

**JO ANN HARRIS**

**Attorney at Law**

[Redacted]  
**New York, New York 10025**

**Telephone and Fax** [Redacted]

February 18, 2002

Honorable Judges of the Special Division  
District of Columbia Circuit  
333 Constitution Avenue, NW  
Washington, DC 20001-2866

Attention: Hon. Mark J. Langer, Room 5409

**Re: Division No. 94-1, In Re: Madison Guaranty Savings & Loan Association  
(Regarding Monica Lewinsky and Others)**

Honorable Judges:

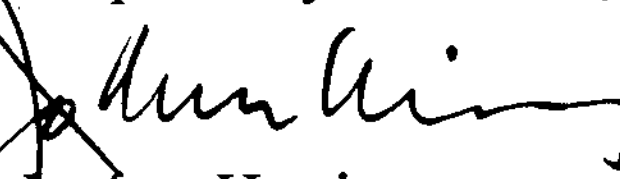
On February 15, 2002, I received through the United States mails a copy of a Per Curiam Order of the Special Division, which was filed on February 7, 2002, and postmarked February 12, 2002. The Order denied my request that my January 9, 2002 letter with attached exhibit (Report of Special Counsel) be made part of the record in this case and, pursuant to 28 U.S.C. Section 594(h)(2), be included as comments to the Independent Counsel's Final Report.

Both Ms. Harkenrider and I believe it is important to our professional reputations that our comments are included with the Independent Counsel's mis-characterization of our Report. Toward that goal, I am modifying my request of January 9, 2002, to exclude the proffer of the exhibit (which I assume to be the reason for the denial of my request), and ask simply that the enclosed modified letter dated February 18, 2002, be included as comments to the Independent Counsel's Final Report. It is modified only to remove the request concerning the exhibit.

If the Court regards any portion of my comments as somehow inappropriate, I respectfully request notice and the opportunity to revise my submission, or to consider requesting that our names and any mention or description of our Report of Special Counsel be removed from Independent Counsel's Final Report.

Five copies of my modified letter dated February 18, 2002 are enclosed.

Respectfully submitted,



Jo Ann Harris

Enclosure, Letter dated Feb. 18, 2002

**JO ANN HARRIS**  
**Attorney at Law**  
[REDACTED]  
**New York, New York 10025**

Telephone and Fax [REDACTED]

[REDACTED]  
February 16, 2002

[REDACTED]  
FOIA(b)(6)

Honorable Mark J. Langer  
Clerk, Special Division, Room 5409  
District of Columbia Circuit  
333 Constitution Avenue, NW  
Washington, DC 20001-2866

**Re: Division No. 94-1, In Re: Madison Guaranty Savings & Loan Association  
(Regarding Monica Lewinsky and Others)**

Dear Mr. Langer:

By letter dated October 5, 2001, I was informed of the Court's authorization to examine portions of the Independent Counsel's Report (IC Report) in which I was mentioned. I exercised this opportunity on October 22, 2001. This letter is my submission of comments and factual information in response to those portions of the Report. I ask that this submission be included in the record and made part of the Report released to the public.

**Introduction**

It would be hard to overstate the intensity of the public debate generated by the methods used by the Office of Independent Counsel (OIC) on January 16, 1998, when OIC lawyers and FBI agents, pursuing their investigation of the President, confronted Monica Lewinsky in a hotel room in Virginia. Among the allegations were that the OIC had disparaged Ms. Lewinsky's lawyer and interfered with her desire to contact him in violation of Department of Justice rules, regulations, policies and practices relating to contact with persons represented by lawyers. The OIC defended its tactics as "traditional techniques that law enforcement always uses."<sup>1</sup> Criminal

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<sup>1</sup> Testimony by Independent Counsel Kenneth Starr, Impeachment Inquiry: William Jefferson Clinton, President of the United States, Hearing Before the Committee of the Judiciary, House of Representatives, Nov. 19,

defense lawyers seized upon the OIC position as proof that federal prosecutors routinely abuse their power. The topic commanded coverage not only by the legal press, but by general magazine, newspaper and television outlets throughout the country.<sup>2</sup> It became the subject of court cases, live broadcasts of congressional hearings, thousands of letters to the Department of Justice, and ultimately part of a widely reported investigation by the Department.<sup>3</sup>

At the request of Robert Ray after he was appointed Whitewater Independent Counsel in late 1999, the Attorney General referred the allegations relating to the January 16, 1998 contact with Ms. Lewinsky back to the OIC. Mr. Ray asked me to conduct an independent investigation, make factual findings, findings regarding the propriety of the conduct involved, and, if appropriate, recommendations as to discipline, or other recommendations.

We discussed what would happen if he did not accept my findings, conclusions, or recommendations. Our shared view was that in such an event, the public interest was so great and public accountability so important that both my findings and conclusions, and his, would be made matters of record, giving members of the public the information needed to form their own views. In this connection, we agreed that my inquiry was essential to bolster public confidence in federal prosecutors, whether it showed the government capable of sanctioning its own lawyers who fail to meet their ethical obligations, or found that the conduct under attack was appropriate.

I agreed to undertake the task and recruited Mary Frances Harkenrider to serve as co-counsel. She had been my counsel when I was the Assistant Attorney General in charge of the Criminal Division at the Department of Justice.<sup>4</sup>

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1998 at 75. See also id. at 39 (“it was [not] our place to discard law enforcement practices that are used everyday by prosecutors and police throughout the country”).

<sup>2</sup> Because of the pervasive publicity, the allegations relating to the Lewinsky contact became inextricably entwined with the underlying investigation that is the subject of Independent Counsel’s Report, which is subtitled “Regarding Monica Lewinsky and Others.”

<sup>3</sup> This widespread exposure could not have happened at a worse time for the Department of Justice which was locked in an often acrimonious exchange with defense attorneys, judges and state disciplinary bodies about the Department’s efforts to protect federal prosecutors from the reach of state ethics rules. See, e.g., ABA Journal, “Is DOJ Above the Rules?” November 1997 at 26, et seq.; SC Report at 54-57. Ultimately Congress legislated against the Department, rendering its lawyers subject to the various state contacts rules and regulations. The SC Report analyzes language used in the Department’s regulation that is similar to language in ethical rules in use in the District of Columbia and many states. See SC Report at 54-82. Such analysis could be useful in aiding bar authorities to ensure the intended application of their own rules.

<sup>4</sup> In the Department, Ms. Harkenrider had been very involved in matters concerning attorney ethics. Between the two of us, we brought to the task some 20 years experience as federal prosecutors with the Department in Washington and in our respective United States Attorney’s offices (the Southern District of New York and the Northern District of Illinois). Ms. Harkenrider also received notice authorizing her review of relevant pages in the IC Report. She has participated fully in this response to the IC Report and joins in its submission.

On December 6, 2000, Special Counsel Harkenrider and I submitted a 100-page Report of the Special Counsel (SC Report), setting forth our findings of fact, our detailed analysis of the Department of Justice's standards, practice and guiding principles relating to the conduct under investigation,<sup>5</sup> our findings as to the propriety of that conduct, and recommendations. In our Report, we found that no OIC attorney committed professional misconduct, a finding compelled by our determination that the then applicable regulation did not provide a clear and unambiguous answer to whether Monica Lewinsky was represented regarding the "subject matter" of the OIC investigation on January 16, 1998.<sup>6</sup> SC Report at 70-82; see generally SC Report at 59-70 (setting forth Department regulation, rules, and guidance).

But, importantly, under the analytical framework employed by the Department's Office of Professional Responsibility (OPR) in such investigations, a finding of "no professional misconduct" is just the beginning of the inquiry, not the end.<sup>7</sup> Thus, looking beyond the black letter of the regulation to the Department's broader teachings and standards regarding the appropriate respect and deference to attorney-client relationships, we further found that the OIC attorney who was responsible for the overall confrontation with Ms. Lewinsky and who had virtually all of the contact with her that day, "exercised poor judgment and made mistakes in his analysis, planning and execution of the approach to Lewinsky." SC Report at 2; 82-98.

Mr. Ray accepted our findings of fact, but he isolated one limited aspect of our analysis as the basis for his determination that the OIC attorney in question had not shown poor judgment in the confrontation with Monica Lewinsky. The Independent Counsel was entitled under our agreement to reject our findings. We comment, not on his failure to accept our findings of poor judgment and mistake, but on the description of our Report and the citations to it contained in Appendix C of the IC Report (Appendix C). The Independent Counsel's description is so selective and cursory that it may lead to a misunderstanding of Special Counsel's work product and trivialize the allegations involved.<sup>8</sup> We believe the record should be complete and accurate.

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<sup>5</sup> By statute, OIC attorneys were bound to adhere to standards of conduct imposed upon all Department of Justice lawyers. 28 U.S.C. § 594(f)(1).

<sup>6</sup> It has never been disputed that Ms. Lewinsky was in fact represented by Frank Carter, a well known Washington, D.C. lawyer, if not in this matter, in a closely related matter, the Jones case against the President.

<sup>7</sup> Pursuant to the "Analytical Framework Used by the Office of Professional Responsibility in Investigations and Inquiries Into Allegations of Professional Misconduct" ("OPR Framework"), if OPR determines that professional misconduct did not occur, OPR considers whether an attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. Our Report sets forth a summary of the guidelines used by OPR in making these determinations. SC Report at 47-53. Importantly, OPR is explicit in stating that an attorney may be found to have used poor judgment even if the standard involved was not sufficiently clear to support a finding of misconduct.

<sup>8</sup> Special Counsel were not consulted as to the final wording of Appendix C; and, despite a request, were not allowed to review relevant portions of the Appendix. Nor were Special Counsel consulted on a petition we understand was filed by the Independent Counsel seeking permission to include a Summary of the SC Report as

In this response, we identify certain portions of Appendix C that fail adequately to characterize the SC Report.

### **Special Counsel's Comments Regarding Appendix C of the IC Report**

Appendix C of the Independent Counsel's Report, four pages in length, seeks both to characterize Special Counsel's Report, 100 pages in length, as well as explain the Independent Counsel's rationale for rejecting Special Counsel's finding that an OIC attorney exercised poor judgment in connection with the confrontation of Monica Lewinsky on January 16, 1998.

Although the Independent Counsel recognized the "substantial interest in assuring the public that these allegations were fully investigated and appropriately resolved" (Appendix C, n. 41), these four pages do not begin to serve that purpose, nor are they consistent with Independent Counsel's discussions with Special Counsel regarding these principles. Indeed, reading these four pages, the public would incorrectly jump to the conclusion that Special Counsel's efforts and analysis were minimal, that Special Counsel's finding of poor judgment was grounded solely on a technicality about which there was a difference of opinion, and that Special Counsel unfairly focused on one lawyer only. Nothing could be further from the facts.

**1. The IC Report does not acknowledge that Special Counsel's 100-page Report contains detailed findings of fact that were accepted by the IC.**

Special Counsel's Report contains detailed factual findings that were the result of a thorough factual investigation involving some 25 interviews and the examination of thousands of pages of documents.<sup>9</sup> SC Report at 8-47. The Independent Counsel accepted these factual

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part of the IC Report. We are aware that the Court denied Independent Counsel's petition although we had no input, nor did we have the opportunity to review or respond to whatever submissions were the basis for the Court's decision. Given the chance, we would have contended that the widespread public interest to be served by release of the Summary far outweighed other considerations, and further would have suggested that the Summary was not sufficient to complete the record; only the complete SC Report can accomplish that goal.

<sup>9</sup> Among other materials, we reviewed the final OIC submissions as well as the underlying work-product and back up material relative to the following proceedings, all of which related to the issue under investigation: litigation filed in the Federal District and Appeals Courts for the District of Columbia; the testimony of the Independent Counsel before the House of Representatives in the Fall of 1998; the D.C. Bar Counsel's inquiry; the DOJ inquiry. We also had access to investigative files of the OIC.

findings, yet in Appendix C, there is no reference to their existence, even though they form a formidable basis for our analysis and findings regarding the propriety of the conduct involved.<sup>10</sup> Nor does Appendix C describe the circumstances under which we decided we had to investigate the facts anew instead of relying on earlier factual submissions on the subject made by the OIC to the D.C. District Court, to the Congress, to the D.C. Bar Counsel and to the Department of Justice.

The final record in this matter should reflect our view that we were compelled to proceed in this fashion because the statements made by the OIC to these various entities were so strongly adversarial in tone and substance that they did not provide an objective view of what happened, but rather distorted and omitted important facts. SC Report at 6-7; 26, n.24; 30-32 & nn.31-33; 38 & n.44. These circumstances, causing as they did, substantial expenditure of the public's monies, should be part of any description of the SC Report.

**2. The IC Report leaves the mistaken impression that Special Counsel's finding of poor judgment was narrowly confined to whether the OIC attorney used one mode of analysis or another when, in fact, it was based on his overall conduct and the Department's consistent principles.**

Independent Counsel, in support of his rejection of Special Counsel's finding of poor judgment, states in Appendix C, "... [a]ccordingly, no finding of poor judgment could be fairly sustained that was 'entirely dependent' upon which mode of analysis was correct." It is important that the record reflect, as any reading of the SC Report would demonstrate, that – unlike the finding that there was no professional misconduct – Special Counsel's finding of poor judgment was not dependent upon which mode of analysis was correct.

Rather, in assessing the attorney's judgment, Special Counsel adhered to OPR's Framework and looked beyond the mode of analysis to the overall conduct of the confrontation. We looked to the principles espoused by the Department demonstrating deference to and respect for attorney-client relationships, including a person's right to choose an attorney free from government interference, and the standard of care required by its attorneys when these principles are implicated in investigative strategies.<sup>11</sup> SC Report at 63; 68-69; 77-79; 82-88; see generally

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<sup>10</sup> We have received no indication that Independent Counsel disagrees with our factual findings, and in fact, we were told by Independent Counsel's representatives that the Independent Counsel had no problem with our factual findings.

<sup>11</sup> In connection with our analysis of the Department regulation and standards, we collected and considered extensive DOJ background materials including DOJ statements made about the regulation and related rules; training and guidance provided to DOJ attorneys on the rules; advice given to DOJ attorneys relating to potential contacts in specific cases; closed DOJ/OPR case files; OPR annual reports; and documents setting forth the DOJ/OPR framework for examining allegations of professional misconduct.

SC Report at 54-70. We also weighed the standard of care and exercise of judgment the Department expects from its attorneys generally so as to ensure the public's trust and confidence in our criminal justice system. SC Report at 47-48; 82-88. Applying these standards and OPR's Framework for resolving allegations of ethical breaches, Special Counsel found two distinct, although related occasions in which the OIC attorney's judgment failed.

The first was during his analysis and planning of the contact. Our Report sets forth detailed findings of fact and analysis regarding the attorney's consideration of the sensitive issue of contacting Ms. Lewinsky, a target of the investigation, outside the presence of her attorney in the Jones case, in order to negotiate her cooperation. We found the level of care insufficient to "ascertain the obligations and standards imposed" and "in marked contrast to the action the Department may reasonably expect," especially considering the context of the investigation and the history of the Department's rules.<sup>12</sup> SC Report at 3-4; 23-27; 32-33; 34 & n. 40; 82-94.

We also found the attorney displayed poor judgment in connection with the actual confrontation at the Virginia hotel where Ms. Lewinsky's attempts to involve Frank Carter evolved in such a manner as should have caused any Department attorney to reassess the propriety of the ongoing contact and call a halt to it. Our findings detail the events of the day, including the more problematic statements made by and to Ms. Lewinsky regarding her ability to contact Frank Carter. SC Report at 35-47; 91-93; 94-98.

**3. The IC Report wrongly suggests that Special Counsel unfairly focused on the conduct of only one OIC lawyer.**

Independent Counsel's Appendix C states that "[t]he Independent Counsel rejected the Special Counsel's finding that an attorney exercised poor judgment, on the ground that the Independent Counsel considered it fundamentally unfair to single out one attorney for decisions that were made in consultation with supervisors, other colleagues, and a representative of the Department of Justice...." These assertions need to be placed in context.

If it was unfair to single out one attorney, the referral to Special Counsel should not have been made at all. Both the Independent Counsel and the Attorney General knew at the time of the referral to Special Counsel that the Department had the jurisdiction to refer the case of only one

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<sup>12</sup> In defining poor judgment, OPR states that an attorney displays poor judgment when "faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take" or when "confronted with an obviously problematic set of circumstances, the attorney fails to seek advice or guidance from his or her supervisors even though an attorney exercising good judgment would do so." SC Report at 51 quoting OPR Framework.

lawyer; he was the only OIC lawyer still employed by the government.<sup>13</sup> SC Report at 2. But, more importantly, Appendix C fails to mention that Special Counsel specifically considered the concerns raised by the focus on this lawyer and found the focus warranted. As it happened, and as noted in Special Counsel's Report, he was the OIC lawyer who advised the other OIC lawyers as to the contact rules, the lawyer responsible at the hotel room, and the one with virtually all of the direct contact with Ms. Lewinsky on January 16. SC Report at 2; 4; 11; 23-27; 36-47.

Second, Independent Counsel attempts to use the presence of a single Department of Justice lawyer to justify or mitigate the conduct of the OIC lawyer involved. From the time that public attacks began over the OIC's handling of this matter, the usually fiercely independent Office of the Independent Counsel has repeatedly attempted to justify its actions by pointing to a single Department lawyer who was sent to OIC offices to help the Department decide how to handle the OIC's demand for jurisdiction over the Lewinsky matter. The record should reflect that we carefully examined the role of the Department lawyer and concluded that OIC's efforts to use him as a shield was one more example of OIC's adversarial style in dealing with criticism of its actions. SC Report at 21-33 & nn.31-33; 89, n.115; 97.

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One final comment – given the tensions we identified in the relationship between the Department of Justice and the OIC, especially as they related to matters of attorney conduct, we made two specific recommendations designed to assist any future special prosecutors (whether appointed by the court or the Attorney General or some other authority) in handling such matters.

We learned during our investigation that the OIC had no structure in place to provide OIC lawyers consistent, authoritative ethical advice. We suggested that future independent counsel designate a full-time, senior prosecutor as a Professional Responsibility Officer, paralleling the Department's "PRO" program, as does every federal prosecutor's office throughout the country. We also suggested that the Department and a prospective special prosecutor could avoid the acrimony we saw in this case with a pre-appointment agreement setting forth, in the clearest terms, the manner in which the special prosecutor's office and the Department would relate to each other in matters involving alleged ethical violations by special prosecutor's attorneys. We also urged that an aspect of the agreement be a plain statement that the special prosecutor's

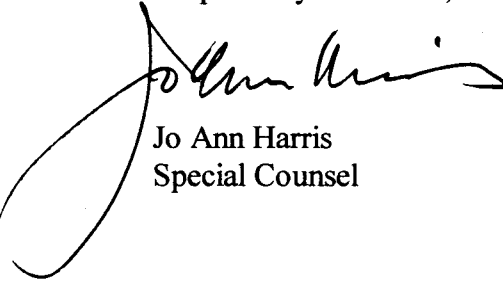
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<sup>13</sup> See correspondence AG Reno to IC Ray, 11/12/99; IC Ray to AG Reno 11/18/99; IC Ray to SC Harris, 1/11/00.



lawyers owe the investigating authority a duty of cooperation and candor. SC Report at 99-100. These recommendations are not memorialized in Appendix C. We believe these recommendations deserve serious consideration and should be part of the public record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jo Ann Harris". The signature is written in a cursive style with a large, sweeping initial "J".

Jo Ann Harris  
Special Counsel