been in contact for 30 months before the DOJ notified Petitioners of its investigation, on January 27, 2003. (Resp. at 62, n 30.) The Bar offered no evidence on this point, and instead asks this Court (twice) to take judicial notice of the trial and appellate court decisions in the *U.S. v. Stringer, et al.*, criminal action. The Trial Panel excluded these opinions before the hearing began (R 1,665), and *the Bar does not challenge the Trial Panel's evidentiary ruling in that respect.* As a result, the opinions are not properly part of the record that this Court may consider on *de novo* review, and the Bar's reliance on the court decisions for evidence of any sort is inappropriate. Moreover, the record demonstrates irrefutably that the DOJ went out of its way to make sure that its potential involvement was kept secret, and that neither Petitioner had knowledge of DOJ involvement prior to January 27, 2003. (Pet. at 17; Ellis 2693:10-2694:14; Rosenbaum 851:20-23; Exs. 529, 590.)

(i) The Bar ignores critical facts.

The Bar ignores three important facts:

First, there is an obvious reason for Petitioners' work on the SEC matter in 2003—contrary to the Bar's brief, there *was* an active SEC case. On September 30, 2002, the SEC filed a civil complaint against former FLIR CEO Ken Stringer, who was not represented by Petitioners. (Ex. 356.) In connection with that case, both the SEC and Stringer sought discovery of FLIR's files and personnel. The discovery deadline was set for October 2003. (Ex. 301 at Dkt. No. 21.)

In late 2002, before the DOJ surfaced, the SEC began conducting informal interviews of FLIR personnel to gather evidence for its case against Stringer. (*See, e.g.*, Ex. 503 at R 10,089-90 (recording Rosenbaum's time spent preparing for and attending SEC interviews of FLIR personnel).) The following spring, the SEC's trial lawyers in the Stringer case continued to conduct interviews of Muessle, Almerfors, and others. (*Id.*; Rosenbaum 993:21-994:24, 998:10-16.) Meanwhile, Stringer's lawyers were also noticing depositions of FLIR personnel, including Almerfors, Daltry, Wynne, and Fitzhenry. (Ex. 503 at R 10,091, 10,093, 10,095-98 (recording Stoel Rives time spent reviewing and responding to subpoenas from Stringer's attorneys (*e.g.*, Jeanne Chamberlin), and coordinating depositions with them).)

The FLIR nonparty witnesses were represented in their depositions and interviews in the *SEC v. Stringer* case by Rosenbaum. (Wynne 2375:13-22.) Rosenbaum appeared on behalf of Daltry at the specific request of Daltry's criminal defense lawyer, Myers, who also represented Daltry at the deposition. (Myers 1062:21-1064:2, 1082:16-24; Rosenbaum 437:18-438:1.) Not surprisingly, the testimony in these interviews and depositions focused on Stringer, the defendant in the SEC case, and not on Petitioners' former clients, all of whom had settled with the SEC in the fall of 2002. (Wynne 2393:2-5; Pet. at 13.)

Thus, the SEC's activity in the spring of 2003 was not some Trojan horse designed to funnel evidence to the DOJ, but was directly related to the case that the SEC had filed against Stringer six months earlier, and in which discovery was set to close six months later. Discovery requests were initiated both by Stringer's lawyers and by the SEC (Ex. 503 at R 10,091, 10,093, 10,095-98), but not by the DOJ, which was not a party and did not attend the depositions. The Bar's entire premise that the SEC's activity "makes sense only in the context of the DOJ investigation" (Resp. at 67 (emphasis in original)) is plainly wrong.

Second, the Bar's unsupported premise that the DOJ needed to conduct discovery through the SEC is wrong. FLIR, acting through Wynne and CEO Earl Lewis, had committed to cooperate with the DOJ's investigation and to

make its personnel available for interviews. (Wynne 2358:16-18; Ellis 2705:12-2706:18.) The DOJ had no need to construct an elaborate, surreptitious scheme to use SEC interviews as "the vehicles by which FLIR [could] convey[ ] evidence to the DOJ." (Resp. at 67.)

Third, although Petitioners do not have the burden of proof, the evidence affirmatively established that the DOJ was proceeding independently of the SEC's case against Stringer. From the moment the DOJ announced its investigation, it was highly critical of the SEC and led Petitioners to understand that the DOJ was not going to rely on information acquired by the SEC, but rather would conduct its own investigation. (Rosenbaum 2904:17-25; Ellis 2704:16-23; Exs. 94, 151.) The DOJ's actions were consistent with Petitioners' understanding. For instance, the DOJ issued its own document requests to FLIR, even though the same documents had previously been produced to the SEC. (Roberts 1801:11-1802:4.)

(ii) The Bar misstates the facts on which it relies.

In addition to the Bar's errors just discussed, the "facts" which the Bar tries to string together in support of its conspiracy theory are not supported by the record. For example:

- Wynne did *not* tell Rosenbaum "that he had recommended that Garten talk to Muessle and Almerfors about the Swedish Drop Shipment, and had promised to make those witnesses available." (Resp. at 63.) The testimony the Bar cites for this "fact" was that Wynne "may have" told Garten it might be productive to interview "someone" at FLIR, with no mention of subject matter. (Wynne 2384:25-2385:2.)

- Wynne did *not* "email[ ] Rosenbaum that * * * the SEC wanted to interview or depose [Almerfors]." (Resp. at 63 (emphasis in original).) The message from the SEC was conveyed *from Rosenbaum to Wynne.* (Ex. 225) This sequence is consistent with Rosenbaum's understanding that the SEC wanted to interview Almerfors in connection with its case against former CEO Stringer, in which Rosenbaum was representing FLIR.[9]

- It is *not* true that, as of April 2003, the "SEC had shown no interest in pursuing" the Swedish Drop Shipment. (Resp. at 63.) In late 2002, the SEC requested interviews of several FLIR personnel, including Almerfors, about that transaction. (Ex. 503 at R 10,089-90.)

- The Bar speculates that Petitioners must have known of a "connection between the DOJ's interest in Almerfors and the SEC's deposition [of him] * * * because on the same day as the [SEC] deposition [April 22, 2003], Almerfors and Wynne met with Garten at Stoel Rives' offices." (Resp. at 64 (emphasis in original).) But Garten testified that he did not have substantive contact with Petitioners after February 2003. (Ex. 609 at ¶ 7.) The Bar cites Wynne's testimony, but Wynne prefaced his testimony by cautioning that he did not have a clear recollection of the meeting. (Wynne 2386:3-6.) Further, as the Bar acknowledges (again, in a footnote), Petitioners' records do not show that either of them attended the meeting and Garten testified that he does not recall whether either of them was there. Neither Petitioner was asked.

- It is *not* true that Muessle's SEC interview, which was attended by Rosenbaum, provided the information "about the Swedish Drop Shipment—conveyed by the SEC to the DOJ—that led to Samper's indictment." (Resp. at 65.) In the testimony cited by the Bar, Wynne testified that Garten received information about the Swedish Drop Shipment from *a private meeting* Garten had with Muessle. (Wynne 2409:2-18.) Garten confirmed that his information came from a meeting with Muessle, and that, "[t]o the best of my knowledge, I *never received anything from the SEC* directing [my attention] to the Swedish Drop Shipment." (Ex. 609 at ¶ 3 (emphasis added).)

- It is *incorrect* that "the SEC had no independent reason" for wanting FLIR testimony about the Swedish Drop Shipment. (Resp. at 67 (emphasis in original).) To the contrary, Samper, Wynne, Muessle,

[9] This is the second time Petitioners have corrected the Bar's inaccurate sequence of these events. (Rosenbaum 992:11-17.)

and Almerfors had repeatedly identified Stringer, the sole remaining defendant in the SEC case, as the source of the entry for the Swedish Drop Shipment. (Ex. 140 at 470:22-471:16; Wynne 2398:12-2399:17; Muessle 2498:2-2500:5; Rosenbaum 751:15-753:1.)

- It is *not* true that Petitioners learned about the tactics and strategy employed by the DOJ through "their close communication with Wynne." (Resp. at 67.) Petitioners and Wynne had agreed that they would not discuss the substance of the DOJ investigation, and they did not do so. (Ex. 418; Wynne 2376:19-2377:19; Rosenbaum 919:19-920:2, 928:16-929:7.)

- It is *not* true that the SEC's "interest in deposing Muessle, Almerfors, Daltry, and Fitzhenry" in April 2003 was "sudden." (Resp. at 63, 67.) In the fall of 2002, *after* Petitioners' clients had resolved their cases with the SEC, the SEC requested informal interviews with FLIR personnel, including Almerfors, and Rosenbaum met with FLIR personnel to help them prepare. (Ex. 503 at R 10,089-90.) There was nothing sudden or unexpected about the SEC's—and Stringer's—interest in then conducting formal interviews and depositions the following spring, as the discovery deadline approached.[10]

(iii) The Bar's tale of "disguised" billing.

Finally, the Bar contends that Petitioners "disguised" their work for the DOJ "as a continuing representation of FLIR in the SEC matter" by designating their time within Stoel Rives' internal billing system to the FLIR SEC matter, not the FLIR DOJ matter. (Resp. at 61-68.) Because this claim was neither pled nor asserted during the 12-day hearing, Petitioners had no notice that they should present evidence as to how their time was entered.

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[10] The Bar also suggests that Petitioners sent the transcripts of the SEC depositions that occurred in the spring of 2003 to the DOJ. (Resp. at 66.) The Bar never asked Petitioners or any other witness about the cited time entry, and there is no evidence regarding what transcripts were included in the letter Rosenbaum sent to Wynne and Garten, much less the circumstances under which they were sent.

Regardless, the Bar's theory collapses under the weight of the evidence that was admitted. The SEC was actively litigating its case against Stringer, and both the SEC and Stringer's attorneys were obtaining discovery from Petitioners' client, FLIR, in that case. This work was appropriately charged to the SEC matter.

Moreover, whom would Petitioners have been misleading by billing their time to the SEC matter? The bills were sent to FLIR (Ex. 503; Rosenbaum 490:1-14), not to the former clients. And none of the work was being done in secret. Samper's counsel, Kaner, testified that she knew that Petitioners were continuing to represent FLIR and its personnel in connection with the SEC's case against Stringer, was generally aware of what was happening in that case, was receiving transcripts from Stoel Rives of the depositions Rosenbaum attended, and did not object or express any concern. (Kaner 2080:2-2081:7, 2083:4-10, 2085:21-2086:1; Ellis 2559:18-2560:12; *see also* Exs. 77, 196, 577, 606; Roberts 1826:15-1827:19.)

c. Petitioners performed no substantive work on behalf of FLIR on the DOJ matter.

The Bar fly-specks Petitioners' DOJ billings in an effort to show that Petitioners did substantive work, not just the ministerial tasks Petitioners described in the 2003 Consent Letters. That is a remarkable contention, because the Bar expressly disclaimed any such argument at the hearing: "[T]he bar's case is not based on a violation of a promise to only produce documents

and schedule witnesses. The bar's case is a conflict of interest case." (Tr. 2204:10-13.) The Bar did not allege that either Petitioner exceeded the limited scope described in the 2003 Consent Letters.

Nonetheless, the Bar now argues that Rosenbaum provided substantive assistance to FLIR on March 17, 2003, when, as the Bar describes it, she told "Wynne that FLIR should not produce documents to the DOJ before Stoel Rives reviewed them." (Resp. at 61.) The Bar's description is not accurate. Rosenbaum's email simply asked whether a lawyer—either one from Stoel Rives or Wynne—should review FLIR employee communications to the DOJ before they were sent to the DOJ, as opposed to their being sent directly by employees. (Ex. 229; Rosenbaum 997:16-998:4.) Asking that question fell squarely within Petitioners' ministerial role of assisting FLIR in producing its documents, not to mention Petitioners' commitment to their former clients to ensure that no personal confidences were voluntarily disclosed. (Ex. 418.) It was in no way adverse to the interests of any of Petitioners' former clients.

The other argument made by the Bar is that "[a] document review necessarily involves legal judgment." (Resp. at 61.) But the process for producing *FLIR's* documents did not entail a typical document review, in which lawyers examine documents to ensure they are not privileged, not subject to other objections, and otherwise required to be disclosed. FLIR (whose documents they were) had waived its privilege, had made no objections, and

had agreed to provide any documents that the DOJ requested (*e.g.*, Ex. 182; Wynne 2359:5-8), nearly all of which had already been collected and organized during the SEC investigation (Roberts 1801:11-1802:4). FLIR's document production was handled almost entirely by a Stoel Rives paralegal, Kelly Roberts, who testified that all or nearly all of the documents she produced had already been produced to the SEC. (*Id.*; 1804:2-7.) The only substantive review that Stoel Rives performed was to monitor the document production for any former client's personal confidential information (Roberts 1820:18-1821:5), just as the 2003 Consent Letters said it would do to ensure that the interests of the former clients were not compromised (Ex. 418). There is no basis to assert that this review was adverse to the former clients' interests.

The Bar cites as evidence of a conflict the reference in Petitioners' 2003 Consent Letters to "advising FLIR," a point which Rosenbaum reiterated to Myers when he consented on behalf of his client, Daltry. (Resp. at 60-61.) Myers testified, however, that he did not interpret this wording as changing the scope of Stoel Rives' role beyond the ministerial work of producing documents and scheduling interviews. (Myers 1045:25-1046:7.) In fact, that is how the letters should be read by anyone who is not looking to uncover a conspiracy. Moreover, every witness who was asked testified that, in the witness's opinion, Petitioners never exceeded the limits of the ministerial role. (Neil 2279:14-17; Myers 1113:16-19; Garten Ex. 609 at ¶ 7; Ellis 2597:11-2598:8, 2721:4-11;

Rosenbaum 900:7-10, 919:6-10.) The Bar's position is therefore without any support in the record.

3. A lawyer's representation may be narrowed in scope to avoid a conflict.

The Bar argues alternatively that Petitioners cite no authority for the proposition that "ministerial representations are somehow exempt from the disciplinary rules in general or the conflicts rules in particular." (Resp. at 60.) Petitioners' position is not that the limited scope of their role exempted them from the rules, but that that limited scope is the lens through which their clients' interests must be analyzed. (Pet. at 48; *see also Hostetter*, 348 Or at 584 (explaining that the conflicts analysis does not hinge on "just any *interests* of the former client," but must consider the interests involved in the representation) (emphasis in original).)

This was the widely-accepted view in Oregon, *see* The Ethical Oregon Lawyer § 9.13 (2003) ("If a lawyer can limit a representation to avoid an actual or a likely conflict, then no such conflict will exist."), and elsewhere, *see* Restatement of the Law Governing Lawyers § 121, cmt c(iii) ("Some conflicts can be eliminated by an agreement limiting the scope of the lawyer's representation if the limitation can be given effect without rendering the remaining representation objectively inadequate."). In fact, shortly before Petitioners agreed to the ministerial role, the New York City Bar, a source elsewhere relied on by the Bar (Resp. at 47 n 23), concluded: "[W]e see no

reason why the client cannot limit the scope of the lawyer's representation to eliminate an adversity between another client and the lawyer, and thereby avoid any conflict." New York City Bar Formal Ethics Opinion No. 2001-3.[11]

The Bar cites *In re O'Neal*, 297 Or 258, 683 P2d 1352 (1984), for the rule that a "lawyer cannot mitigate conflict by limiting scope of representation." (Resp. at 60 and n 29.) But *O'Neal* was decided under a prior version of the disciplinary rules, which used a different framework for conflicts. *See id.* at 261-62 (prohibiting representation where lawyer's "exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected * * * except * * * [where] it is obvious that he can adequately represent the interest of each and if each consents").

Further, *O'Neal* involved the concurrent representation of multiple criminal defendants whose interests were by nature antagonistic. Such a representation is generally prohibited under the ethics rules, a point the Court emphasized in its holding. *See id.* at 265 ("The likelihood of conflicts arising during the representation of multiple criminal defendants is well known.") ("The potential for conflict of interest in representing multiple [criminal] defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations * * * .") (quoting The American Bar Association Project on Standards for Criminal Justice,

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[11] This opinion is available at www.nycbar.org/ethics/ethics-opinions-local/2001-opinions/1038-formal-opinion-2001-3.

Standards relating to the Prosecution Function and the Defense Function § 3.5(b)); *see also* The Ethical Oregon Lawyer § 9.14 (2003) (observing a high risk of conflict among criminal defendants). The lawyer in *O'Neal* "testified that he was aware of the conflict, but [ ] justified his multiple representation [of criminal co-defendants] because it was limited to negotiating the guilty pleas." *O'Neal*, 297 Or at 263. This Court explained that negotiating plea agreements involves myriad conflicts of interest, which the lawyer's limitation did not (and likely could not) remove. *Id.* at 265-66. *O'Neal* is inapposite.

4. The former clients' interests were served by Stoel Rives serving as FLIR's document depository.

The Bar does not dispute that Petitioners' former clients benefitted from Stoel Rives continuing to serve as FLIR's document depository, but argues this fact is "obviously irrelevant." (Resp. at 68.) The Bar is wrong.

The question that the conflicts rules pose is whether the clients' objective interests were adverse. *See* DR 5-105(C); *see also Hostetter*, 348 Or at 584 ("The wording of those rules focuses on the *interests* of the former client.") (emphasis in original). The potential benefit a former client might receive from a particular legal strategy is relevant to assessing that client's objective interests. For instance, Petitioners' former clients had an interest in continued access to FLIR's documents and in making sure their privileges and confidences would be protected. (Pet. at 49-50.) Meanwhile, FLIR had an interest in minimizing the cost and delay associated with complying with the DOJ's document requests.

(Wynne 2373:5-10, 2377:1-8.) Those interests were each served by having Stoel Rives act as FLIR's document depository, and therefore not only were not adverse—they were aligned.

The hearing evidence demonstrated that these benefits were not only contemplated, but actually realized. The evidence was undisputed that FLIR, through Stoel Rives, made its files available to Samper's counsel and that Stoel Rives provided documents to them on numerous occasions. (Pet. at 50.) For example, Kaner testified that the "whole file was made available to us and that was what we were then obtaining at that point [in 2003]." (Kaner 2081:19-2086:1; *see also* Pet. at 50.) The Bar cites an email from Kaner suggesting the contrary (Resp. at 68, n 33) but ignores the fact that Kaner in the email was seeking *additional assistance from FLIR*, not from Stoel Rives. At the hearing, neither Kaner nor Petitioners (nor anyone else) was asked about that email.

5. No lawyer believed there was a conflict.

The Bar argues that it is irrelevant that none of the lawyers with whom Petitioners conferred, or who were involved in representing FLIR, the former clients, or for that matter the DOJ, thought there was a conflict of interest. (Resp. at 68.) In fact, the consistent and contemporaneous views of 10 experienced members of the Oregon State Bar (Wynne, Glade, Kaner, Neil,

Garten, Myers, Ramfjord, and Jarvis,[12] as well as Petitioners) that there was no likely or actual conflict is powerful evidence that the "objective interests" of the current and former clients were not adverse, especially since these lawyers were in the best position to know of their clients' individual interests.

6. Petitioners provided full disclosure to their former clients.

The Bar asserts that Petitioners' 2003 Consent Letters did not provide the degree of "full disclosure" necessary for informed consent. (Resp. at 70.) Incredibly, the Bar does not discuss the Trial Panel's findings on this issue or respond to Petitioners' arguments. Instead, the Bar misstates the evidence and then advances a new laundry list of purported facts, many neither alleged nor true, that it says Petitioners were required to disclose.[13] (Resp. at 70-72.) Again, the Bar failed to include these allegations in the Amended Formal Complaints' 153 paragraphs—not even in Ellis paragraph 75 and Rosenbaum paragraph 64, where it listed its claimed omissions.

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[12] *See* Wynne 2376:19-2377:19; Neil 2276:19-22, 2278:4-11; Jarvis:1863:9-20, 1869:5-11; Kaner 2146:21-2147:20; Myers 1043:25-1044:8; Ramfjord 862:22-864:7; Exs. 102, 609 at ¶ 7.

[13] For example, the Bar claims that at the January 30, 2003 meeting Garten "offered FLIR informal 'immunity' from prosecution in exchange for helping him build a criminal case." (Resp. at 69.) The Bar cites no testimony in support of its claim. The only two witnesses present at that meeting testified to the contrary (Ellis 2703:21-2705:3; Rosenbaum 940:12-941:9), and Rosenbaum's contemporaneous notes say nothing about immunity (Ex. 566). On the same page, the Bar also fails to note that, although Garten requested Petitioners' "proactive assistance," the testimony was undisputed that in both their February 18, 2003 letter and in the February 19, 2003 meeting, Petitioners rejected Garten's request for assistance. (Pet. at 19-21.)

Perhaps more remarkably, the Bar also repeats the Trial Panel's fundamental error of failing to acknowledge or apply the controlling definition of "full disclosure:"

> 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). Instead, the Bar invents its own definition of "full disclosure," citing an irrelevant treatise chapter on the "bespeaks caution" doctrine in securities law. (Resp. at 70, citing Mallen and Smith, *Legal Malpractice* § 14.19.) The Bar's failure to rely on and apply the wording of the disciplinary rule it is charged with enforcing is astonishing.

Once the controlling standard is applied and the Bar's factual errors are corrected, it is clear that none of the nine "facts" allegedly omitted was a material matter that Petitioners were required to disclose in order to obtain informed consent.

(1) *Potential adverse consequences (and accompanying risk) of Petitioners performing the ministerial role.* The Bar argues that, although Petitioners stated that there may be potential adverse consequences, they were required to also "describe what [the potential adverse] consequences were" of Petitioners acting in the ministerial role. (Resp. at 70.) In fact, the letter was referring to the potential adverse consequences of *the DOJ investigation* (Ex. 418)—which were obvious. If the Bar is claiming that the letter needed to

disclose the "potential adverse consequences" of Stoel Rives, rather than some other law firm, performing the ministerial role, the Bar does not say what these were, and Petitioners know of none beyond those that were expressly addressed in the 2003 Consent Letters, such as protecting the former clients' confidential information. Nor does the Bar cite testimony from any witness at the hearing identifying any such potential consequences.

The Bar relies solely on Jarvis's suggestion that Rosenbaum insert a sentence explaining that Stoel Rives might be "more inclined to cooperate with the DOJ due to [its] continuing representation of FLIR." (Resp. at 73-74.) Amazingly, the Bar fails to inform the Court that Jarvis testified at the hearing that Rosenbaum was right not to include this language because it would not have been accurate. (Jarvis 1886:15-1887:24; Rosenbaum 651:2-17.)[14]

(2) *"[T]hat the DOJ had demanded [Petitioners'] affirmative assistance."* (Resp. at 71.) Petitioners did not include this statement because when they wrote the conflict waiver letters, that "demand" had been rejected and withdrawn. (Pet. at 67-68; Exs. 163, 609 at ¶ 7.) Further, Rosenbaum had specifically informed Glade that Garten had initially asked Petitioners to help

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[14] The Bar observes that Petitioners also consulted Stoel Rives partner Per Ramfjord, and states that Ramfjord thought Petitioners' 2003 Consent Letter was "not a 'normal conflict waiver letter.'" (Resp. at 74, n 36.) But Ramfjord was not speaking about Petitioners' 2003 Consent Letters—he was speaking about the informational letter Petitioners sent to Glade on February 20, 2003 (Ex. 99), which Ramfjord described as a "good letter" and "an appropriate letter to send" (Ramfjord 874:7-24, 876:13-17).

"prepare his case," and that Petitioners had rejected his request. (Ex. 103.) *See* The Ethical Oregon Lawyer § 20.6 (2003) (explaining that former DR 10-101(B) does not require "that any or all of the matters discussed between the lawyer and the client actually be referenced in writing").

(3) *"[T]hat FLIR had agreed to provide [assistance] in order to save itself from criminal prosecution."* (Resp. at 71.) Such a disclosure would have been false. (*See* Pet. at 58-69.)[15]

(4) *Petitioners "had assured the DOJ that they could 'arrange for' Wynne to respond to any request made problematic by [Petitioners'] own ethical obligations."* (Resp. at 71.) On February 18, 2003, Petitioners sent Garten a letter notifying him that they would not take any action that violated their ethical duties to their former clients. (Ex. 182.) Because the duties were theirs and not FLIR's, and because FLIR had agreed to cooperate, Petitioners also informed Garten that Wynne would be available to respond to the DOJ's requests to the extent Petitioners could not. (*Id.*; Rosenbaum 899:22-900:6.) The Bar cites no evidence and provides no explanation for why Petitioners' factual report that Wynne would be available to respond to the DOJ was

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[15] The Bar's excerpt of Garten's February 14, 2003 letter includes the statement: "In this case, FLIR seeks immunity from prosecution * * * ." (Resp. at 25.) But Garten later explained that neither FLIR nor its counsel ever sought immunity for FLIR. (Ex. 609 at ¶ 5.) Instead, he explained that his statement "was simply [his] interpretation of FLIR's clear message that it wanted to cooperate," and that he believed that "an application of the factors in the Thompson memo would not result in a prosecution." (Ex. 609 at ¶ 5.)

material to any "potential adverse impact" of Stoel Rives performing the ministerial role. The evidentiary burden is the Bar's; it has not even attempted to meet it.

(5) *Petitioners "had for weeks been responding to the DOJ's demands by producing documents and arranging for interviews."* (Resp. at 71.) Petitioners repeatedly informed Glade, Kaner, and Myers that FLIR was cooperating with the DOJ investigation (Pet. at 69-74; Exs. 99, 101, 418), and this matter was addressed fully in Petitioners' Opening Brief (Pet. at 69-74; 85-86). The Bar has not even acknowledged Petitioners' position, much less offered a response.

(6) *Petitioners "had (as requested by the DOJ) already produced Samper and Daltry's compensation information."* (Resp. at 71.) This issue is also addressed fully in Petitioners' Opening Brief. (Pet. at 69-74.) The Bar has again offered no response.

(7) *FLIR "was again trying to interest the government in the Swedish Drop Shipment."* (Resp. at 71.) As discussed above, Petitioners repeatedly disclosed that FLIR was cooperating with the DOJ investigation. Further, contrary to the Bar's assertion, Wynne testified that he viewed FLIR's role narrowly—"responding to [Garten's] information requests in as concise and prompt a way as we possibly could." (Wynne 2370:19-2371:6.) Wynne also testified that FLIR had no interest in accusing Petitioners' former clients of wrongdoing, and that he told Garten that he "didn't think [Garten] had much of

a case." (Wynne 2429:15-2430:19, 2367:1-3.) At the hearing, Wynne was asked whether he called the Swedish Drop Shipment to Garten's attention. He testified that it was "one of the transactions [they] discussed" when he and Garten went through the company's accounting (Wynne 2384:17-21), not that he called the transaction to the DOJ's attention, much less was trying to "interest" the DOJ in it. In addition to being factually incorrect, the Bar does not explain why this disclosure would have been material to any "potential adverse impact" of Stoel Rives performing the ministerial role.

(8) *Petitioners "intended to help FLIR provide information to the SEC to be shared with the DOJ."* (Resp. at 71.) This issue is addressed fully at pp. 11-20, above.

(9) *"Ellis was asserting in Fitzhenry's disciplinary matter that Samper and Daltry were responsible for misrepresentations."* (Resp. at 71-72.) This statement is untrue, and was addressed fully in Petitioners' Opening Brief. (Pet. at 74-79.) The Bar has offered no response, beyond repeating its baseless accusation. The issue is also discussed in response to the Bar's Additional Question on Review No. 2. (*See* pp. 80-90, below.)

In short, none of the information cited by the Bar constituted a material omission under former DR 10-101(B).[16]

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[16] The thoroughness of Petitioners' 2003 Consent Letters is also evident by comparing those letters with the model consent letters that were available to Oregon lawyers at the time. *See, e.g.,* "Letter 7—Former Client Conflict

7. Petitioners were not required to suspend their activity until all former clients had consented.

The Bar contends that Petitioners' ministerial work in February and March 2003 also was a conflicts violation, because they did not receive consent from Samper until April 11, 2003. (Resp. at 68-70.) This issue is addressed in Petitioners' Opening Brief. (Pet. at 85-86.) The Bar has offered no response.

D. Reply to Bar's Response to Petitioners' Third Assignment of Error.

In a single, conclusory sentence, without citation to evidence or authority, the Trial Panel found that Petitioners withheld information from their former clients that they had in mind and knew to be material, in violation of former DR 1-102(A)(3). Petitioners provided five pages of case law, evidence and argument establishing that the Trial Panel erred. (Pet. at 86-91.)[17]

In its response, the Bar does not attempt to defend the Trial Panel's finding or to address Petitioners' cited authority, evidence, and arguments. Instead, it alleges a new list of purportedly deliberate omissions, some of which are not even included in the Amended Complaints and should be rejected for that reason. (*Compare* Resp. at 70-72 with Resp. at 74-75, and both to ER 22-

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Waiver Letter—to Former Client Being Opposed," published in connection with Peter R. Jarvis, Mark J. Fucile, Bradley F. Tellam, "Waiving Discipline Away: The effective of disclosure and consent letters," *Oregon State Bar Bulletin* (June 2002), available at www.osbar.org/_docs/bulletin/02jun/letter7.pdf and attached as App 38-39.

[17] As Petitioners noted in their Opening Brief, the Trial Panel's finding was also internally inconsistent, given that the Panel found that Petitioners were, at most, negligent. (Pet. at 90.)

23 and 88-89.) Rather than attempt to explain why each newly alleged fact was (1) true, (2) in Petitioners' mind, and (3) known by Petitioners to be material, the Bar (1) complains darkly that Petitioners sent the 2003 Consent Letters because Jarvis advised them that they should do so to protect themselves from Bar scrutiny later—as if that were a bad reason (Resp. at 73), (2) rattles off a series of purported "half-truths" (Resp. at 74-76), and then (3) levels the intentional misrepresentation charge in the same fashion the Panel did: a single, conclusory sentence without citation or justification (Resp. at 76). And, like the Trial Panel, the Bar totally ignores the definition of "full disclosure" applicable to a consent request—former DR 10-101(B).[18] With respect to the Bar's latest list of alleged material omissions (which again differ substantially from those listed in the Amended Complaints), Petitioners respond as follows:

(1) *FLIR had already produced documents, including documents previously withheld based on privilege and documents never before requested.* (Resp. at 74.) Petitioners told Glade, Kaner, and Myers repeatedly that the DOJ was requesting and FLIR was producing documents, and none of those lawyers objected, expressed concern, or inquired as to the content of the documents. (Pet. at 85-86.) The document produced that had been subject to a claim of privilege—by FLIR—in the SEC matter consisted of notes by counsel to the

[18] "'Full disclosure' means 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."

FLIR Special Committee, which included a one-line statement by Ellis favorable to Samper. (Rosenbaum 889:8-890:13; Ellis 2725:15-2726:10; Ex. 383 at R 8,387.)[19] Moreover, the Bar's only example of a document that had not previously been provided to the SEC is Samper's and Daltry's compensation information. The Bar provides no citation for its statement, and it is incorrect. Glade and Kaner had produced Samper's financial information to the SEC (Ex. 601; Kaner 2047:15-2049:2), and Daltry's had been published in the company's securities filings pursuant to SEC rules (Ex. 628; Ellis 2726:11-24; Myers 1092:20-1093:2).

(2) *"DOJ offered FLIR the chance to save itself from criminal prosecution" by cooperating.* (Resp. at 74.) The Bar cites no evidence to substantiate its statement, because the evidence demonstrated that Garten had repeatedly told Petitioners that he did not intend to seek an indictment against FLIR. (*See* Pet. at 59-69.) Moreover, the DOJ stated during its first meeting with Petitioners that FLIR would not be a target of its investigation. (Ex. 566.)

(3) *"FLIR was 'fully committed' to the cooperation effort."* (Resp. at 74.) Petitioners disclosed repeatedly that FLIR had committed to cooperate with the DOJ. (*E.g.*, Exs. 99, 418.)

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[19] Ellis told Kaner in their very first conversation about the DOJ investigation that the DOJ had requested the Special Committee counsel file. (Exs. 94, 151; Ellis 2725:1-5.)

(4) *FLIR "had already waived privileges."* (Resp. at 74.) Petitioners' conflict waiver letter stated: "FLIR has agreed to waive the attorney-client privilege." (Ex. 418.) Further, the Thompson Memorandum, which Petitioners had provided to Glade and Kaner (Ex. 94; Rosenbaum 886:16-887:25), and which was well known in the criminal defense bar (Ex. 609 at ¶ 4), stated that waiving privilege was a standard component of cooperation (Ex. 123 at ER 288).[20]

(5) *FLIR had already "facilitated access to witnesses."* (Resp. at 74.) No DOJ witness interviews had occurred when the 2003 Consent Letters were sent.

(6) *FLIR had already "provided helpful suggestions such as, 'look at the Swedish Drop Shipment,'" and had "convinced the DOJ to look closely at the Swedish Drop Shipment."* (Resp. at 74, 75.) The Bar misstates the evidence. The Swedish Drop Shipment was not new—it had been the subject of a public restatement by FLIR (Ex. 43; Ellis 2527:15-20) and substantial testimony volunteered to the SEC by Samper (Ex. 140 at 470:22-471:16)—and it was

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[20] In its Statement of Facts, the Bar claims that Petitioners' 2003 Consent Letters "did not disclose that * * * FLIR had waived its attorney-client privilege with both Stoel Rives and Fitzhenry through 2001." (Resp. at 32 (emphasis in original).) That is not accurate. The letters stated that FLIR had waived privilege "with respect to *all* communications with its counsel, *including Stoel Rives*, through December 31, 2000." (Ex. 418 (emphasis added).) Although an earlier letter references a time period of 1997-2001, no waiver actually occurred for communications in 2001, and the Bar does not cite any evidence to the contrary. (Ex. 569; Ellis 2781:12-2784:13.)

considered by Petitioners to be evidence relating to Stringer, a non-client (Pet. at 81-83). The Bar cites no evidence that Wynne "convinced" Garten to look closely at it, or that Wynne's comment to Garten was in Petitioners' minds, or that they considered it material, when they sent the 2003 Consent Letters.[21] Nor has the Bar ever explained how this issue related to any "potential adverse impact" of Stoel Rives performing the ministerial role.

(7) *Petitioners "assured Garten that they would find a way to work around their ethical responsibilities" by "help[ing] ('arrange for') Wynne to do so."* (Resp. at 74-75.) Absolutely false. The Bar is doubling down on its mischaracterization of Petitioners' words and intent when they told Garten that, because Petitioners could not assist him, Garten would need to speak with Wynne. (*See* pp. 27-28, above.)

(8) *Petitioners had met with Garten three times.* (Resp. at 75.) Petitioners informed Glade and Kaner in detail about their meetings with the DOJ. (*E.g.*, Exs. 94, 99, 100, 101; Ellis 2705:4-6, 2715:4-19, 2867:10-12; Rosenbaum 647:2-15, 809:13-15, 851:11-19, 886:9-15, 887:5-10, 900:13-25.) Because Daltry was out of town and not returning Rosenbaum's communications, Petitioners did not know who his criminal lawyer would be and could not speak with that lawyer (or even Daltry) until after Petitioners' final meeting with the DOJ. (Pet. at 18.) At that time, they told Myers about

[21] Notwithstanding the Bar's persistent use of "Accused," there was no evidence that Ellis even knew about a conversation between Wynne and Garten.

their meetings with the DOJ. (Ex. 610.) For whatever the relevance of the specific *number* of meetings, Petitioners told Myers that they had met with the DOJ three times: "[Ellis] + Rosenbaum have met with AUSA x3." (Ex. 610 (Myers' notes of conversation); Myers 1036:4-16.)

(9) *Garten had identified Samper, Daltry, Eagleburger, and Fitzhenry as targets.* (Resp. at 75.) Petitioners' 2003 Consent Letters stated: the DOJ "has informed us that it is currently investigating individuals who were named in the SEC complaint and related actions [*i.e.,* Stringer, Samper, Eagleburger, Fitzhenry, and Martin], and possibly Bob Daltry." (Ex. 101.) Further, even before those letters were sent, Petitioners had already told Glade—verbally and by letter—the information they had about the DOJ's targets. (Exs. 100 ("Mark [Samper] is a target * * * as is Stringer, Eagleburger, Martin."), 99 (The DOJ "has identified Mark, Ken Stringer, Bill Martin, Steve Eagleburger, Robert Daltry, and Jim Fitzhenry as individuals who may need lawyers."). They had also provided this information to Myers. (Ex. 610 ("AUSA pursuing Stringer, Martin & Sampier [sic];" "[l]ikely Stringer, Martin & Sampier [sic] – likely not Def., Fitzhenry, Eagleberger [sic];" "[Ellis] [s]ays impression is AUSA targeting Stringer, Sampier [sic], Martin and to lesser degree: Eagleburger, Daltry, Fitzhenry").)

(10) *"Garten was perhaps willing to offer Daltry and Fitzhenry (but not Samper) a deal."* (Resp. at 75.) Directly contrary to the Bar's allegation,

Rosenbaum *told* Glade, two weeks before the 2003 Consent Letters were sent, that Garten was willing to consider making an offer to Daltry and Fitzhenry, but not to Samper. (Rosenbaum 646:1-13; Ex. 100.) As to Daltry, Myers' notes reflect that on February 25, 2003, Rosenbaum told Myers that "AUSA thinks Daltry and [illegible but likely refers to Fitzhenry] inclined to give immunity if cooperate." (Ex. 610; *see also* Myers 1034:8-14.) Fitzhenry did not waive privilege, so his communications with Petitioners are not in the record. (Tr. 2173:25-2174:10.)[22]

(11) *Garten had demanded Petitioners' personal assistance, which they considered a threat against FLIR and had not unambiguously rejected.* (Resp. at 75.) What part of "No" is ambiguous? (*See* Pet. at 67-68.) Petitioners unequivocally told the DOJ, FLIR, and their former clients that they could not and would not assist the DOJ in developing its case against their former clients. (Wynne 2376:22-25; Ellis 2802:13-18; Rosenbaum 640:14-23; Ex. 182.) By the end of the day on February 19, 2003, Garten had adopted the same unambiguous view as Petitioners: they could not and would not assist the DOJ's case. (Ex. 163.)

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[22] Throughout its Statement of Facts, the Bar states that there were no communications between Petitioners and certain former clients, including Fitzhenry. The Bar fails to disclose that Samper is the only former client who waived his attorney-client privilege with Stoel Rives during discovery. (*See, e.g.*, Tr. 681:10-15.) The Bar's attempt to transform the former clients' decisions not to waive privilege into evidence that no communications existed is improper and unfounded.

(12) *Ellis was arguing on behalf of Fitzhenry that Samper and Daltry were responsible for misrepresentations.* (Resp. at 75.) The Bar's statement is not true. (*See* p. 29, above; pp. 80-90, below; Pet. at 75-79.)

Finally, the Bar asserts that two of Jarvis's recommended revisions to the 2003 Consent Letters were "fundamental requirements," and that not including them constituted knowing misrepresentations.[23] (Resp. at 73.) As to the first, Jarvis's suggestion that Petitioners state that they "might be more inclined to cooperate with the DOJ" (Ex. 211) was incorrect, and Jarvis later agreed that Rosenbaum was right not to include it. (*See* p. 26, above; Jarvis 1886:15-1887:24.) Rosenbaum testified that she decided not to include it because she believed Stoel Rives would be *less* cooperative due to its ongoing duties to its former clients, and that Jarvis agreed. (Rosenbaum 651:5-17.) There is no evidence that Ellis was even aware of this discussion. The evidence is undisputed that Rosenbaum did not consider this statement material to the consent request. (*Id.*)

As to the second, Jarvis suggested that Petitioners write: "Regardless [of the direction in which the DOJ takes the investigation], we will not represent FLIR in responding to DOJ requests unless we have your consent to do so." (Ex. 211.) Although Jarvis and Rosenbaum both testified about Jarvis's

[23] The Bar embraces Jarvis's ethics analysis when it believes the analysis supports the Bar's case, and labels it "impermissible expert testimony" when it does not.

proposed edits, the Bar never asked Jarvis or Rosenbaum why this proposed wording was not included. The Bar's only explanation for why failure to include that statement constituted a material omission was that, without it, Petitioners' 2003 Consent Letters failed to state "that the representation depended on the recipients' consent." (Resp. at 73.) But the letters cited the former client conflicts rule and made clear that, under that rule, a lawyer cannot continue with a conflicted representation "unless the former and current clients consent." (Ex. 418.) Moreover, the former clients were represented by separate counsel—in whose care the letters were sent—to help the former clients understand the import of the consent letters. *See generally* The Ethical Oregon Lawyer § 20.2(A) (2003) (the explanation required under former DR 10-101(B)(1) should be calibrated to the sophistication of the recipient) (citing the Restatement (Third) of the Law Governing Lawyers § 122).[24]

E. Reply to Bar's Response to Petitioners' Fourth Assignment of Error.

The Trial Panel found that the following sentence in the FLIR Wells Submission constituted a conflict of interest:

> Finally, to the extent wrong-doing may have occurred, we understand that the SEC is pursuing fraud claims against one or more individuals who may have been responsible.

(ER 168-170.) Petitioners explained in detail in their Opening Brief why this sentence did not constitute or evidence a conflict of interest. (Pet. at 92-100.)

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[24] Again, the Bar's use of the word "Accused" to refer to both Petitioners hides the fact that there was no evidence that Ellis was aware of Jarvis's suggestion.

The Bar does not respond to Petitioners' arguments. Instead, it admonishes the Trial Panel for not reviewing FLIR's Wells Submission "closely enough" (Resp. at 50), but nevertheless argues that the Trial Panel's finding of a violation should be affirmed because FLIR's Wells Submission identified Petitioners' former clients as "righteously discarded wrongdoer[s]." (Resp. at 51.) The Bar's use of this alliterative description of the submission is colorful, but it illustrates the Bar's unfortunate tendency, throughout these proceedings, to alter the words of a document and then attack the content of its revisions. When one considers the words actually used, the Bar's allegations collapse.

1. The Bar misconstrues the FLIR Wells Submission.

The FLIR Wells Submission did *not* identify Samper, Daltry, or Eagleburger as responsible for FLIR's problems. Nor did it accuse anyone of fraud. The paragraph at the heart of the Bar's argument begins:

> At the conclusion of the [Special Committee]'s investigation, the Board removed those senior managers who were responsible for the *accounting errors* and the *management problems*, *including the President and CEO, Stringer*.

(Ex. 179 at ER 249 (emphasis added).)

As an initial matter, neither in this paragraph nor anywhere else in its Wells Submission did FLIR accuse its former management of wrongdoing. It used words like "errors" and "problems" to describe the company's undeniable accounting issues—words that do not admit, indicate, or imply fraud.

(Maletta 1700:4-18, 1702:8-1703:11; Glade 1366:16-24; Ellis 2660:18-2661:2; Wynne 2425:6-16; Ex. 158; *see also* Pet. at 94-99.)

Further, none of Petitioners' clients was blamed for the company's "errors" or "problems." The sentence above identifies only Stringer, a non-client, as having been responsible for FLIR's problems and as having been removed. The sentences that follow, which refer to Daltry, Samper, and Eagleburger (as well as Martin, a non-client[25]), describe the circumstances under which these individuals *also* left FLIR (*e.g.*, "The Chairman of the Board also resigned * * * the CFO had tendered his resignation in February * * * ."). They do not state that these individuals were "removed," as Stringer was. That distinction between Stringer and the others is consistent with the widely-held view that Stringer, as CEO, had been a singularly domineering force within the company. (Glade 1241:9-21; Wynne 2420:21-23; Ellis 2621:5-8; Rosenbaum 538:25-539:6, 752:9-15, 752:23-753:1.)

Undeterred by the actual wording of the FLIR Wells Submission, the Bar argues that its interpretation is supported by FLIR's statement to the SEC nine weeks later that FLIR should be credited for remediation for, among other things, the "replacement of the Chief Executive Officer, Chief Financial Officer,

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[25] The Amended Complaints alleged that Petitioners represented former FLIR employee William Martin. The Trial Panel found that Martin was not represented by Petitioners (ER 149-53), and the Bar does not contest that finding. Ellis testified that the word "removed" could also have applied to Martin (Ellis 2661:3-10), although it was not phrased that way.

Controller, Treasurer, key members of the financial organization, and the Company's independent auditors." (Resp. at 51.) The Bar complains: "The word 'replacement' no more accurately described how Samper left FLIR than the word 'removed.'" (Resp. at 51.)

Of course, as explained above, neither FLIR nor Petitioners described Samper as having been "removed." (Ellis 2660:14-2661:10.) Further, "replace" means to put something or someone new in place. *See* Webster's Third New Int'l Dictionary 1925 (unabridged ed 1993) ("1: to place again * * * 2: to take the place of * * * 3: to put in place of * * * 4: to fill the place of"). FLIR's use of the word "replacement" did not and was not intended to describe Samper's voluntary departure, but rather what the Company did *after* he left—he was replaced, just as were other employees within the finance group (*e.g.,* Widdows) and the outside auditors (Pricewaterhouse Coopers), who had effectively resigned. Samper's counsel understood the difference. (Glade 1207:3-23.) The point was that, whatever had occurred in 1998 and 1999, the current FLIR management was qualified to perform the duties of a publicly-held company. (Wynne 2424:10-20; Ellis 2650:25-2653:5.)

The Bar next argues that the FLIR Wells Submission was intended "to divert the SEC's attention from FLIR toward the real culprits." (Resp. at 51.) The Bar's contention is unfounded. FLIR did not portray any of its former management as "culprits." More to the point, the only "shift" that FLIR hoped

to engender was a shift of the SEC's attention from FLIR's past to FLIR's future, not from itself to others. (Maletta 1585:23-1589:21; Ellis 2651:2-2653:5.) By focusing the SEC on the risk of any future accounting problems, FLIR hoped to persuade the SEC that no enforcement action was necessary. (*Id.*; Maletta 1585:23-1587:19.)[26]

The Bar claims—incorrectly—that Rosenbaum "admitted" in the 2005 criminal case that the FLIR Wells sought to shift the SEC's attention from the company to the individual "culprits." (Resp. at 51-52.) The Bar quotes two excerpts in support of that proposition, but its editing and characterization of those excerpts is highly misleading.[27]

In the first excerpt (Resp. at 52), the Bar omits Rosenbaum's statement immediately preceding the excerpted testimony, in which Rosenbaum makes it clear that the FLIR Wells Submission identified only Stringer as having been responsible for the company's problems:

> [T]he only person who was indicated to be responsible for the accounting errors, as I read it, is Mr. Stringer. That was consistent with the way Mr. Samper had been viewing the case all along.

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[26] *See* Maletta Offer of Proof No. 26 (Ex. 616) (concluding that the FLIR Wells Submission "would not be interpreted by someone familiar with the SEC enforcement process and the applicable principles of securities law as taking a position inconsistent with any position that Mr. Samper or the other jointly represented individuals had already taken or could reasonably take"). This exhibit is discussed further at pp. 48-51, below.

[27] Rosenbaum appeared at the hearing because she was called as a witness by defense counsel Hoevet. (Rosenbaum 2870:1-23.)

(Ex. 351 at R 7,964.) And, as discussed above, "errors" does not connote fraud. The Bar also fails to mention that Rosenbaum continued by explaining that a company is not interested in seeing its former employees become subjects of SEC enforcement because a decision by the SEC to prosecute former employees could hurt the company's reputation. (Ex. 351 at R 7,965.)

The Bar also omits important passages from Rosenbaum's testimony in connection with the second excerpt. (Resp. at 52.) For example, Rosenbaum testified that the sentence criticized by the Trial Panel was intended to refer only to Stringer:

> I don't know whether we identified in our mind anyone other than Mr. Stringer, to be honest.

(Ex. 351 at R 8,036.)

2. Ellis did not breach any duty to FLIR by not attacking the former management.

Finally, the Bar argues, for the first time, that the FLIR Wells Submission was a conflict of interest *adverse to FLIR* because Ellis "pull[ed] his punches" to protect his individual clients. (Resp. at 52.) The Bar conjectures, with no evidence whatsoever, that Ellis counseled FLIR to omit an acknowledgement of wrongdoing so as to protect Ellis's individual clients. Nonsense.

Contrary to the Bar's argument, the only evidence on the issue was that FLIR had no interest in finger-pointing (Wynne 2424:10-20, 2428:7-19, 2430:10-19), which is generally considered to be a harmful tactic anyway

(Maletta 1583:4-1584:5). By that time, Petitioners and Wynne had concluded that Stringer and Martin had committed fraud by using side letters that gave customers a right of return. (Rosenbaum 618:22-619:8; Ellis 1971:19-23, 2542:24-2543:16, 2670:8-22; Wynne 2346:4-8.) But FLIR's decision not to state this in its Wells Submission could not have been based on any potential conflict of interest between clients, because Petitioners did not represent either Stringer or Martin. And, if FLIR was not accusing Stringer and Martin of fraud, *a fortiori* it would have no basis or reason to do so for Samper, who neither Petitioners nor FLIR believed had acted fraudulently. (Ellis 2620:19-2621:10; Rosenbaum 2875:9-17; pp. 68-72, below.)

For the reasons set out above, the Bar's responses to Petitioners' various assignments of error—to the extent that the Bar, which had the burden of proof, bothered to respond at all—do nothing to defeat those assignments. The assignments are well taken, and the Trial Panel's findings of violation should be rejected.

Petitioners turn now to the Bar's effort to revivify claims that not even the Trial Panel found persuasive, as well as claims never before urged by the Bar.

III. RESPONSE TO BAR'S ADDITIONAL QUESTIONS ON REVIEW

A. Summary of Responses to Bar's Additional Questions on Review

1. Response to Additional Question #1: There was no likely current client conflict of interest among Petitioners' clients FLIR, Samper, Daltry, Eagleburger, and Fitzhenry during the 2000-2002 SEC investigation. Further, Petitioners received valid consent to the multiple representation from each of these clients.

2. Response to Additional Question #2: Ellis's representation of Fitzhenry in Fitzhenry's Bar disciplinary matter did not involve any former client conflict of interest.

3. Response to Additional Question #3: No sanction is warranted in this case.

B. Response to Additional Question No. 1.

The Bar argues that the Trial Panel erred in finding there was no current client conflict of interest during the SEC investigation. The Bar's argument is without merit: Petitioners' clients' interests were aligned throughout the SEC investigation and, in any event, Petitioners' obtained their clients' valid consent to the multiple representation.

1. Response to Bar's Statement of Facts

The Bar's recitation of facts relating to its Additional Question No. 1 contains numerous errors. For example:[28]

- The Bar states that "[a]s an experienced securities lawyer, Ellis was aware of the [DOJ] Holder Memorandum." (Resp. at 6.) Ellis and Rosenbaum both testified that the Holder Memorandum had no relevance to their area of securities law practice. (Ellis 2545:23-2546:7; Rosenbaum 664:7-13.)

- The Bar states: "In late 1999 and early 2000, while preparing FLIR's 1999 financial statements, its auditors discovered [a series of] * * * aggressive and questionable accounting practices," including sales that were "entirely fictitious." (Resp. at 7.) The Bar cites no contemporaneous document or testimony, because none exists. Instead, the Bar cites a settlement proposal drafted by the SEC staff 33 months later, reflecting the SEC staff's views. The Bar omits entirely the detailed testimony at the hearing that explained the evolution and nature of the accounting issues (Ellis 2518:22-2543:16), and the fact that, in 2000, no one in the company (including FLIR's Special Committee) attributed the accounting restatements to fraudulent conduct (Wynne 2422:21-24; Rosenbaum 669:14-24).

- The Bar states (with no citation) that "FLIR's Board of Directors blamed CFO Mark Samper" for purportedly fictitious and other improper accounting entries, triggering Samper's resignation in February 2000. (Resp. at 7.) That is not true. The Board's frustration was aimed at management generally, and specifically its inability to finalize the consolidated financial statements on time. (Wynne 2412:1-2415:3.) There was no "hint" of fraud when Samper resigned. (Wynne 2414:19-23; Rosenbaum 677:13-678:11.)

- The Bar states (with no citation) that Daltry did not have an independent lawyer during the SEC investigation. (Resp. at 9.) But the only evidence at trial on this issue was Ellis's testimony that Daltry told Ellis that he *did* have an independent lawyer but

[28] Due to space limitations, Petitioners are not able to detail all of the Bar's errors.

wanted Ellis to represent him at his SEC interview. (Ellis 2634:9-13.)

- The Bar labels Samper's independent counsel, Glade, and Eagleburger's independent counsel, Carl Neil, as "monitoring counsel." (Resp. at 14, 16.) The Trial Panel found the Bar's descriptions of these lawyers as monitoring counsel "somewhat misleading," and that Glade "was an effective co-counsel for Samper." (ER 158-160.) The overwhelming evidence supported the Panel's finding that Glade was at least co-counsel for Samper during the SEC investigation, and that both Glade and Neil were lead counsel for their respective clients during the Wells and settlement phases (Neil 2275:3-2276:1; Ellis 1945:17-24, 1947:19-1948:10; Rosenbaum 487:1-4, 583:16-584:2, 804:9-805:7, 833:15-20).[29]

- The Bar states that Ellis did not attend Samper's March 2002 Wells meeting with the SEC staff because he was preoccupied with FLIR's Wells Submission. (Resp. at 16.) The Bar fails to mention that (1) Glade did not tell Ellis about the date of the meeting until two days before, and did so by voicemail when Ellis was away so that Ellis did not receive the message until one day before the meeting (Ellis 2612:1-2614:6; Ex. 504 at R 10,175); (2) Ellis was scheduled to leave the country on another matter (Ellis 2598:13-17); (3) Rosenbaum was out of the country (Rosenbaum 815:16-23; Ellis 2612:25-2613:6); (4) unlike the other independent counsel, Glade and Kaner had been involved since the start of the SEC investigation and were more knowledgeable about their client's situation than Ellis (Ellis 2614:7-21); (5) Ellis left a detailed voicemail with his recommended strategy and offered to talk further if Glade thought it would be helpful (Ex. 54; Ellis 2614:22-2615:10); and (6) Glade never called him back (*id.*).

- The Bar states that Samper's independent counsel, Glade and Kaner, were "shocked" to learn during Samper's March 2002 Wells meeting that the SEC staff believed Samper was not credible, and the SEC told Glade and Kaner to "ask Lois" about testimony that undermined Samper's credibility. (Resp. at 16-17.) The Bar

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[29] *See also* Maletta Offer of Proof No. 25 (Ex. 616) (concluding that Glade was primary counsel, not "monitoring counsel," for Samper during the SEC investigation). This exhibit is discussed at pp. 48-51, below.

fails to disclose that: (1) Petitioners had previously sent Glade and Kaner reams of detailed notes, documents, and information recounting other witnesses' testimony that Rosenbaum had attended (*e.g.*, Exs. 35, 111, 61, 137, 81, 87, 127, 132, 532, 535, 542, 550, 551; Rosenbaum 762:25-763:6), which information Glade and Kaner did not tell the SEC staff they had (Ex. 552); (2) the day before the meeting Ellis predicted to Glade that he was "going to hear very strident statements" from the SEC staff (Ex. 54); (3) Glade testified that the SEC staff's statements may have been "just a bluff" (Glade 1202:5-14); and (4) in describing the meeting to Rosenbaum, who was overseas, Glade wrote that the meeting "was *what you would expect*" and focused on "the transactions *with which we have become all too familiar*" (Ex. 552 (emphasis added)). (*See also* Ellis 2616:25-2618:2.)

- The Bar claims that Wynne testified that "Arthur Anderson concluded [FLIR's accounting] had to have been done intentionally." (Resp. at 13.) Wynne actually testified that he interpreted "most all of [Arthur Anderson's] discussion as being directed to the *competence* issue," and that the only person whose integrity was questioned was Stringer. (Ex. 459 at R 9,114-16 (emphasis added).)

- The Bar states that Eagleburger "consulted with the Accused" before settling with the SEC. (Resp. at 21.) Eagleburger's testimony relates to Ellis's recommendation, when Eagleburger unexpectedly received a Wells notice, that Eagleburger *retain independent counsel*. (Ellis 2606:5-19.) Rosenbaum was out of the country and did not participate in Eagleburger's Wells Submission or settlement negotiations. (Rosenbaum 2882:11-2883:3.)

2. The Trial Panel Erred in Excluding Petitioners' Expert's Case-Specific Opinions.

The Bar's Additional Question No. 1 challenges Petitioners' multiple representation of FLIR and its personnel during the SEC's investigation of FLIR's accounting. At the hearing, Petitioners offered the expert testimony of Jeffrey Maletta, a former SEC attorney who concentrates his practice in

securities enforcement and other government investigations. (Maletta 1555:19-25.) He is a partner in the K&L Gates law firm, an adjunct professor at the Georgetown Law Center, and the author of the leading text on ethical issues involved in multiple representations during SEC investigations. (Maletta 1552:24-1561:2.) There were no objections to Maletta's qualifications.

When Maletta was announced as a witness for the defense, however, Bar counsel objected, and the Trial Panel ruled that, under *In re Leonard*, 308 Or 560, 784 P2d 95 (1990), Maletta would be permitted to testify only as to his published text, primarily "the practice of SEC defense work * * * as a general proposition," in the "abstract" and not "specific to this case." (Tr. 1414:12-23 (Trial Panel's ruling); *see also* Tr. 1572:9-1574:7, 1577:6-1579:4, 1678:20-1679:9, 1680:7-1681:17, 1685:22-1685:1, 1686:16-1687:19, 1687:21-1689:3, 1728:20-1729:9 (examples of instances in which the Bar objected to Maletta's testimony and the Panel sustained the objection).) When Petitioners' motion to reconsider was denied (Tr. 1546:6-19), Petitioners submitted a written Offer of Proof containing Maletta's opinions on case-specific issues (Ex. 616).

The Panel's ruling was error, and Petitioners are entitled to have Maletta's case-specific opinions considered by this Court. Under the Bar Rules, "evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs" is admissible—a near classic

statement of the rule of admissibility used in administrative cases throughout the United States. BR 5.1(a). The Rules put no limitations on expert testimony, which has often been admitted and relied upon in lawyer discipline cases. *See, e.g., In re Marandas*, 351 Or 521, 528, 532-33, 270 P3d 231 (2012) (testimony from experts for both parties regarding reasonableness of attorney's statements about confidentiality provision); *In re Eakin*, 334 Or 238, 254, n 6 and 8, 48 P3d 147 (2002) (testimony from experts for both parties regarding reasonableness of attorneys' fees and testimony from Bar expert regarding appropriate litigation strategy in the underlying representation); *In re Eadie*, 333 Or 42, 61, 36 P3d 468 (2001) (testimony from Bar expert regarding appropriateness of having copy of deposition transcript at trial); *In re Claussen*, 331 Or 252, 263-64, 14 P3d 586 (2000) (testimony from experts for both parties regarding reasonableness of accused lawyer's position).

Leonard does not hold otherwise. In *Leonard*, this Court held that expert testimony as to whether a lawyer violated the rule against dishonesty in modifying and describing a lease was not admissible because it "amounted to nothing more than an oral brief as to why one particular construction of the governing disciplinary rule would not be violated by a particular hypothetical set of facts." 308 Or at 570. Under *Leonard*, therefore, an expert's opinion may be excluded where it does not offer more than a legal argument about substantive construction of the Oregon rules. There is no basis, however, for

suggesting that the case stands for the broader proposition that expert testimony must be offered in the abstract and may not analyze the facts of the case.

Maletta's testimony falls squarely within the Bar rules and this Court's precedent relating to admissible expert testimony. His testimony was particularly appropriate given the complex and specialized practice of SEC investigations, and the scope and breadth of the investigation at issue, which was unprecedented in Oregon but has occurred elsewhere. (Ellis 2603:19-2604:7.) *Leonard* expressly carved out from its ruling "expert testimony * * * offered to explicate some external standard of actual practice." 308 Or at 570. The proffered testimony was exactly that.

The Trial Panel's exclusion of Maletta's opinions was not assigned as error in Petitioners' Opening Brief because Maletta's opinions were not applicable to the issues Petitioners raised on appeal. (*See* Pet. at 77, n 26.) However, those opinions are directly relevant to the Bar's Additional Question No. 1. The Trial Panel's ruling excluding Maletta's testimony was error, and his Offer of Proof is highly relevant to the merits of the Bar's arguments. On the assumption that this Court will agree that the Trial Panel's evidentiary ruling was error, Maletta's testimony in the Offer of Proof is referenced in footnotes throughout Petitioners' analysis.

3. Petitioners' Multiple Representation During the SEC Investigation Was a Common, Effective, and Ethical Strategy.

The Trial Panel found there was no likely or actual conflict of interest in Petitioners' multiple representation of FLIR and its personnel during the SEC investigation. (ER 162.) The Bar argues that the Panel's finding was erroneous because, during the SEC investigation, FLIR's interests were "adverse" to the interests of its former officers. But the Bar makes this argument with minimal citation to evidence or authority, without having called as witnesses Samper or Daltry, the principal former clients whose interests it claims were adverse, and without the benefit of an expert witness knowledgeable in SEC investigations.

Tellingly, the Bar also makes no reference at all to Maletta, the only expert witness on government investigations to appear at the hearing. Maletta testified for an entire day and explained that multiple-client representation in an SEC investigation is (1) common, (2) based on shared interests among corporate and individual clients, and (3) provides substantial advantages to all clients—and in particular to individual (versus corporate) clients. (Maletta 1581:9-20, 1647:25-1649:1, 1759:4-17.)[30]

The published authorities available at the time of the SEC investigation of FLIR's accounting agreed:

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[30] *See also* Maletta Offer of Proof Nos. 5, 6, 21, 22 (Ex. 616) (concluding that Petitioners' multiple representation in the SEC investigation of FLIR was advantageous for all clients, and for Mark Samper in particular).

American Bar Association, *The Securities Enforcement Manual: Tactics and Strategies* at pp. 53, 80, 469 & 476 (1997) (emphasis added):

> As a general matter, to facilitate exchanges of information and to maintain a unified defense, *it often is desirable for one set of counsel to represent as many witnesses as possible, provided that there are no conflicts of interest that would prevent joint representation* * * *
>
> Counsel commonly represents more than one witness in an SEC investigation, or (as often is the case) represents a witness and that witness's employer * * *
>
> A company may justifiably try to minimize legal expenses by having one counsel represent all or a number of employees collectively. *But there are other, potentially more significant advantages, particularly in the investigatory stage * * * [J]oint representation may prevent the staff, using a "divide and conquer" approach, from pitting one party against another party.*
>
> It is common practice, particularly in the context of securities investigations, for attorneys to accompany and appear on behalf of employee witnesses before investigators, while at the same time representing the corporation.

Victor A. Warnament, Michael J. Missal, and Leigh P. Freund, "When the SEC Comes Calling: Tips for Dealing with an Enforcement Investigation," 19 No. 4 ACCA Docket 18, 29 (April 2001) (emphasis added):

> In certain circumstances, it will be possible for a law firm to represent your company and all or most of the witnesses that SEC enforcement staff calls to testify. This type of joint representation allows outside lawyers to obtain information from numerous individuals within your company without waiving the attorney-client or work-product privileges. When staff takes testimony, the same counsel can attend all of the sessions of persons he or she represents and thereby learn more about the staff's understanding of the facts and its legal theories. Moreover, joint representation may prevent the staff from using a divide-and-conquer approach in which SEC lawyers would try to get witnesses to give damaging testimony against others. *By avoiding finger-pointing and adopting a common defense through one counsel, all witnesses may improve their prospects. For these reasons, joint*

> *representation of multiple witnesses is very common in SEC investigations, and you should consider it.*
>
> Arthur F. Mathews, "Effective Defense of SEC Investigations: Laying the Foundation for Successful Disposition of Subsequent Civil, Administrative and Criminal Proceedings," 24 *Emory L.J.* 567, 573-74 (1975):
>
> > [T]he initial strategy in an investigation often will be to appear with as many witnesses as possible, consistent with counsel's duties to represent each client fully and fairly, to avoid conflicts of interest, and to avoid unfairly impeding the orderly conduct of the investigation by the SEC Staff.

In fact, even SEC Form 1662 (Ex. 461), which is given to every individual testifying before the SEC (*e.g.*, Ex. 333 at R 7,819) recognizes this practice:

> You may be represented by counsel who also represents other persons involved in the Commission's investigation.

Glade's office also researched the issue, and confirmed that published authorities supported the practice. (*See* Ex. 52.)

Notwithstanding that multiple representation in SEC investigations was and continues to be widely-used and its advantages widely-recognized, the Bar claims that FLIR's interests were adverse to the individuals' interests for five reasons, each supported by nothing more than Bar counsel's ipse dixit and contradicted by the record evidence. The Bar is incorrect for the following reasons:

a. Petitioners' clients did not have an interest in "accusing one another."

The Bar first argues that every client "had an interest in identifying and testifying against possible wrongdoers," including Petitioners' other clients.

(Resp. at 37-39.) On the contrary, in an SEC investigation finger-pointing is counter-productive for all involved:

> The problem with finger pointing is twofold; first of all, an attempt by someone to shift blame to someone [else] immediately frequently arouses suspicion on behalf of the SEC against the finger pointer himself. Second of all, it creates a tension in the group which may not be necessary and often creates false impressions about factual issues and events that have not yet been put fully on the record and in some respects may be affirmatively misleading to the staff itself. So it's counterproductive both on the part of the person pointing the finger and on everybody else involved in the SEC investigation.

(Maletta 1583:10-1584:5.)

The other witnesses agreed. Petitioners testified that in their experience in securities cases, clients do not have an interest in blaming each other. (Ellis 2639:25-2640:15, 2642:13-2643:6; Rosenbaum 689:2-6.) Wynne testified that, throughout the SEC investigation, FLIR had no interest in blaming its former officers. (Wynne 2424:10-20; 2430:10-19.) And Glade testified that it was not in Samper's interest to blame others. (Glade 1294:13-23.)[31] Martin, who was separately represented by Neil, said the same. (Martin 360:25-361:17.)

[31] *See also* Maletta Offer of Proof Nos. 7 and 24 (Ex. 616) (concluding that Petitioners' clients' did not have an interest in accusing each other of wrongdoing and that their interests were aligned throughout the testimony phase of the SEC investigation).

The Bar further argues that, during their SEC interviews, the testimony of some witnesses represented by Petitioners was "adverse" to or "implicated" Samper. (Resp. at 39.) There are two responses to this claim.

First, in an SEC investigation, the possibility of critical or inconsistent testimony from another witness only underscores the *benefit* of multiple representation. The biggest problem facing FLIR's former officers was an information deficit—learning the topics under review by the SEC and what the testimony of other witnesses was or might be. (Ellis 2576:14-2577:13; Rosenbaum 767:22-768:5.) This deficit is most problematic—and thus the client's interest in overcoming it is most acute—when the testimony may appear critical or inconsistent. (Maletta 1690:10-1691:1; Ellis 2580:15-2581:16.) In Maletta's words, inconsistent or critical testimony is exactly "the type of information you want to know." (Maletta 1690:22-1691:1; *see also* Rosenbaum 570:17-571:4, 703:10-704:11.)[32] In an SEC investigation, the only effective way to learn what other witnesses are saying is through joint representation. (Maletta 1615:10-1616:20; Rosenbaum 767:22-768:5, 768:6-25; Ellis 2580:18-2581:16, 2590:7-16.)[33]

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[32] *See also* Maletta Offer of Proof Nos. 5 and 15 (Ex. 616) (concluding that Petitioners' multiple representation was based on common interests and advantages to all, and that inconsistent testimony does not make clients' interests adverse).

[33] The only alternative, joint defense agreements, are cumbersome, unpredictable, prone to delays in information-sharing, and do not allow for a lawyer with institutional knowledge of the investigation to attend each

Second, the Bar mischaracterizes the testimony it references as having been "adverse." (Resp. at 13-14, 39.) For example, the Bar claims that Gina Chambers' testimony was adverse to Samper because she testified that he had "told her to destroy a log" of accounting reversals. (Resp. at 13.) But there was no dispute about this fact. In July 2000, Rosenbaum interviewed Chambers and learned about her recollection of destroying a log. (Ex. 303.) Rosenbaum shared this information with Samper and Glade. (Rosenbaum 701:11-702:16.) Samper explained that Chambers was correct, and that he had asked her to destroy the log because it was inaccurate. (*Id.*; Ex. 22.) In short, Chambers' testimony was *consistent* with, not adverse to, Samper's recollection. (Rosenbaum 766:6-767:6.)[34] Further, because of the joint representation, Samper and his independent counsel were able to learn what Chambers was saying and could be prepared to address it with SEC staff. (Rosenbaum 703:2-17.)[35]

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interview. (Ellis 2588:22-2590:2; *see also* Rosenbaum 540:9-18 (describing how as the lawyer attending multiple clients' interviews she could collect, distill, and analyze the information across the interviews).)

[34] *See* Maletta Offer of Proof Nos. 18-20 (Ex. 616) (concluding that, as a matter of SEC enforcement practice, Petitioners handled Chambers' recollection and testimony appropriately, and that none of the testimony cited by the Bar as "adverse" raised any issue that would have precluded continuing the multiple representation).

[35] The Bar also fails to acknowledge that in the investigation stage it is difficult to assess which, if any, inconsistencies are material (Maletta 1783:1-19), as well as that a potential inconsistency may not be material if the witness does not have personal knowledge of the underlying matter, *e.g.*, accounting (Maletta 1783:10-19; Kaner 1431:24-1432:25).

b. Petitioners' clients' "varying degrees of involvement in suspected wrongdoing" did not create a conflict.

The Bar argues that clients' interests are adverse where they have "varying degrees of involvement in suspected wrongdoing," citing three criminal cases. (Resp. at 37-38.) Petitioners agree that in the context of a criminal case, like *In re Porter*, 283 Or 517, 584 P2d 744 (1978), multiple representation is usually not appropriate because of conflicts of interest between co-defendants. Petitioners both testified that in this respect criminal cases are significantly different from civil cases such as an SEC investigation, and that if they had been asked to represent FLIR and its current and former personnel in a criminal case, the multiple representation decision might well have been different. (Ellis 2702:13-2703:20; Rosenbaum 655:7-18.) But this was not a criminal case, and everyone involved in the representation of Petitioners' clients, including independent counsel for the affected clients, testified that they did not believe the FLIR accounting issues would lead to criminal prosecution. (Pet. at 17; Neil 2278:12-16; Glade 1269:18-22; Kaner 2093:5-19; Rosenbaum 692:4-10, 850:16-851:23; Ellis 2547:5-2550:17, 2705:4-11.) The Bar never explains why, *in a civil SEC investigation*, clients' interests would be adverse just because some were more involved in the company's accounting than others.

Moreover, Petitioners took affirmative steps to avoid any risk to their clients resulting from the clients' varying degrees of involvement. Because there is a risk of comparisons being made during settlement negotiations with

the SEC staff (Ellis 2608:18-2609:11), as soon as the Wells Notices were issued, Petitioners saw to it that each recipient who did not already have independent counsel retained such counsel, and that all substantive settlement negotiations were handled by that independent counsel (Rosenbaum 475:14-21, 483:5-12, 523:25-524:6, 526:7-23, 582:21-584:2; Ellis 2604:23-2606:23, 2608:10-2609:11; Fitzhenry 2165:25-2166:6). The practice of bringing in independent counsel at the Wells and settlement stages is a well-established mechanism for guarding against conflicts. (Maletta 1584:6-1585:22, 1720:8-1721:11.)[36]

c. Petitioners' clients' interests in whether to cooperate with the SEC were not adverse.

One page after arguing that the individuals had an interest in cooperating with the SEC, the Bar argues that FLIR's interest in cooperating with the SEC "might well have been adverse" to the individuals' interests in *not* cooperating, including invoking their Fifth Amendment privilege against self-incrimination and thereby protecting themselves against "future professional discipline." (Resp. at 39-40.) The evidence established just the opposite.

First, the individuals' interests in "protecting themselves" was entirely consistent with cooperation. (*See* Maletta 1582:23-1583:3.) Refusing to cooperate, including by invoking the Fifth Amendment, exposes, not protects,

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[36] *See also* Maletta Offer of Proof No. 8 (Ex. 616) (concluding that Petitioners' efforts to obtain independent counsel for their clients and continued representation of FLIR, Fitzhenry, Samper, and Eagleburger through the Wells phase and final settlement was consistent with and appropriate under SEC enforcement practice).

an individual. Unlike in a criminal case, in an SEC case, the SEC (and the courts) are permitted to draw an adverse inference from a witness's decision not to testify. (Rosenbaum 800:6-15.) Invoking the Fifth Amendment also almost certainly will lead to an SEC debarment order and fines, as well as termination of any professional license. (Ellis 2701:1-2701:17.) For these reasons, as well as the fact that invoking the Fifth Amendment "excites the interest" of the SEC staff, it is "rare in SEC cases." (Maletta 1668:15-1670:11.)

Second, the stated strategy of the multiple representation was to present a unified defense: cooperating with the SEC by providing testimony and documents to show that the accounting issues were not the result of fraud. (*See, e.g.*, Ex. 392.) Each client represented by Petitioners shared that interest, or the client would not have opted into (or continued with) the multiple representation. Glade's office researched the issue independently and concluded that it was in Samper's interest to cooperate fully. (Glade 1264:23-1266:17; Ex. 52 at R 5,698-99, 5,710.) Stringer and Martin, whom Petitioners did not represent, made the same decision. (Martson 278:12-22; Ex. 580 at ¶ 6.)

Consider the case of Samper. Petitioners each specifically discussed with Samper or his independent counsel, Glade and Kaner, the tradeoffs involved in invoking the Fifth Amendment versus cooperating with the SEC, including the

risks mentioned above. (Rosenbaum 800:6-15; Ellis 2699:19-2701:21.)[37] All the lawyers involved, along with Samper, decided that cooperation "was the best and most effective strategy for dealing with the SEC." (Glade 1265:12-17; *see also* Kaner 1495:2-1496:17, 2067:25-2069:6; Ellis 2699:19-2701:21.) The Bar falsely claims that Glade testified that the strategy "failed to take into account the effects such early testimony might have on Samper." (Resp. at 40.) To the contrary, Glade testified that he thought cooperation was in Samper's best interests. (Glade 1264:23-1266:17.)[38]

For evidence purportedly supporting the Bar's claim that FLIR's interest in cooperating was adverse to Samper's interest, the Bar cites again an email Kaner sent to Rosenbaum three years later. (Resp. at 40.) With the criminal investigation pending and an indictment looking "inevitable," Kaner asked FLIR to lend additional resources to Samper's defense. (Ex. 427.) While the email expresses some regret that Samper testified early, it does not question that decision based on the facts available at the time or suggest that Samper's decision to testify was not fully supported by his independent counsel.

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[37] The Bar incorrectly states that Rosenbaum simply "dismissed the idea [of invoking the Fifth Amendment] as 'ridiculous.'" (Resp. at 40.) In fact, Rosenbaum testified that she believed the Fifth Amendment issue was "something that has to be thought through" (Rosenbaum 245:20-246:2), and she discussed the pertinent risks with Glade (and others). The word "rediculous" [sic] comes from *Glade's* internal notes of a conversation with Rosenbaum. (Ex. 24.)

[38] Every other former FLIR officer, including Stringer and Martin, neither of whom was represented by Petitioners, came to the same conclusion that they should testify. (Martson 278:16-22; Ex. 580, at 6.)

d. FLIR's remediation argument did not accuse any individual of wrongdoing.

The Bar argues that the corporate and individual clients' interests were "clearly adverse" because FLIR had an interest in remediating "by firing suspected wrongdoers," while the individual clients had an interest in "remaining employed and in preserving a good professional reputation." (Resp. at 40-41.) On the facts of this case, the Bar's argument makes no sense.

At the time FLIR advanced the remediation argument in 2002, none of the individual clients at issue was still employed by FLIR. Samper and Daltry had resigned before the SEC even announced its investigation. (Wynne 2413:24-2414:2; Ex. 158.)[39] Eagleburger was asked to leave in July 2001 (Eagleburger 414:18-416:12), and there is no evidence that his departure was in any way related to the ongoing SEC investigation. In fact, Eagleburger received four months' severance pay (Eagleburger 416:4-10)—an indication that he was *not* terminated for cause. While a company under investigation for conduct by its then-current officers *may* have conflicting interests with those

[39] The Bar suggests that the termination of Samper's consulting agreement by FLIR was in response to the SEC's criticisms of Samper. (Resp. at 41 n 20.) The Bar cites no evidence in support. Samper testified to the SEC that his consulting arrangement with FLIR ended in October 2001 as part of the resolution of a dispute over stock options. (Ex. 518 at 1360:23-1361:3.)

officers if they are still employed (Maletta 1787:15-1789:15), there were no conflicting interests in the circumstances of this case (Ellis 2640:20-2641:21).[40]

The Bar also misstates that FLIR sought credit for "ridding itself of wrongdoers." (Resp. at 41.) No witness described FLIR's "remediation" argument as blaming or punishing wrongdoers, and FLIR never characterized any of its former officers that way. Instead, FLIR argued that, *regardless* of what had happened in 1998 and 1999, as of 2002, FLIR did not pose a risk of future violations, partly as a result of significant new controls it had put into place. (Wynne 2335:25-2336:7; Ellis 2651:2-2653:2.) FLIR's argument was forward-looking and separate from the underlying merits of whether fraud had occurred. (Maletta 1585:23-1587:19, 1589:6-21, 1709:1-25.) For that reason, counsel for companies commonly assert the remediation defense, even if that counsel has represented the company's officers, too. (Maletta 1589:6-21.)

Throughout its argument, the Bar assumes that FLIR's conduct during the SEC investigation was driven by the October 23, 2001, SEC Release No. 44969, often referred to as the "Seaboard Report." (Ex. 118.) That SEC release was unusual because it announced that the SEC was *not* going to

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[40] Fitzhenry was still employed, but FLIR had long-since concluded that he, as general counsel, had no material involvement in the company's accounting. FLIR made this point explicit in a footnote in its Wells Submission (Ex. 158 at R 6,597), not to favor Fitzhenry, as the Bar suggests, but because it was necessary to clarify for the SEC why Fitzhenry's continued employment would not undermine the Company's ability to operate without any future accounting errors (Ellis 2662:1-2663:1).

proceed against a parent company that had discovered fraud by a subsidiary's controller and had reported it to the SEC. The release gave several reasons for non-action by the SEC and some guidance for the future, most of which had no direct bearing on the FLIR case (including because the FLIR Special Committee had *not* concluded there was fraud, and the SEC came to FLIR, not the other way around). (*See* Maletta 1685:21-1686:5 (describing how the Seaboard Report required that a company discover and report problems first).)

Although FLIR did try to argue in its Wells Submission in March 2002 that its conduct in 2000 had elements the SEC viewed as favorable (particularly the wording about being a new company), the release was not the cause of any of FLIR's earlier actions, because that release was issued 18 months *after* FLIR's management and auditors turned over. Prior to the Seaboard Report, the SEC had offered no similar guidance. (Maletta 1685:4-1686:15.)

e. The Bar misstates that the SEC's communications indicated a conflict of interest.

Next, the Bar cites two SEC documents as "warnings" of a conflict of interest. The first is a letter the SEC staff sent Rosenbaum on July 19, 2000, at the start of its investigation. (Resp. at 41, referencing Ex. 18.) The Bar states incorrectly that this letter warned that conflicts were "likely." (Resp. at 41.) The SEC's letter never described any conflicts as "likely." The letter stated that "it is far too early in the investigation for SEC staff to identify people who may

possess liability," and described only "potential conflicts" and a "possibility of conflicts" (Ex. 18)—a fact never in dispute (Rosenbaum 459:14-23, 550:2-11).

Indeed, there is always the potential for conflicts to emerge in any multi-client representation. That is why Petitioners' engagement letters suggested that the clients retain "independent counsel" who would "be prepared to represent [the client's] interests should any conflict * * * later arise" (Ex. 392), and why later in the process Petitioners ensured that each individual client who received a Wells Notice had independent counsel (Ellis 2605:9-2606:10). But the *possibility* of a conflict is not the same as a *likely* conflict. *See In re Stauffer,* 327 Or 44, 48 n 2, 956 P2d 967 (1998) ("The mere fact that a theoretical conflict of interest exists that may develop into an actual conflict at some later date is not sufficient for the disclosure and consent requirements of DR 5–105."); *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 146, 843 P2d 442 (1992) ("[A] theoretical potential for conflict is not a *likely* conflict.") (emphasis in original).

Further, the SEC's letter was a self-serving tactical device. (Rosenbaum 548:10-22.) The SEC uses a "divide-and-conquer" strategy, in which the SEC "tr[ies] to separate people out of common representations, to keep them isolated, and to keep them dealing directly only with the government to the fullest extent possible." (Maletta 1635:25-1637:3; Ellis 1643:11-2645:6; Rosenbaum 546:21-550:1.) Because multiple representation is a common

method for overcoming the SEC's strategy (Maletta 1636:23-1637:3), the SEC staff issues form letters like the one Rosenbaum received discouraging it (Rosenbaum 548:13-22).[41]

When Rosenbaum received the letter, she consulted Ellis about it, and he described his prior experience with government agencies that used the same tactic. (Ellis 2643:11-2645:6.) Rosenbaum informed the SEC that Stoel Rives would act in accordance with its ethical responsibilities (Ex. 18) and, two days later, the SEC staff responded that it would "honor" the multiple representation and would expect Petitioners to withdraw "*[i]f* * * * a conflict should arise" (Ex. 509 (emphasis added)), both further indications that the SEC, like everyone else, did not perceive any existing or likely conflicts of interest.[42] In any event, Rosenbaum shared the SEC staff's letter with Samper's independent counsel. (Ex. 18.)

The second document cited by the Bar is SEC Form 1662, which is attached to SEC subpoenas and includes a statement on multiple representations. (Ex. 461.) Again, the Form does not assert a "likely" conflict of interest, only "a potential conflict of interest" if the clients' interests are adverse. Moreover, the fact that the SEC Form expressly discusses multiple representation

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[41] *See* Maletta Offer of Proof No. 13 (Ex. 616) (explaining that the SEC staff frequently expresses concern about joint representation, but acknowledges that it is generally permissible).

[42] *See also* Maletta Offer of Proof No. 23 (Ex. 616) (concluding that the SEC's July 19, 2000 letter reflected the SEC staff's standard position and was not a statement that the SEC perceived an actual conflict of interest here).

demonstrates that multiple representation is a common occurrence. Petitioners discussed Form 1662 with each of their clients. (Rosenbaum 561:13-24; *see also* Ex. 346 at R 7,890.)

f. There was no conflict of interest between FLIR management and Samper.

The Bar criticizes the Trial Panel's finding that "'no one' at FLIR thought Samper had acted fraudulently," arguing that the Panel's finding is irrelevant to the conflicts analysis because "[t]he SEC would inevitably draw its own conclusions." (Resp. at 42.) The Bar provides no basis or reasoning for its position that the possibility that an adverse party (or fact-finder) might come to a different view of the facts than that held by an attorney's clients creates a conflict of interest. Indeed, the Oregon law on this subject says otherwise. *See In re Johnson*, 300 Or 52, 62, 707 P2d 573 (1985) (an attorney is entitled to rely on information provided from his client).

The Bar then disputes the substance of the Panel's finding, arguing that FLIR management *had* concluded that Samper committed fraud. (Resp. at 42-43.) The Bar does not explain why, even if this were true, it would establish a conflict. The disciplinary rules do not make any reference to clients' conflicting beliefs, only to their conflicting interests. *See Hostetter*, 348 Or at 584 ("The wording of those rules focuses on the *interests* of the former client.") (emphasis in original). Here, FLIR and Samper both determined that it was in their interests to cooperate with the SEC but defend against any finding of fraud

(Glade 1181:4-1182:5, 1266:9-12; Kaner 1493:22-1494:10; Rosenbaum 589:15-21), and that is exactly what they did.[43]

Further, the evidence did *not* establish that FLIR's management concluded that Samper had committed fraud, or that even if it had, this view was communicated to either Petitioner. Regarding that topic, the Bar inexcusably misconstrues Wynne's testimony. According to the Bar, Wynne testified that he had concluded by spring 2002 "that former management *(including Samper)* had committed fraud." (Resp. at 43 (emphasis added).) But what Wynne testified to was that he concluded that *Stringer and Martin* had engaged in fraud, and had that conclusion in mind during settlement negotiations a year later:

> A. Your question, to clarify, is did I think in 2001 that Stringer and Martin had engaged in fraudulent conduct?
>
> Q. Correct.
>
> A. Yes.
>
> Q. And as you negotiated with the SEC staff in spring 2002 and discussed settlement with your lawyers, did you have it in your mind that the former management had committed fraud?
>
> A. Yes.

(Wynne 2346:4-13.) Nowhere in that testimony did Wynne even mention Samper.[44]

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[43] *See also* Maletta Offer of Proof Nos. 6, 14, 21, 24 (Ex. 616) (concluding that, as a matter of SEC enforcement, the interests of Petitioners' clients were aligned).

Although Wynne testified that he concluded in the spring of 2001 that an accounting entry from the third quarter of 1999 was fraudulent, he also testified that (1) he did not share any conclusion he had about Samper with Petitioners (Wynne 2445:24-2448:12), and (2) he believed that Samper made that entry based on *Stringer's* directive and computer spreadsheet (Wynne used the words "manufactured in Portland") (Wynne 2401:24-2402:7, 2406:19-22). Wynne rejected Bar counsel's characterization that he had "concluded by March of 2001 that Mr. Samper had been involved in securities fraud," and clarified that he had concluded only that Samper had filed financial statements "based on entries * * * which he either knew to be inaccurate or did not know whether they were accurate or not" (Wynne 2339:2-12), which if not done with intent may be a securities violation but not fraud. (*See* Maletta 1600:25-1601:10 (explaining that fraud is prosecuted under a different statute than negligent securities violations, if they are prosecuted at all).) The Bar's theory that Wynne had concluded in early 2001 that Samper acted with intent to deceive is further undermined by the fact that (1) after Samper resigned, FLIR hired him as an independent contractor to assist with the company's restatements and

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[44] Like Wynne, Petitioners also concluded that Stringer and Martin engaged in fraud by issuing "side letters" that varied the terms and conditions of a sale and gave customers a right to return product. (Ellis 1971:19-23, 2670:14-17; Rosenbaum 618:22-619:8.) Ellis believed that their fraud was a fraud not only on the market, but on the finance department and on Samper as well. (Ellis 2542:24-2543:16.) Petitioners did not represent either Stringer or Martin, and expressly declined to represent Martin out of concern for conflicts of interest. (Ex. 404.)

continued that arrangement through the fall of 2001 (Ex. 542 at R 11,164), and (2) in 2003, Wynne told the DOJ that he did not think the DOJ had "much of a case" (Wynne 2366:24-2367:3).

Even more directly on point with respect to the charges against Petitioners, both Ellis (Ellis 2595:9-2597:10) and Rosenbaum (Rosenbaum 2875:9-14) testified that no FLIR personnel (including Wynne and Muessle) ever told them that they believed Samper had acted fraudulently. And, most importantly, neither Petitioner ever had that belief either. (Ellis 2519:22-24, 2618:21-2621:10; Rosenbaum 614:13.)

The Bar dismisses Wynne's and Petitioners' testimony on this point as "simply not credible." But the Bar has the burden of proving its claim by clear and convincing evidence. Disbelief does not constitute positive proof of the contrary position, as it would have to do in order to give the Bar's argument any traction at all. Having produced no contrary evidence, the Bar does not satisfy its burden by declaring that it does not like the consistent and unanimous testimony of these three lawyers.

The Bar levels three other criticisms at the Panel's finding of no conflict during the SEC investigation. As to each, the Panel was right, and the Bar is wrong:

First, the Bar disputes the Panel's conclusion that there was no conflict during the SEC investigation because, *inter alia*, there was no opportunity to

advocate. (Resp. at 43.) But the Panel correctly explained that an SEC investigation "is just that: an investigation," with no specific charges, a focus on information-gathering, and unique rules regarding witness interviews that facilitate the SEC staff's "divide-and-conquer" approach. (ER 154-158). The structure of the investigation unifies clients' interests behind a shared clearinghouse of information, eliminates any possibility of an actual conflict, and reduces the chance of any likely conflicts.

Second, the Panel correctly held that, because FLIR could be held liable for the acts of its officers, its interests were aligned with theirs. (ER 158; *see also* Pet. at 93-94.)

Third, the Bar incorrectly argues that the Panel should have ignored the substantial benefit to all clients from the multiple representation. (Resp. at 44.) The suggestion seems particularly odd: those benefits are an essential component of determining a client's interests.[45]

4. Petitioners' engagement letters.

Because, as the foregoing discussion demonstrates, there was no actual or likely conflict, no conflict waiver was required at all. Nevertheless, Petitioners chose to err on the side of caution, sending retention and waiver letters because they considered it good practice. (Ellis 2638:20-2639:8.) The Bar's criticisms of these letters have no merit.

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[45] *See also* Maletta Offer of Proof No. 5 (Ex. 616) (concluding that "[t]here were common interests and significant advantages in the joint representation").

a. No additional letter to Samper was required.

The securities class action and SEC investigation arose from the same set of facts, the identical evidence, the same time period, and the same securities laws. (Rosenbaum 494:4-23, 693:4-694:11.) For this reason, FLIR's insurance carrier treated them as one matter. (Rosenbaum 737:12-738:10; Ex. 560.) Glade agreed, on behalf of Samper, to Petitioners' engagement letter in the class actions (with one minor modification (*see* Ellis 1932:3-1933:4; Rosenbaum 686:6-19)) before the SEC announced its investigation (Ex. 7), and never concluded that a second engagement letter for the SEC investigation was required (Glade 1248:13-1249:24). Nonetheless, the Bar contends that a new letter was required for Samper when the SEC investigation surfaced two months later because (the Bar claims) SEC investigations involve additional considerations. (Resp. at 45-46.)[46]

First, the Bar contends that, unlike the class action, the SEC investigation threatened "non-reimbursable fines." (Resp. at 46.) But this difference has nothing to do with conflicts of interest. As Ellis explained, there is a lesser, not greater, potential for conflicts in the SEC context than in the private class action context because there is no possibility of cross-claims, proportional fault-

[46] Daltry signed a letter that specifically referenced both the SEC and the class action. (Ex. 110.) Eagleburger, who was not a defendant in the class actions, signed an engagement letter relating specifically to the SEC investigation. (Ex. 109.) In addition, Rosenbaum sent Glade a copy of the SEC's letter regarding potential conflicts in the SEC investigation, as well as a copy of her response. (Exs. 18, 608.)

sharing, or individual settlements that might deplete a limited common insurance fund. (Ellis 2645:7-2650:1.)

Second and third, the Bar contends that, unlike in the class action, the SEC investigation involved "the likely sharing of information with government agencies," and "the possibility of future professional discipline and/or criminal charges." (Resp. at 46.) Again, the Bar provides no explanation for why those risks are any different in class action litigation, or why those risks are even relevant to the "potential adverse impact" of a multiple representation, the controlling standard for "full disclosure" under former DR 10-101(B).

As to the fourth issue, FLIR's purported incentive "to distance itself from its former management," Petitioners have elsewhere explained why the Bar's claim is incorrect. (*See* pp. 54-57 and 59-64, above.)[47]

b. All material information was disclosed.

The Bar contends that the seven items of information discussed below were required to be, but were not, disclosed in the retention letters. (Resp. at 46-47.) Once again, this new list of alleged material omissions appears nowhere in the Bar's Amended Complaints and should be rejected for that reason. Moreover, the items listed are not supported by analysis, citation to evidence, or the controlling standard, former DR 10-101(B).

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[47] *See also* Maletta Offer of Proof No. 2 (Ex. 616) (concluding that as a matter of SEC enforcement practice, a new letter specific to the SEC investigation was not necessary for Samper).

(1) *Petitioners' judgment might be affected by the fact that FLIR paid the bills.* The joint clients were told both by FLIR and by Petitioners that FLIR would cover the costs (Exs. 4, 6; Rosenbaum 560:12-21), and there is no evidence that FLIR put any constraints or conditions on Petitioners' representation of those clients. The Bar cites no basis for asserting that a lawyer's judgment in this very common situation might be affected or that any further disclosure is required.

(2) *Possibility of finger-pointing.* It was in no one's interest to accuse others of wrongdoing. (*See* pp. 54-57, above.)

(3) *Testifying could result in SEC enforcement, penalties, or criminal charges.* Penalties or charges are theoretically possible as a result of any SEC investigation, irrespective of whether a person testifies or invokes the Fifth Amendment. Indeed, contrary to the Bar's assumption, they are *more* likely to follow the invocation of the Fifth Amendment. The Bar does not provide any reason why listing the theoretical outcomes of an SEC investigation would have added anything material to what was disclosed. *(See also* pp. 59-61, above.)

(4) *Refusal to testify may hurt FLIR's interest in cooperating.* The Bar offered no evidence that an individual's refusal to testify could hurt the corporation's interest. *See* pp. 59-61, above.

(5) *FLIR's interest in cooperating might be adverse to the interests of the individuals. See* pp. 52-57 and 59-61, above.

(6) *Individuals might have an interest in cooperating inconsistent with others' interests.* *See* pp. 52-64, above.

(7) *Clients were waiving confidentiality.* This information was disclosed: "if we represent each of you, we will share with each of you all information that we learn about the litigation and not keep secrets relating to the litigation from any of you." (Ex. 6; Rosenbaum 528:24-529:3.)

Once again, as was stated in connection with the 2003 Consent Letters, none of the information cited by the Bar constituted a material omission under former DR 10-101(B).[48]

Finally, the Bar's misstatements that Petitioners made no further disclosures, after the initial retention letters (*e.g.*, Resp. at 12), must be corrected. Petitioners provided volumes of information to Samper's independent counsel, both in writing and verbally, throughout the SEC investigation (*see, e.g.,* Exs. 35, 49, 111, 61, 137, 81, 87, 127, 132, 532, 535, 542, 550, 551; Rosenbaum 762:25-763:6), including information specifically bearing on potential conflicts (*see, e.g.,* Ex. 18; Rosenbaum 497:21-498:13). This information was not packaged in a formal conflict waiver letter because neither Petitioners nor Samper's independent counsel concluded that a likely or

[48] *See also* Maletta Offer of Proof No. 3 (Ex. 616) (concluding that the joint representation letters Petitioners sent to their clients "were appropriate and consistent with SEC enforcement practice").

actual conflict of interest had arisen, the only circumstance in which a formal letter would have been required.

5. FLIR settlement.

The Bar defines its Additional Question No. 1 as relating to "the SEC Investigation." (Resp. at 2.) It then defines the timeframe of the SEC investigation as from "April 2000 to January 2002." (Resp. at 3.) Nevertheless, the Bar gratuitously comments on the FLIR settlement, which was finalized in September 2002, even though it is not at issue in Petitioners' Assignments of Error or the Bar's two Additional Questions. (Resp. at 49-50.) The Bar's argument should be rejected for that reason.

Further, the Bar's argument is patently incorrect. The Bar contends that the Trial Panel should have found an actual conflict of interest during the Wells and settlement phases because, according to the Bar, Petitioners had a "duty on behalf of FLIR to [1] admit misconduct by Samper, Daltry, and Eagleburger," and (2) argue that FLIR should be credited "for getting rid of them." (Resp. at 50.) Contrary to the Bar's claim, FLIR's actual strategy, based on *its* assessment of the evidence and *its* interests, was not to admit fraud by Samper, Daltry, and Eagleburger. (Wynne 2424:10-20, 2428:7-19, 2430:10-19; Rosenbaum 589:15-21, 610:10-17.) There are myriad reasons why a company may decide that it is not in its interests to admit fraud, including damage to reputation (Ex. 351 at R 7,965), and concerns about government debarment

(Rosenbaum 841:15-842:5), especially where it believes the evidence of fraud is weak (Wynne 2435:23-2437:7, 2366:24-2367:3). The Bar cites no support or explanation for its bizarre proposition that Petitioners had a duty on behalf of FLIR to disregard FLIR's wishes and admit misconduct by its personnel.[49]

The Bar also ignores the fact that, in settlement negotiations and in the final settlement agreement, FLIR never admitted wrongdoing by its former management. (Ex. 367 (FLIR consented to settlement "without admitting or denying the findings contained in the Order"); Ellis 2650:25-2653:5; Rosenbaum 556:2-11, 831:20-832:4.) The SEC insisted on a finding of fraud as a condition of *all* of the settlements, and insisted that the settling party not deny the SEC's findings, although it could choose, as FLIR did, not to admit them. (Ellis 2667:3-2668:9; Rosenbaum 531:9-532:1, 587:9-16.) Every other settling party also agreed to this condition. (Rosenbaum 589:2-9, 839:9-14.)[50]

In summary, the Bar's "Additional Question No. 1" relates to uncharged conduct, is based on a version of facts not supported by the record, and involves theories by the Bar that fly in the face of the only expert opinion offered respecting the underlying legal matters. It is also true that many of the Bar's present arguments are entirely new ones, and do not merit consideration on that

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[49] *See also* Maletta Offer of Proof No. 9 (Ex. 616) (concluding that Petitioners' representation of FLIR through the Wells process and settlement negotiation was appropriate and consistent with SEC enforcement practice).

[50] *See* Maletta Offer of Proof Nos. 10-11 (Ex. 616) (explaining why the terms of FLIR's settlement were not adverse to the jointly represented individuals).

ground alone. It is no surprise that, to the extent that any of the Bar's theories was argued to the Trial Panel, the Panel rejected them.

Both in relation to the claims just discussed, as well as those relating to Petitioners' ministerial role, the Bar has failed to meet its burden of proof. Indeed, it failed even to call the witnesses who would have had personal knowledge of the facts purportedly underlying the claims the Bar asserts: (1) Mark Samper, whose thought processes have been the subject of constant speculation by the Bar; (2) anyone from the SEC staff, regarding the practice of SEC investigations from the defense side, the purportedly crucial Swedish Drop Shipment, and a variety of other matters that have been the subject of speculation by the Bar; (3) an expert to challenge Jeff Maletta's testimony, if in fact there had been any basis for such a challenge; (4) Ron Hoevet, Samper's criminal defense lawyer who could have shed light on what he understood by the 2003 Consent Letter; and (5) Allan Garten, whose motives and purported use of SEC information have been wildly speculated on by the Bar. The Bar's first "Additional Question" should be dismissed.

C. Response to Additional Question No. 2.

In its "Additional Question on Review No. 2," the Bar claims that Ellis's representation of Fitzhenry in Fitzhenry's Bar disciplinary matter was a former client conflict of interest in violation of former DR 5-105(C). (Resp. at 76-79.) The Bar's claim should be rejected because: (1) the rule on which it purports to

be based had been repealed at the time of the conduct in question; and (2) there was no violation of that rule (assuming it applied, or, if it did not, there was no violation of its successor rule, Rule of Professional Conduct 1.9).

1. DR 5-105(C) had been repealed.

The Bar's claim should be disallowed because it attempts to apply former DR 5-105(C), which was repealed on January 1, 2005, to conduct that occurred in 2005-2007. Former DR 5-105(C) was replaced by Rule of Professional Conduct 1.9, which, among other things, measured conflicts by whether the clients' interests were "materially adverse." The allegations of the Tenth Cause of Complaint[51] against Ellis relate solely and specifically to "Fitzhenry's lawyer discipline trial and * * * the appeal of the decision of the trial panel," and the only disciplinary rule charged is DR 5-105(C). (ER 19.) That trial occurred in October and November 2005, and the appeal was in 2006 and 2007. Those

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[51] The Bar is inconsistent as to which Cause of the Amended Formal Complaint it asserts this claim. The Bar initially cites the Tenth Cause against Ellis as the basis for Additional Question No. 2 (Resp. at 2), but in its argument states (twice) that this Additional Question relates to the Ninth Cause (Resp. at 76, 79.). The Ninth Cause was limited to a claim for a current client conflict of interest. The Bar has now conceded that by January 2003, Samper and Daltry were former clients (Resp. at 56), so the Ninth Cause (assuming that is the cause at issue) fails for that reason alone. Moreover, in its argument in support of its "Additional Question No. 2," the Bar makes no reference to the Tenth Cause. In the face of this imprecision, Petitioners nonetheless assume that the Tenth Cause is the one on which the Bar actually relies, and that this Court may be willing to overlook the defects in the Bar's presentation. Petitioners therefore reply accordingly, but respectfully suggest to this Court that imprecision of the kind demonstrated by the Bar here should result in dismissal of any consideration of the Bar's claim.

events, as well as the three principal statements cited by the Bar as evidence of a purported conflict, occurred after former DR 5-105(C) had been repealed: (1) Fitzhenry's trial memorandum was filed September 26, 2005 (Ex. 582); (2) the opening statement to Fitzhenry's trial panel was given on October 3, 2005 (Ex. 583); (3) the post-trial memorandum was filed on November 4, 2005 (Ex. 379); and (4) the Supreme Court brief was filed on September 8, 2006 (Ex. 587). Thus, there was no basis for Ellis to know in 2005-2007 that his conduct in the Fitzhenry representation would be judged by a set of rules that had been repealed before the Fitzhenry hearing began.

2. Ellis's Representation of Fitzhenry was not a conflict.

Even if the former disciplinary rules on which the Bar relies were applicable, the Bar's claim is without merit for two independent reasons: (1) Fitzhenry's Bar matter was not "significantly related" to Samper's SEC matter; and (2) Fitzhenry's interests were not adverse to Samper's.

a. Statement of Facts.

In 1998, FLIR was in the process of selling some of its Safire systems to be installed on Sikorsky helicopters for use by the Colombian National Police in a US-funded drug interdiction program. (Ellis 1997:9-24.) The Jaramillo Company in Bogota signed letters in December 1998 stating its intent to purchase the units and specifying a price, configuration, delivery date, and an authorization for FLIR to build them. (Ellis 1997:25-1998:6.) In February

1999, Stringer asked Fitzhenry to speak with the lawyer for Jaramillo to see if the company's written commitment to purchase the units could be strengthened or accelerated. (Ellis 2812:23-2813:8; Fitzhenry 2186:20-2187:5.) Fitzhenry spoke by telephone with the lawyer for Jaramillo, but they were unable to agree on different wording. (Ellis 2812:23-2813:8.) Fitzhenry told Stringer that his attempt had been unsuccessful. (*Id.*)

Stringer (former CFO for FLIR and a CPA), Widdows (FLIR Controller and a CPA), and Samper (FLIR CFO), approved including the sale to Jaramillo in FLIR's 1998 revenue. (Ellis 1998:7-9.) Pricewaterhouse Coopers, the outside auditors, also approved including the sale in 1998 revenue. (Ellis 2741:12-21.) In April 1999, the Jaramillo transaction was referenced in one of 31 subparagraphs in a Management Representation Letter (MRL) from FLIR to its auditors, which was signed by Stringer, Samper, Widdows, Fitzhenry, and Daltry. (Exs. 375, 376.[52])

During the SEC investigation, the SEC staff asserted that the Jaramillo transaction had been recognized prematurely, and that Fitzhenry committed a securities law violation when he signed the letters to the auditors stating that "to the best of my knowledge and belief" the statements in the letter regarding the Jaramillo sale were accurate. (Fitzhenry 2186:20-2187:5, 2230:22-2231:5;

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[52] There are two versions of this letter because it originally was drafted on April 12, 1999, and then was slightly revised approximately a week later.

Ellis 1998:25-1999:18.) In November 2002, Fitzhenry settled the SEC claim against him without admitting or denying the SEC's allegations. (Ex. 244.)

In November 2003, the Bar filed a disciplinary complaint against Fitzhenry based on his signature on the MRL.[53] (Ex. 250.) Ellis was one of the lawyers who represented Fitzhenry in the disciplinary hearing (Exs. 582-584) and on appeal (Ex. 587).

b. Response to Bar's Statement of Facts.

The Bar's Statement of Facts as to the Fitzhenry representation is riddled with errors. Three examples:

- The Bar states (with no citation) that "[t]he Accused helped Fitzhenry's independent counsel prepare his Wells submission." (Resp. at 19.) The record testimony says just the opposite:

  Q [Bar]. You participated in writing [Fitzhenry's Wells submission, Ex. 120] correct?

  A [Ellis]. No. I think I've told you maybe six times, maybe ten times that I don't recall whether I saw it before or after it was filed. I did provide information to Mr. Wilson [Fitzhenry's independent counsel], but I do not have a memory that I participated in writing it.

  (Ellis 2000:15-24.) There is no evidence that Rosenbaum, who reviewed Fitzhenry's Wells Submission while she was in Italy, had any role in its preparation. (Rosenbaum 2880:11-2881:1.)

- The Bar repeatedly asserts that, beginning with the Fitzhenry Wells Submission, Fitzhenry "blamed Daltry" for Fitzhenry's signing of the MRL. (Resp. at 20, 35, 77 n 37, 79.) There is not a single word in the Fitzhenry Wells Submission (Ex. 120), or any later statement by Ellis or Fitzhenry, that supports this claim. The

[53] The Bar's statement that this complaint was filed in September 2003 (Resp. at 35) is wrong.

testimony at the hearing was uncontradicted that it never happened. (Ellis 2753:10-18; Pet. at 79.) There is no explanation as to why the Bar has chosen to disregard the record on this (and other) matters, but this choice (and too many choices like it) impugns the Petitioners repeatedly without a shred of justification.

- The Bar states that Fitzhenry self-reported to the Bar through Ellis because "Ellis knew the attendant publicity could result in a lawyer discipline investigation." (Resp. at 35.) That is not true, and there is no evidence from which any such inference could be drawn. The only relevant testimony was that Fitzhenry asked Ellis to notify the Bar about the SEC matter because "he wanted to be open and honest with his bar association." (Ellis 2013:14-23.)

c. Fitzhenry's Bar matter was not significantly related to Samper's SEC matter.

The former client conflict rule, former DR 5-105(C), is triggered only if the matter involving the current client (Fitzhenry's Bar matter) and the matter involving the former client (Samper's SEC matter) are "significantly related." Two matters are significantly related if:

> (1) Matter-specific test: representation of the current client (Fitzhenry) "would, or would likely, inflict injury or damage upon the former client" (Samper) in any matter in which the lawyer previously represented the client (Samper's SEC matter); or
>
> (2) Information-specific test: representation of the former client (Samper) provided the lawyer (Ellis) with confidential information "the use of which would, or would likely, inflict injury or damage upon the former client [Samper] in the course of the subsequent matter" (Fitzhenry's Bar matter).[54]

[54] The Amended Complaint includes no allegation that Ellis received any confidential information from Samper that would, or was likely to, harm Samper during the Fitzhenry Bar proceeding. This omission was for good reason: Samper was not called by either party as a witness in the Fitzhenry Bar case, and throughout that hearing Fitzhenry simply reiterated Samper's own statements to the SEC. (*See* Ex. 521; Ellis 2743:6-2751:13.) *See also*

DR 5-105(C). *See also Brandsness*, 299 Or at 430-31 (discussing the tests for "significantly related"). In paragraph 67 of its Amended Complaint, the Bar conceded that it had the burden to prove that Ellis's representation of Fitzhenry in the Bar matter "would or would likely inflict injury or damages upon Samper." (ER 20.)

But, the foregoing acknowledgment notwithstanding, the Bar in its Respondent's Brief now applies a different test, and ignores both its Amended Complaint and former DR 5-105(C). Under the Bar's test, two matters are significantly related if they "ar[i]se from the same operative facts and involved the same allegations of misconduct." (Resp. at 79.) That is not the rule. *See PGE Co. v. Duncan, Weinberg, Miller & Pembroke, PC,* 162 Or App 265, 283-84, 986 P2d 35 (1999) ("[T]here is nothing in any of the terms used in [former DR 5-105(C)] to suggest that two things are the same matter simply because they involve the same subject or information.").

Under the Bar's new theory of a matter-specific connection, Ellis's representation of Fitzhenry harmed Samper (according to the Bar) in connection with Samper's then-settled SEC matter because the Fitzhenry matter involved "allegations of wrongdoing" that "tended to deprive" Samper "of the finality

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American Bar Association Model Rule 1.9, cmt 3 (disclosure of information that has previously been disclosed to a non-privileged party "ordinarily will not be disqualifying").

and peace of mind" Samper thought he had achieved by settling his SEC matter. (Resp. at 79.) The Bar's theory is as wrong on the facts as it is on the law.

First, as demonstrated throughout this brief, the Bar's shopworn statement that Fitzhenry's Bar matter involved "allegations of wrongdoing" by Samper is false. To make the point once more: Fitzhenry's position was that in signing the MRL, he believed that he was certifying the legal representations in the letters, and relied on (and had no reason to doubt) the company's accountants (Stringer, Samper, and Widdows) for the accounting representations. (Fitzhenry 2187:6-2188:20; Ellis 1999:8-15.) Fitzhenry testified to this understanding in his very first SEC interview, in October 2000 (Ex. 315 at 231:3-232:3, 237:9-239:1, 241:13-242:5), and asserted it consistently throughout his Bar proceeding (Ellis 1999:19-2000:5).

The facts on which Fitzhenry's position rested were consistent with Samper's own prior testimony and statements. Samper testified to the SEC that he drafted the MRL (Ex. 519 at 250:1-5); signed it himself (Ex. 519 at 250:6-9); was responsible, along with Stringer and Widdows, for revenue recognition decisions (Ex. 518 at 346:7-24, 1223:14-20); still believed, in October 2000, that the accounting representations were accurate (Ex. 519 at 261:9-262:4, 1152:20-1153:5); and that both he and Stringer had signed the letter before it was presented to Fitzhenry for his signature (Ex. 519 at 312:20-313:16). Samper made it clear, to FLIR, to his independent counsel, to Petitioners, as

well as to the SEC, that he, as CFO, was responsible for FLIR's accounting and financial statements. (*E.g.,* Ex. 519 at 1059:19-21, 1060:10-12; Glade 1279:2-5; Kaner 2091:21-2092:4; Wynne 2415:4-9; Rosenbaum 764:12-19.)

Fitzhenry never argued or testified that Samper had engaged in wrongdoing. (Fitzhenry 2252:9-11.) In fact, Ellis, in his role as Fitzhenry's counsel in the Bar proceeding, argued that the disputed representations in the MRL were accurate. In his closing argument in the Fitzhenry Bar case, Ellis stated: "So on the first issue was there a misrepresentation, *the answer is, no, there was not* * * * ." (Ex. 585 at 464:10-12 (emphasis added).) That is the same position Samper took in his SEC testimony and presumably would take in his DOJ defense. Ellis also specifically told the Trial Panel in Fitzhenry's disciplinary hearing that "it would not be appropriate to blame Samper" with respect to the company's accounting of the Jaramillo sale. (Ex. 585 at 445:22-447:6.)[55]

The Bar strains to find sentences in the Fitzhenry disciplinary hearing transcript and briefs that it argues may be interpreted to impugn Samper. (Resp. at 77-78.) For example, the Bar cites Ellis's statement to the trial panel that the SEC and DOJ did not prosecute Fitzhenry for fraud, as they did other members

[55] Ultimately, Fitzhenry's position did not prevail, and the Supreme Court affirmed the Trial Panel's finding of a violation. The opinion in that matter has no relevance as to whether representing Fitzhenry was a conflict of interest.

of FLIR management.[56] (Resp. at 78.) But this statement, which accurately reported the outcome of the government investigations, was a statement of undisputed fact, not an endorsement of any government action. And the statements the Bar highlights regarding the acts of others at FLIR applied not to Samper but to Stringer, whom Fitzhenry had told of his unsuccessful call to Jaramillo and assumed would tell the auditors if it was material to the accounting treatment (Ellis 2812:23-2813:8), and Martin, who had proposed a side letter to Jaramillo without Fitzhenry's knowledge (Ex. 585 at 437:1-438:7). They did not apply to Samper. Fitzhenry's testimony at his hearing was consistently favorable to Samper, for whom he had "very high regard for his capability and integrity." (Ex. 584 at 308:7-12.)[57]

Second, there is no evidence to support the Bar's claim that Samper's "peace of mind" was disturbed by Ellis's representation of Fitzhenry. The Bar cites Glade's testimony (Resp. at 79), but that testimony had nothing to do with the Fitzhenry Bar matter. Glade never testified (in the cited passage or anywhere else) that the Fitzhenry Bar matter disturbed Samper. To the contrary,

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[56] The SEC found that Fitzhenry intended to sign the MRL, but not that he intended to violate the law. (Ex. 244 at R 7,144.)

[57] On the only variance between Fitzhenry's recollection and Samper's, whether Fitzhenry had asked Samper whether the accounting was correct before signing, Fitzhenry volunteered that Samper did not recall that conversation. (Ex. 584 at 308:13-20; Ellis 2003:23-2004:10.) Fitzhenry never claimed that Samper's answer to him was false (Ellis 2751:24-2752:6), and his recollection of a brief conversation added nothing beyond what was already conveyed by Samper's signature.

he testified he did *not* conclude that Ellis's representation of Fitzhenry was a problem for Samper. (Glade 1310:8-13.) And the one witness competent to discuss Samper's "peace of mind"—Mark Samper—was not called by the Bar to testify.

The Trial Panel correctly found that Ellis's representation of Fitzhenry in his Bar matter did not and was not likely to harm Samper (ER 197), and therefore the two matters were not "significantly related."[58] The Bar's attempt to rewrite history cannot justify rejecting the Trial Panel's correct finding of no conflict.

d. Fitzhenry's and Samper's interests were not adverse.

The Bar's claim should also be rejected because Fitzhenry's interests and Samper's interests (if he had any) in the Fitzhenry Bar matter were not in actual or likely conflict. DR 5-105(C). There is no evidence that Fitzhenry had any interest in seeing Samper prosecuted or his accounting license revoked (or that

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[58] The Trial Panel went even further than was required under the rules, finding that the Fitzhenry representation was not likely to harm Samper *in the criminal investigation*, a matter in which Ellis never represented Samper. The Panel did not analyze the 2005 Rules of Professional Conduct, but the outcome would be the same under those rules. Under RPC 1.9, the standard is "substantially related," which means (in relevant part) that two matters "involve the same transaction or legal dispute." *See, e.g., Hostetter*, 348 Or at 591 (quoting American Bar Association Model Rule 1.9(a)). The Fitzhenry Bar matter and Samper SEC matter did not involve any transaction (to which Fitzhenry or Samper were parties) or the same legal dispute. The Fitzhenry Bar matter dealt with Fitzhenry's conduct as a lawyer under the Oregon disciplinary rules, whereas the SEC investigation of Samper dealt with Samper's conduct as the company's CFO under the federal securities laws.

any such events would aid Fitzhenry in his own case), or that Samper had any interest in Fitzhenry's law license. The Bar's theory that Fitzhenry's position hinged on accusing Samper of wrongdoing is demonstrably false, as discussed above. Fitzhenry's position throughout his Bar matter was parallel to, not in conflict with, the position Samper had taken, and there was no advantage to Fitzhenry in accusing Samper of fraud. (Ellis 2739:15-2740:17.)

The Bar's argument that Fitzhenry's and Samper's interests were adverse is also contradicted by the conduct and testimony of Samper's own lawyers. In April 2001, Petitioners sent Glade and Kaner a transcript of Fitzhenry's SEC testimony, in which he discussed his view of his role and his reliance on the company's accountants. (Exs. 81, 315.) Later, and before the Fitzhenry Bar hearing, Glade and Kaner reviewed the letters Ellis sent to the Bar in 2002 and the Fitzhenry disciplinary file. (Glade 1388:16-1389:7; Ex. 504 at ER 336; Exs. 160, 161 (both Bates stamped by Glade's law firm).) Neither Glade nor Kaner ever raised a concern. (Glade 1391:3-8.) In fact, they both testified in this case that reliance by a general counsel on a CFO for accounting is normal (Glade 1310:1-7, 1393:18-1394:5; Kaner 2091:10-20), and that they did not perceive any problem for Samper (Glade 1310:8-13; Kaner 2091:10-15).[59]

[59] *See also* Maletta Offer of Proof No. 28 (Ex. 616) (concluding that Fitzhenry's position did not attribute improper conduct to Samper).

The Trial Panel agreed, finding that Fitzhenry's position was "logical and predictable," and not adverse to Samper. (ER 192, 195.) Its finding should be upheld.[60]

D. Response to Additional Question No. 3.

For the following reasons, no sanction is warranted in this case.

1. Novelty of issues.

To this date, there has been no precedent or other guidance from the Oregon State Bar on the type of representations Petitioners were engaged to perform in 2000-2003.[61] Indeed, at the time of the representation, there was no guidance from any authoritative source at all.[62] *See, e.g.,* New York City Bar Association Formal Opinion No. 2004-02: Representing Corporations and Their Constituents in the Context of Governmental Investigations ("[T]here is relatively little guidance available to attorneys on the ethical issues implicated by a request for simultaneous representation of a corporation and an officer or

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[60] Even if Ellis's representation of Fitzhenry were analyzed under the 2005 Rules of Professional Conduct, the Trial Panel's finding of no conflict should be upheld for the same reasons. *See* RPC 1.9 (requiring that the client's and former client's interests be "materially adverse"); *Hostetter*, 348 Or at 593 (explaining that the analysis under RPC 1.9 and former DR 5-105(C) is "not materially distinct").

[61] There had never before been a full-blown SEC investigation in Oregon of the kind that occurred here, with dozens of witnesses, hundreds of days of interviews, and hundreds of thousands of documents. (Ellis 2603:19-2604:7; Rosenbaum 661:10-15.)

[62] The Bar states that Petitioners received conflicts "warnings from the SEC, the DOJ, and Peter Jarvis." (Resp. at 83.) Just the opposite is true. The SEC (Ex. 509), the DOJ (Wynne 2376:19-2377:19), and Jarvis (Jarvis 1869:5-11) all *agreed with* Petitioners that there was *no* likely or actual conflict.

employee of that corporation in the context of a governmental investigation. We have found no ethics opinions addressing the topic.").[63] There was, however, and still is, a national practice with respect to SEC enforcement matters. (Maletta 1631:20-1633:6.) The contours of that practice, Petitioners' meticulous adherence to it, and the benefits to all clients of that practice have been set out in Petitioners' submissions to this Court, and are detailed in Maletta's testimony and his Offer of Proof.[64]

This Court has been sensitive to the presence of novel issues in lawyer discipline cases in the past. *See, e.g., In re Banks*, 283 Or 459, 482, 584 P2d 284 (1978) (observing as part of the sanctions analysis the "novel aspects which have caused us to plow some new ground"); *see also In re Brandt/Griffin*, 331 Or 113, 147, 10 P3d 906 (2000) (citing *Banks* for the principle that novel issues weigh against sanction). The spirit of the concerns expressed in *Banks* could and should have led the Bar to refer the issues raised here for the Bar Ethics Committee to receive comments and draft an opinion to guide Oregon practitioners in this unique area of law. Instead, however, the Bar launched this protracted disciplinary proceeding, which, without any guidance from

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[63] This opinion is available at www.nycbar.org/ethics/ethics-opinions-local/2004-opinions/815-representing-corporations-and-their-constituents-in-the-context-of-government-investigations.

[64] *See, e.g.,* Maletta Offer of Proof No. 31 (Ex. 616) (concluding that "[a] number of situations described [in the ABA treatise] arose during the investigation, and * * * those situations were appropriately considered and addressed").

consideration of the broader underlying issues, has ended up a scattershot exercise in which the Bar, as late as the filing of its last brief, still has not given any clear notice of what it considers to be impermissible under the former disciplinary rules.[65]

2. Delay.

The Bar complains that it was unfair for the Trial Panel to consider as a mitigating factor the long delay in these proceedings. (Resp. at 84.) But the Bar has been directly responsible for much of the delay, changing and proliferating the issues repeatedly—a practice that, as noted, has continued even on appeal. A prime example is the claim made about Ellis's representation of Fitzhenry in his Bar matter. Every aspect of that representation was known to Bar staff from its inception in late 2002 to its conclusion in 2007, yet it was not

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[65] This Court has referred to the Bar as its surrogate. *See Hendrick*, 346 Or at 106. Petitioners respectfully suggest that the surrogate has failed to take to heart this Court's guidance, as reflected in cases like *Hendrick*, as well as the Bar Rules, on several important matters, including: (1) stating allegations clearly and specifically, so that a lawyer may understand and address them (BR 4.1(c); ORS 9.534(2)); (2) answering an accused lawyer's requests for clarification on the nature of the allegations, so all parties know the issues in dispute (Ex. 634; BR 4.1(c); ORS 9.534(2)); (3) interviewing witnesses objectively, without biasing their testimony with an inaccurate version of events (*see* Myers 1094:1-1096:1, Pet. at 79); (4) prosecuting the case on the allegations made, not on constantly-changing and expanding speculation; (5) being prepared to shoulder its burden of proof required when a lawyer's reputation is at stake; (6) basing claims on the best evidence available, including by calling as witnesses the individuals on behalf of whose interests the Bar purports to act; (7) being willing to accept and address expert opinion, wherever such opinion would be helpful in resolving the underlying issues (*see, e.g.,* Maletta Offer of Proof Nos. 31-39 (Ex. 616)); (8) applying the ethical rules at issue; and (9) treating the accused lawyer with respect and fairness.

included in this case until the Bar filed its Amended Formal Complaint on February 24, 2012—10 years after the representation was first known to the Bar, five years after it was concluded, four years after the Bar opened its "investigation" in this proceeding, and 18 months after formal proceedings in this matter began.

In addition to the difficulties to Petitioners inherent in defending a case so many years after the events and communications occurred (*see, e.g.*, Rosenbaum 753:9-754:3 (discussing documents that were deleted long ago pursuant to Stoel Rives' document retention policy, including Petitioners' email files)), the fact that both Petitioners have practiced without a blemish for the 13 years since the challenged conduct—not to mention the six years since the Bar initiated this matter, and a combined 90 years before this proceeding began—are also factors weighing against any sanction. *See, e.g., In re Lawrence*, 332 Or 502, 515, 31 P3d 1078 (2001) (finding as a mitigating factor "the more than five-year delay, coupled with the accused's unblemished disciplinary record in the intervening years").

3. No client injury or complaint.

The Trial Panel purported to find "injury" in that the former clients consented to the ministerial representation in 2003, but the Panel never explained what injury that ministerial representation caused. The Bar encourages this Court to adopt that finding on the ground that a material

omission is, in and of itself, an injury (Resp. 81-82 (arguing that "depriving" clients of facts constitutes an injury)), but cites no support for that position.

The Bar's other theories of injury either (1) misunderstand the nature of the representation—*e.g.,* the Bar's assertion that Petitioners injured their clients by "look[ing] on" while their clients gave purportedly inconsistent testimony, even though Petitioners' clients were testifying only as to their sworn recollections and Petitioners were not advocating on behalf of any testimony, but instead were there to encourage clients to be truthful and not to speculate, and to hear and share witness testimony so their clients could be ready for their own interviews; (2) are refuted by the record—*e.g.*, Petitioners "helped the DOJ (through the SEC) assemble the evidence against [Samper];" or (3) are entirely speculative and baseless—*e.g.*, Samper might not have been indicted had Petitioners not produced FLIR's documents and assisted in scheduling the timing of its witness interviews.

No client has complained to the Bar—specifically including Samper (Glade 1408:24-1409:7), whose 2005 motion to dismiss in the criminal case was the genesis of this whole process (Ellis 2819:2-12; Rosenbaum 2907:11-2908:12). On the contrary, Petitioners' multiple representation and ministerial

role was advantageous to all of their clients. (Pet. at 10-11; Kaner 1491:13-1492:7; Ellis 2582:8-25, 2607:20-2608:9; Rosenbaum 767:22-768:5.)[66]

4. Cooperation.

The Trial Panel correctly credited Petitioners for their full and free disclosure and cooperative attitude. (Resp. at 84.) Despite Petitioners' strong disagreement with the Bar's position and tactics in this case, they have made themselves and their files available for the Bar and the Trial Panel consistently, including responding to the Bar's inquiries, and providing documents and information voluntarily. (*See, e.g.,* Exs. 602, 435, 183, 436, 437, 631, 438, 439.)

However, the Trial Panel did err—an error the Bar unaccountably now asks this Court to adopt—in finding that Petitioners' steadfast position that they served their clients' best interests and adhered to their ethical duties is an aggravating factor. Lawyers in Bar cases are permitted to defend themselves in good faith without triggering additional sanctions. *See In re Smith*, 348 Or 535, 556, 236 P3d 137 (2010) (a lawyer's defense of his conduct "cannot be used to enhance the penalty that would otherwise be imposed").

5. Sensitivity to conflicts.

The Bar's arguments on Petitioners' mental state and pattern of conduct ignore the evidence entirely.

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[66] *See also* Maletta Offer of Proof Nos. 5, 21, 22, 23, 33 (Ex. 616) (concluding that Petitioners' multiple representation in the SEC investigation was advantageous to all their clients, and in particular Samper).

In the SEC matter, Petitioners and their clients agreed to and employed a strategy that gave the individual clients the best of both worlds—access to documents and information they could not otherwise get and individual counsel to guide them through the Wells and settlement process. (Ellis 2604:23-2606:23.) Petitioners investigated the potential for conflicts at the outset (*e.g.*, Rosenbaum 470:17-23, 519:17-520:13; Ex. 32); continuously reassessed the potential for conflicts throughout (*e.g.*, Rosenbaum 761:13-23; Ellis 2653:25-2655:7);[67] raised issues relating to potential conflicts when they arose (*e.g.*, Ex. 22); declined a representation when they believed that there might be a likely conflict with respect to a specific individual (*e.g.*, Ex. 404); and saw to it that each individual who received a Wells notice had independent and informed counsel to handle settlement negotiations (Pet. at 11-13).

When the DOJ investigation was announced, Petitioners immediately relayed the information they received to their former clients (*e.g.*, Exs. 94, 151, 100, 99); informed all involved about what they would and could do (*e.g.*, Exs. 182, 570, 418); consulted with two of their partners (one experienced in criminal investigations and the other an expert on Oregon ethics) about the appropriate way to handle the representation (Ramfjord 865:25-866:7; Jarvis 1862:24-1863:20); directed that their firm would perform only ministerial

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[67] *See also* Maletta Offer of Proof No. 12 (Ex. 616) (concluding that Petitioners "continually considered possible representation issues and adjusted the representation" accordingly).

work (Wynne 2376:22-25); analyzed their former clients' interests in doing so (Ellis 2732:13-2733:15; Rosenbaum 914:1-18); received the written consent of their former clients (Exs. 102, 418, 420, 605, 624); and adhered to their commitments (Ellis 2597:11-2598:8, 2721:4-11; Rosenbaum 900:7-10, 919:6-10; Neil 2279:14-17; Myers 1113:16-19; Garten Ex. 609 at ¶ 7).

In short, the evidence established a deliberate and repeated *sensitivity* to ethical issues—just the opposite of the Bar's claim.

"The purpose of lawyer discipline is * * * to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession." *Hostetter*, 348 at 598 (quoting American Bar Association Standards for Imposing Lawyer Sanctions § 1.1). Neither the public nor the integrity of the profession needs protection from Petitioners' representation. Their conduct not only complied with the ethical rules of this Court, but was highly effective for all of their clients, including Samper.[68] (Ellis 2607:20-2608:9.)

Further, the Bar has never acknowledged the risk that its position, if accepted, holds for the public. Future corporate officers and employees would likely be deprived the ability to choose to be represented (or co-represented) by counsel for the company, even though such representation in an SEC

[68] *See* Maletta Offer of Proof No. 22 (Ex. 616) (concluding that "Samper was the principal beneficiary of the joint representation").

investigation is acknowledged to be highly advantageous,[69] and courts have repeatedly protected a client's right to do just that, in part because that counsel invariably will be the best informed. *See, e.g., SEC v. Higashi*, 359 F2d 550, 553 (9th Cir. 1966) (corporate director was entitled to his choice of counsel, even though that counsel had represented other witnesses and SEC objected); *SEC v. Csapo*, 533 F2d 7, 10-11 (D.C. Cir. 1976) (corporate officer's choice of counsel who had represented eight other witnesses "is both understandable and reasonable" given "they have acquainted themselves with the underlying facts and the complex corporate background," and replacing them "would require further time and effort * * * at added expense"); *Matter of Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) 79,608 at 83,634 (A.L.J. 1973) (observing that generally "a litigant's choice of counsel is an extremely important right which should not be denied him," and the "practical approach of permitting the clients to choose as their counsel, if they wish to do so on an informed basis, the attorneys who are most familiar with the case and with the potential vulnerability of those charged with the offenses"). Petitioners have searched for but not found any other cases in which lawyers have been disciplined for the legal strategy that Petitioners followed on behalf of FLIR and their individual clients.

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[69] *See* Maletta Offer of Proof No. 30 (Ex. 616) (concluding that the Bar's position in this case could deny clients "the advantages that might otherwise be available through a joint representation and potentially could hinder the effective defense of those clients").

6. Character.

Finally, the Trial Panel found that Ellis and Rosenbaum "are of excellent character[,] have impeccable reputations in the community," and have made outstanding contributions to the profession and community. (ER 213; *see also* Ramfjord 882:5-17; Glade 1246:18-1247:11; Roberts 1828:20-1829:7; Houser 1911:16-20; Jarvis 1882:21-1884:20; Fitzhenry 2252:12-20; Neil 2281:6-9; Wynne 2449:5-24; Ellis 2768:18-2777:6; Rosenbaum 661:16-663:3; Ex. 500.) To tarnish either of their exemplary reputations based on the ill-conceived and deeply flawed case presented by the Bar would be a disservice to all Oregon lawyers.

IV. CONCLUSION

These cases should be dismissed.

DATED: January 13, 2014 **SCHWABE WILLIAMSON & WYATT PC**

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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 January 27, 2014 and (2) the word-count of this brief is 24,989 words.

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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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DATED: January 13, 2014 **SCHWABE WILLIAMSON & WYATT PC**

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2014, I served a true copy of this **AMENDED REPLY BRIEF OF BARNES H. ELLIS AND LOIS O. ROSENBAUM** via electronic notification on:

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CERTIFICATE OF FILING

I hereby certify that on January 13, 2014, I efiled the original of this **AMENDED REPLY BRIEF OF BARNES H. ELLIS AND LOIS O. ROSENBAUM** with the State Court Administrator via the Oregon Judicial Department's Appellate e-File system to:

State Court Administrator
Appellate Court Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

DATED: January 13, 2014

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