

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 06-30100

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

J. KENNETH STRINGER, III, ET AL.
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the District of Oregon
THE HONORABLE ANCER L. HAGGERTY
CHIEF UNITED STATES DISTRICT JUDGE
CG 03-432-HA

**BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE, IN SUPPORT OF APPELLANT'S BRIEF
SEEKING REVERSAL AND REMAND**

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INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Commission is the law enforcement agency specifically charged by Congress with civil enforcement of the federal securities laws.^{1/} *See* Securities Act of 1933 (“Securities Act”), Sections 19 & 20, 15 U.S.C. 77s, 77t; Securities Exchange Act of 1934 (“Exchange Act”), Section 21, 15 U.S.C. 78u; *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1390 (D.C. Cir. 1980). With the exception of criminal violations, which must be prosecuted by the Department of Justice (“DOJ”), the Commission is empowered to investigate and prosecute all violations of the securities laws by any person or entity it believes may have committed a violation, including individuals, public companies, securities exchanges, broker dealers, investment advisors and mutual funds. *See, e.g.*, Exchange Act, Section 21(a), 15 U.S.C. 78u(a) (“The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter”). Among the violations the Commission investigates and prosecutes are insider trading, accounting fraud, and providing false or misleading information about securities or about public companies that issue securities.

When a Commission investigation produces evidence of a violation of the

^{1/} As an agency of the United States, the Commission may file an *amicus curiae* brief without the consent of the parties or leave of court. Fed. R. App. P. 29(a).

federal securities laws, the Commission may bring a civil enforcement action to obtain appropriate relief, including cease and desist orders, civil penalties, disgorgement of ill-gotten gains, injunctions prohibiting future wrongdoing, or orders barring violators from participating in the securities industry or serving as officers and directors of public companies. The Commission brings only civil actions as it does not have authority to bring criminal proceedings. *See* Securities Act, Section 20(b), 15 U.S.C. 77t(b); Exchange Act, Section 21(d), 15 U.S.C. 78u(d). However, the Securities Act and the Exchange Act both specifically provide that the Commission may transmit evidence of a violation of the securities laws “to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.” *Id.* The securities laws place no time constraints on when or how the Commission may make evidence available to criminal authorities, leaving such matters to the discretion of the Commission and DOJ. *Id.* The securities laws also provide that willful violations of their requirements can subject a person to criminal penalties and imprisonment. Securities Act, Section 24, 15 U.S.C. 77x; Exchange Act, Section 32(a), 15 U.S.C. 78ff. Instances of improper conduct often lead to both civil and criminal proceedings because different remedies are available in those different proceedings, and even where a defendant is subject to significant criminal

penalties, civil remedies are important to compensate victims of securities law violations, and to prevent the defendants from engaging in future violations of the securities laws or to bar them from the securities industry. *See United States v. Gartner*, 93 F.3d 633, 635 (9th Cir. 1996); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377-78 (D.C. Cir. 1980).

The district court's holding that Commission staff misled defendants J. Kenneth Stringer, J. Mark Samper, and William N. Martin by directing Stringer's counsel to contact criminal authorities when he asked if the SEC was working in conjunction with the United States Attorney's Office will significantly impair the Commission's ability to cooperate with criminal authorities and consequently will impair the government's ability to assure that, where appropriate, those who violate the federal securities laws are subject to both civil and criminal consequences. If the Commission cannot provide ongoing assistance and advice to agencies with authority to investigate and bring criminal actions, those agencies frequently may be unable to bring actions based on complex fraudulent securities transactions.

This brief will address the adverse impact of the holding on the Commission's responsibility to enforce the securities laws. The United States' brief ably explains the factual and legal errors in the holding; the purpose of this

brief is to illustrate why the public interest is best served by fostering the current practice of cooperation between civil and criminal authorities conducting their own investigations and why the district court opinion could significantly harm efforts to enforce securities laws. It will also address why the duty that the holding imposes upon the Commission to seek judicial consideration of possible conflicts of interest between witnesses and their counsel is both unnecessary and unworkable.

SUMMARY OF THE ARGUMENT

The cooperation between the SEC and DOJ in this case was fully in accord with the Commission's policies concerning parallel proceedings: Commission staff advised each witness in the Commission's civil investigation that evidence obtained by the Commission could be used in criminal proceedings and that the witnesses could decline to testify in accordance with their Fifth Amendment rights. If the decision of the court below is affirmed, it will cause a significant adverse impact on the Commission's ability to cooperate with criminal authorities, as directed by Congress and the President and as authorized by the courts. As the Commission often does not have complete or current information about investigations by criminal authorities, any new notices required under the court's decision will not necessarily provide witnesses any information or guidance that is

more meaningful than what they receive under current policies, and in many cases, due to the Commission's lack of information, could have the contrary effect of providing them with misleading or incomplete information.

Also, the court's conclusion that the Commission was under some obligation to take additional steps beyond those it took in this case to prevent conflicts of interest from arising between an individual and his counsel is unsupported by any ethical obligation governing the conduct of Commission attorneys and is unworkable.

ARGUMENT

- I. The Disclosure Requirements Imposed by the District Court Will Create Significant Problems for the Government Without Providing Further Protection for Witnesses or Persons Whose Conduct Is Being Investigated.**
 - A. The Commission Routinely Advises Witnesses of Their Constitutional Rights, Alerts Them to the Possibility of Criminal Investigations, and Informs Them that the Commission May Give Information They Provide to Criminal Authorities.**

When the Commission's staff learns of a possible securities law violation, it conducts a preliminary investigation. In a preliminary investigation, the staff lacks subpoena power and must instead rely upon witness cooperation to obtain information. Where witnesses decline to cooperate, the Commission may enter a

formal order of investigation, granting staff authority to subpoena witnesses or compel production of documents. *See* Exchange Act, Section 21(b), 15 U.S.C. 78u(b); 17 C.F.R. 202.5 & Part 203. If the investigation yields evidence that indicates that any person has violated the federal securities laws, the Commission can either bring a civil action in any United States district court to obtain the appropriate relief, *see* Securities Act, Section 20(b), 15 U.S.C. 77t(b); Exchange Act, Section 21(d), 15 U.S.C. 78u(d), or institute administrative proceedings before the Commission seeking imposition of civil penalties, disgorgement, or other remedies, *see* 17 C.F.R. 202.5(b); Exchange Act, Section 21B, 15 U.S.C. 78u-2.

The Commission's policies and procedures for conducting investigations require Commission staff to provide a Commission Supplemental Information Form (Form 1662) to any person from whom the staff seeks documents or testimony. ER 1134. The Form 1662 provides all persons who are requested to provide information with notice of the basis of the Commission's authority to request the information and the principal and routine uses of the information. The Form 1662 expressly advises witnesses of their right under the Fifth Amendment to refuse to provide any information that may tend to incriminate them. It states:

Fifth Amendment and Voluntary Testimony. Information you give may be used against you in any federal, state, local, or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency.

You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture.

The Form 1662 also expressly advises the person that, as part of the Commission's routine use of any information provided, it is the Commission's policy to share information with other agencies, "particularly United States Attorneys and state prosecutors." It states:

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. *There is a likelihood that information supplied by you will be made available to such agencies where appropriate.* Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. *To coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies. . . .* (Emphasis added).

Under the Commission's policy, before taking testimony, staff allow a witness time to review Form 1662, and at the beginning of the testimony staff ask

if the witness has any questions about the form. It is also the Commission's policy to specifically advise each witness, on the record, that their testimony and the facts developed in the investigation might constitute violations of other state, federal, civil, or criminal laws.

In the course of investigations, staff may provide information to criminal authorities. The Securities Act and Exchange Act both expressly authorize the Commission to transmit evidence of securities law violations to DOJ, for use by DOJ in its discretion to determine whether and when to institute criminal proceedings. *See* Securities Act, Section 20(b), 15 U.S.C. 77t(b); Exchange Act, Section 21(d), 15 U.S.C. 78u(d). Indeed, courts, Congress, and the President have approved close cooperation between the SEC and federal criminal law enforcement authorities. *See* H.R. Rep. No. 640, 95th Cong., 1st Sess. at 10 (1977) (“Traditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee [on Interstate and Foreign Commerce] fully expects that this cooperation will continue”); Exec. Order No. 13271, 67 Fed. Reg. 46091 (Jul. 9, 2002) (Establishment of the Corporate Fraud Task Force) (stating one of the Task Force's functions is to “enhance cooperation among . . . agencies, and entities of the Federal Government in the investigation and prosecution of significant financial crimes”); *Dresser*, 628 F.2d at 1385-87

(noting that Congress had repeatedly endorsed the “close working relationship” and “close cooperation” between the Commission and DOJ, and rejecting “attempts to build a partial information barrier” between agencies engaging in their own separate enforcement spheres in good faith) (*citing United States v. LaSalle National Bank*, 437 U.S. 298, 312 (1978)). These authorities have imposed no time limits on when the exchange of information with DOJ may occur, leaving that determination to the agencies’ discretion.

The Commission’s rules implement these policies. Rule 203.2 of the Commission’s Rules Relating to Investigations expressly authorizes SEC staff to release non-public information in the Commission’s investigative files to federal, state, or local authorities, and to discuss the contents of those files with them. 17 C.F.R. Part 203.2.^{2/} Regulation 19-1.4(a) of the Commission’s administrative

^{2/} Rule 203.2 states:

Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed non-public, but the Commission approves the practice whereby officials of the Divisions of Enforcement, Corporation Finance, Market Regulation and Investment Management and the Office of International Affairs at the level of Assistant Director or higher, and officials in Regional Offices at the level of Assistant Regional Director or District Administrator or higher, may engage in and may authorize members of the Commission's staff to engage in discussions with persons identified in

(continued...)

regulations also provides:

Because SEC examinations and investigations frequently involve violations of State law or other Federal statutes, the SEC recommends and encourages full cooperation with State and other Federal law enforcement authorities. Subject to such guidelines or limitations as may be established by the SEC from time to time, SEC officials are authorized in their discretion to render such assistance as may be requested by these authorities.

SEC Administrative Regulation 19-1, *Disclosure of Non-Public Information in Connection with Examinations or Grants of Access*, 2 SECR 19-1 (Aug. 31, 1999).

Before discussing its investigations or providing file access, the Commission requires the requesting agency to provide a formal written access request. In the access request, the requester must state that the access request is being made in connection with an ongoing lawful investigation, and that it will maintain safeguards to protect the confidentiality of non-public files which it receives. Criminal authorities may request access and seek Commission cooperation at any stage of a Commission investigation or enforcement proceeding.

^{2/}(...continued)

Sec. 240.24c-1(b) of this chapter [other federal, state, or local authorities] concerning information obtained in individual investigations or examinations, including formal investigations conducted pursuant to Commission order.

Once a written access request is provided, Commission staff are authorized to cooperate fully with DOJ or other criminal authorities. This cooperation can include sharing factual information learned in the SEC investigation, sharing documents furnished to the SEC by third parties, providing access to testimony taken by the SEC, discussing the SEC's legal theories supporting its civil case against a respondent, sharing SEC staff's ideas concerning possible civil violations of securities laws, and advising DOJ of the status of the SEC's investigation and the SEC's future investigative plans. SEC staff can also offer their detailed expertise to criminal authorities concerning the operation of the securities laws, that criminal authorities may not otherwise possess.

B. The Defendants Were Specifically Informed of their Fifth Amendment Rights and of the Possibility of a Criminal Proceeding.

The district court did not point to any actions by Commission staff which were inconsistent with these policies and practices. Indeed, the evidence shows that the Commission staff provided each defendant a copy of Form 1662 prior to their investigative testimony, explaining their rights and the Commission's procedures concerning sharing information with criminal authorities, and explaining that their testimony and the facts developed in the SEC's investigation might constitute violations of other state, federal, civil, or criminal laws. ER

1080-81, 1126-30, 1142-48, 1153, 1156, 1160-61, 1164. Each witness admitted that he had read the Form 1662, and had no questions. *Id.* Lois Rosenbaum, counsel for defendant Martin, also testified at the suppression hearing that she took the Form 1662 warnings seriously. ER 829-30. In addition to the warnings on Form 1662, before each witness's testimony, SEC counsel taking the testimony also expressly advised each witness on the record that the facts developed in the SEC investigation could also constitute violations of criminal laws. ER 1080, 1156, 1160, 1164. When defendant Stringer's attorney asked whether the SEC was working in conjunction with the U.S. Attorney's Office of any jurisdiction, he was correctly advised that the SEC's policy was not to comment on such issues, but to direct the witness to inquire of the U.S. Attorney's Office if he chose to. ER 1165.

C. The Court's Decision Will Have a Significant Adverse Impact on the Commission's Ability to Fulfill Its Obligations Under the Securities Laws.

If the district court's decision is not reversed, there will be a significant adverse impact on the Commission's ability to meet its obligations to provide evidence of criminal violations to DOJ, but witnesses in Commission proceedings will not receive any additional information that is more meaningful than what Form 1662 already provides. In fact, in many cases the decision could have the

contrary effect of causing witnesses to receive misleading or incomplete information.

The district court's decision creates two distinct problems. First, it does not give the Commission meaningful guidance as to when disclosure of criminal investigations would be required. Therefore, to assure compliance, Commission staff would have to notify any person it interviews of any related criminal investigation if there is any possibility that they could be subjects or targets of such an investigation. Further, it does not provide any direction about what the Commission staff should do if criminal authorities have a basis for keeping their investigation confidential.

The district court's opinion is based on a finding that "the USAO was actively involved in the SEC investigation," and the district court found the Commission staff's response to a direct inquiry about possible cooperation with criminal authorities misleading "in light of the close association between the USAO and the SEC." Opinion at 9-10. In any case where the Commission provides documents to criminal authorities and has some ongoing communication with the criminal authorities, the Commission could be subject to such a finding. However, the Commission does not control the conduct of criminal investigations by other agencies and is not in a position at any given time to know the status of a

criminal investigation or how the criminal authorities plan to conduct the investigation. The Commission may not even know whether the criminal authorities were interested in a Commission investigation for securities-related reasons, or for some other issue such as tax violations that would be unrelated to the Commission's enforcement of the securities laws. Further, more than one criminal authority may be investigating different aspects of the same general subject matter at any given time – including multiple United States Attorneys' Offices, as well as state and local prosecutors. Each of these different authorities may have different areas of interest and different persons they are interested in. Thus, any comment by Commission staff on parallel criminal proceedings would run the risk of being misleading. Even stating that a certain office or agency is conducting a criminal proceeding could be misleading because the office mentioned may not have any real interest in a case while another office or agency may be looking at the conduct without having notified the Commission of a new (or renewed) interest. Nonetheless, the district court opinion requires disclosure by the Commission of the existence of a criminal investigation to avoid misleading a witness. Paradoxically, the opinion places the Commission in the position of being required to provide information that could be misleading or inaccurate, supposedly to avoid being subject to an accusation that its conduct is misleading.

This issue is magnified if the district court's opinion is read to require not only that the Commission advise witnesses about the existence of a criminal investigation, but also advise them whether they are subjects or targets of a criminal investigation. The terms "subject" and "target" are defined terms from the United States Attorneys' Manual relevant to criminal prosecutions, but the SEC does not have subjects or targets of its civil securities investigations and does not rely on any labels assigned by criminal investigators in its civil investigations. Thus, the Commission would have even less information about who is a subject or target than it has about the existence of an investigation. Also, the labels used by criminal authorities may change frequently and, as the evidence indicates in this case, the terms may be used informally and may have varying meanings. *See* United States Brief at 10. The Commission's policy of requiring witnesses to communicate directly with criminal authorities and not obtain information from the Commission avoids the confusion and ambiguity that would result if Commission staff had to tell witnesses the status of other agencies' investigations.

The second problem with the disclosure required by the district court opinion is that the SEC would potentially have to disclose the existence of criminal inquiries or investigations even in circumstances where criminal authorities would not. This would severely threaten the criminal authorities'

investigatory privileges and the integrity of the investigatory process. In many cases criminal authorities legitimately do not want their presence or interest known to potential subjects or targets of an investigation as they develop their case, such as when the criminal enterprise is ongoing, during an undercover operation, or there is the potential for targets to “cover their tracks,” flee, or destroy evidence. Even requiring the Commission to provide notice to witnesses that it had received an access request could threaten criminal investigations where the criminal authorities have legitimate reasons for not revealing their presence.

These problems likely would lead to less cooperation between the Commission and criminal authorities. Criminal authorities would be unlikely to seek cooperation from the Commission if they believed that the Commission would have to reveal the cooperation, and thus the criminal authorities’ interest, in the course of its own investigation. Indeed, even the practice of providing criminal authorities access to Commission files would likely end, since criminal authorities would be unlikely to request access if making Commission staff aware of their possible criminal interest imposed a duty of disclosure on the Commission.

While accepting inefficiencies or restrictions on investigations may be necessary where the restrictions protect constitutional or other rights of witnesses,

the procedures imposed by the district court's decision here serve no additional purpose and provide no protections not already provided by current procedures. *See SEC v. Jerry T. O'Brien*, 467 U.S. 735, 741 (1984) (reversing a Ninth Circuit decision imposing a requirement on the Commission to provide notice to "targets" of Commission investigations whenever the Commission issues subpoenas to others, noting the Commission's broad authority to determine how to conduct investigations and finding no support for such a notice requirement in the Constitution, the securities laws, or general standards governing enforcement of subpoenas). Because the Commission is not entitled to know – and often does not know – what criminal authorities plan to do and because criminal authorities often change their direction, drop investigations entirely, or start investigations only after the Commission has completed its investigation, requiring the Commission staff to inform witnesses of criminal investigations will not give them more meaningful information than Form 1662 provides.

II. The District Court's Expectation that the Commission Police Conflicts of Interest Between Witnesses and Their Counsel Is Groundless and Unworkable.

In addition to dismissing the indictment, the district court addressed claims by one defendant, Samper, that the Commission and DOJ had improperly exploited a conflict of interest between Samper and one of his attorneys. The

district court held that certain evidence should be suppressed and certain charges should be stricken from the indictment. Opinion at 17. In the course of reaching that conclusion, the district court expressed the opinion that “the government” has an obligation to bring apparent conflicts of interest between a defendant and his counsel to the “trial court’s attention” and, if necessary, seek disqualification of counsel. *Id.* at 16 (quoting *United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991)).^{3/} The brief of the United States ably explains why the district court’s decision to suppress evidence was erroneous, *see* U.S. Br. at 45-51, but the Commission is also concerned about the impact of the dicta stating that the government should have sought disqualification of counsel because that dicta places a groundless and unworkable burden on the Commission by effectively requiring it to initiate a court action seeking disqualification of counsel during an investigation when the Commission has not yet determined whether to bring an enforcement proceeding.

The district court provided little explanation of his finding that the government should have sought disqualification of Samper’s counsel. In the process of reaching that conclusion, the district court stated that “[t]he SEC was

^{3/} The district court did not specify whether DOJ or the Commission should have moved for disqualification.

aware that a criminal prosecution would most likely occur, and was actively involved in obtaining evidence for the purposes of the criminal prosecution.”

Opinion at 16. It further stated that “[t]he government was the only party involved who knew the degree of the conflict of interest” between Samper and his counsel.

Id. The district court did not explain why knowledge of a possible criminal prosecution would place the government, which would not be privy to any discussions between Samper and his counsel, in the best position to evaluate conflicts.^{4/} More specifically, the district court did not cite to Rules 1.7 and 1.8 of Oregon’s Rules of Professional Conduct, which governed the analysis of a potential conflicts of interest between Samper and his counsel,^{5/} or determine whether Samper’s counsel had discussed potential conflicts or obtained a waiver of any perceived conflict from Samper.

Contrary to the district court’s findings, the Commission took all appropriate action and should not be required to take additional action in future

^{4/} Also, as discussed above and in the United States’ brief, the district court’s view of what the Commission must disclose about a parallel criminal investigation is erroneous.

^{5/} Because Samper was located in Oregon and was represented by an attorney practicing in Oregon, the Commission presumes that the Oregon Rules of Professional Conduct would apply to an analysis of Samper’s counsel’s obligations with respect to any potential conflict of interest.

investigations. The Commission repeatedly alerted both Samper and his counsel (Lois Rosenbaum of the Stoel Rives firm in Portland) of the potential for a conflict, without result. As the district court noted, defendant Samper and his counsel were warned of potential conflicts shortly after the inception of the Commission's investigation, prior to Samper's first appearance before the Commission staff. In March, 2000, Rosenbaum offered to represent FLIR, Stringer and Samper in connection with the Commission investigation. Although he had already retained his own counsel, Samper thereafter consented to joint representation by Rosenbaum on May 15, 2000. On June 30, 2000, Samper was subpoenaed to testify before the Commission staff. Immediately thereafter, a member of the Commission staff wrote a letter to Rosenbaum which stated:

Although it is far too early in the investigation of the SEC staff to identify people who may possess liability, we are troubled by the scope of [Stoel Rives'] representation. We urge you to stringently evaluate and assess your conflicts prior to continuing with this method of representation. Further, we hope that the possibility of conflicts has been sufficiently explained to all of your putative clients.

Opinion at 13. Rosenbaum responded that she was aware of, and would comply with, all ethical obligations. *Id.* As noted above, the Commission had no way to verify that Rosenbaum discussed this situation with Samper.

After being advised by Rosenbaum to fully cooperate with the Commission,

Samper testified before the Commission on three occasions in October 2000 and later disclosed all company documents in his possession. *Id.* He provided additional testimony to the Commission in October and November 2001. *Id.* Prior to testifying, Samper was provided with a copy of the Commission's Form 1662. In addition to alerting Samper and his counsel as to the Routine Uses of Information collected by the Commission staff and the likelihood that such information would be shared with law enforcement agencies, the form also provided notice to Samper that the type of multiple representation provided by Rosenbaum to himself, Stringer and FLIR presented a significant potential conflict of interest. The form unequivocally emphasized that it was Samper's responsibility to discuss this matter with counsel and to make the final choice concerning representation:

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

See Form 1662. Accordingly, as a result of the actions of the Commission staff and the operation of the Commission's procedures, Samper received early warning

of the possibility of a conflict of interest.^{6/}

The district court failed to cite a single case or rule which provides a basis for its conclusion that the Commission had an obligation to take the additional step of filing a court action seeking Rosenbaum's disqualification. None of the cases cited by the district court support imposition of such an obligation,^{7/} and we are not aware of a single case in which a court has concluded that the government is required to file a court action seeking disqualification under these circumstances, or which has concluded that warnings such as those provided to

^{6/} The Commission's issuance of warnings to both Samper and Rosenbaum, and its reliance upon Rosenbaum's representation that she was aware of, and would comply with, all ethical obligations, is entirely consistent with Rules 1.7 and 1.8 of Oregon's Rules of Professional Conduct. These rules impose a duty upon the attorney, rather than third parties like the Commission and its counsel, to assess conflicts of interest.

^{7/} *SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966) and *Kentucky West Virginia Gas Co. v. Pennsylvania P.U.C.*, 837 F.2d 60, 618 (3rd Cir. 1988), cited by the district court, support the general proposition that multiple representation is permissible. *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991), cited by the district court, is also inapposite. In *Tatum*, the Fourth Circuit concluded that an attorney's representation of both a client and his own law partner in a criminal trial for bankruptcy fraud represented a clear conflict of interest which adversely affected his representation of the client, and remanded the case for a new trial. Finally, as the United States noted in its brief at 51, n.3, *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980), cited by the district court, is a Sixth Amendment case involving interference after a defendant was criminally charged, and is not relevant to this case, which involves alleged Commission misconduct during its civil investigation when Sixth Amendment rights do not attach.

Samper's counsel and to Samper himself by the Commission staff were inadequate in any way.

In addition, any decision that would require the Commission to take additional steps beyond those it took in this case to prevent potential conflicts of interest from arising between an individual and his counsel would be unworkable. Requiring the Commission to unilaterally approach "the court" to seek the dismissal of counsel when a conflict becomes apparent during a Commission investigation, as the district court concludes should have been done in this case, would not be possible since there is no court action pending during the investigative phase, and hence no court with jurisdiction over the matter.^{8/}

While Rule 8.3(a) of the *Model Rules of Professional Conduct* contemplates that a lawyer who "knows that another lawyer has committed a violation of the Rules of Professional Conduct" will notify the appropriate professional association in certain situations, that obligation is very different from what the district court contemplated.^{9/} First, that obligation would be on individual lawyers,

^{8/} The district court does not address which court would have jurisdiction to hear such a claim.

^{9/} Other ethical codes, including the *Standards of Ethical Conduct for Employees of the Executive Branch* (codified in 5 C.F.R. 2635) and the Commission's own Canon of Ethics (codified in 5 C.F.R. 200.50 *et seq.*) do not
(continued...)

not on the Commission itself. Second, the district court did not make a finding that any Commission lawyer knew of a violation. Indeed, the court did not even refer to the relevant Rules of Professional Conduct to explain the specific nature of the conduct and why it could not be consented to, especially since Samper had independent counsel not subject to the conflict who represented him before Rosenbaum did. Third, requiring the Commission to raise the issue in court gives rise to many more problems than a report to an entity like a bar association which, unlike the Commission, would be in a position to verify that opposing counsel has fully discussed the potential conflict with the client and has, when appropriate, obtained the client's informed consent to continue representation notwithstanding the existence of a conflict. Indeed, were the Commission to seek disqualification of counsel without being privy to the discussions between counsel and client mandated by codes governing attorney conduct, such action would doubtless give rise to claims that the Commission is actually seeking to interfere with, rather than preserve, the client-counsel relationship which the client voluntarily chose to enter

^{2/}(...continued)

impose any additional obligation. Also, California's Rules of Professional Conduct, unlike the Model Rules, do not have a requirement to report a violation to an appropriate professional association.

into,^{10/} triggering an entirely new, ancillary and completely unnecessary area of motions practice. Litigants doubtless would challenge a Commission motion seeking disqualification or dismissal of counsel on conflicts grounds as an attempt to impose an additional burden on individuals, or as a punitive attempt to replace an attorney providing able representation to an individual being investigated by the Commission.

The detriment to the Commission's investigative efforts, and the additional burden imposed upon the district courts and the parties by the requirement that the Commission move for disqualification when it has some reason to believe an unwaivable conflict exists, is manifest and demonstrates the impracticability of such a requirement.

^{10/} Form 1662 states unequivocally that it is the responsibility of an individual under investigation by the staff to choose counsel, and to discuss the possibility of conflicts with counsel. Professional Codes of Conduct impose a similar obligation on attorneys.

CONCLUSION

The Commission respectfully submits that this Court should reverse the decision of the district court.

DATED this 13th day of September 2006.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Commission represents that there are no related cases.

BRIEF FORMAT CERTIFICATION

Ninth Circuit Rule 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Commission's
brief is:

Proportionally spaced, has a typeface of 14 points or more and contains
5893 words, inclusive of certifications.

DATED this 13th day of September 2006.

RICHARD M. HUMES
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