

**Memorandum**

**Office of the Independent Counsel**

To: Robert W. Ray  
Independent Counsel

Date: 1/16/01

From: J. Keith Ausbrook, Deputy Independent Counsel  
Julie F. Thomas, Chief Associate Independent Counsel

Subject: Special Counsel's Report on the Contacts with Monica Lewinsky on January 16, 1998

*JKA*  
*JFT*  
*Approved 1/16/01 1:40pm*  
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This memorandum sets forth our recommendation regarding the December 6, 2000 Report of the Special Counsel Concerning Allegations of Professional Misconduct by the Office of Independent Counsel in connection with the Encounter with Monica Lewinsky on January 16, 1998 ("Report"). We have fully reviewed the Report and the comments [REDACTED] regarding the Report. We have also fully considered [REDACTED] oral presentation, given on January 10, 2001.

We recommend that you accept the Report's finding that neither [REDACTED] nor any other lawyer in the Office of the Independent Counsel engaged in professional misconduct. The Report considers such a finding "compelled" because the Report is unable to conclude whether Monica Lewinsky was a represented person under the regulations. Regardless of whether the Report is correct that the regulations reflect an unresolvable ambiguity regarding that question, it correctly concludes that a finding of professional misconduct would be inconsistent with the finding that the regulation was ambiguous. For that reason, we recommend acceptance of the finding of no professional misconduct.

At the same time, we recommend that you reject the Report's finding that [REDACTED] exercised poor judgment. That finding is predicated on the conclusion that [REDACTED] failed to appreciate an alleged ambiguity contained in departmental regulations relating to contacts with represented persons. According to the Report, that failure resulted in poor planning and execution of the approach to Ms. Lewinsky, involving communications to her that would have been violations of regulations prohibiting disparagement of counsel of a represented person and prohibiting negotiating immunity agreements with represented persons, if Ms. Lewinsky had been a represented person under the regulations.

We recommend that you reject this finding for two reasons. First, the Report reaches no conclusion that [REDACTED] analysis of the contacts issue was incorrect. [REDACTED] analysis was consistent with the "matter" based mode of analysis, a mode regularly, although not exclusively, used by the Office of Professional Responsibility ("OPR"). Although the Report cites the "subject" based mode as another possible mode of analysis, there is scant evidence that this mode has ever been communicated to federal prosecutors in the field. [REDACTED] who has lectured more than a dozen times on behalf of the Department on the subject of contacts, asserts that he was never informed of this alternative mode of analysis: Neither OPR nor anyone in attendance at one of his training sessions has ever raised it.

Accordingly, we recommend that you reject the finding of Poor Judgment because the Report's conclusion that the regulation or its application to these circumstances was ambiguous

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and that [REDACTED] if he had been exercising good judgment, would have recognized the need to be more cautious in some way, is not supported by the record.

The conclusion that [REDACTED] should have recognized the ambiguity is essential to the finding of Poor Judgment. The Report sets forth OPR's definition of Poor Judgment as follows:

An attorney exercises 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.

\* \* \* \*

[A]n attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated . . . a clear obligation or standard. In addition, an attorney may exercise poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding.

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[A]n attorney exercises poor judgment 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.

Report at 51 (quoting "Analytical Framework Used by the Office of Professional Responsibility in Investigations and Inquiries into Allegations of Professional Misconduct" at 9 (Sept. 9, 1999)) (quotation marks omitted; emphasis supplied). Although it is clear that, under this standard, poor judgment may be found even where there is no violation of a clear standard or where the standard is not clear, the conduct at issue must be both "in marked contrast" to an attorney exercising good judgment and result from an "obviously problematic" factual setting.

In this case, the Report's conclusion of Poor Judgment depends entirely on conduct resulting from [REDACTED] failure to recognize an alleged ambiguity in the regulations. As noted, that failure was not "in marked contrast" to an attorney exercising good judgment: OPR uses the same mode of analysis for the regulations at issue and [REDACTED] had no reason to consider any other mode. Therefore, [REDACTED] also had no reason to consider whether he was confronted with an "obviously problematic" factual setting.

Moreover, the evidence does not establish that [REDACTED] subsequent conduct was "in marked contrast" to good judgment. The Report notes that [REDACTED] is known not only for his expertise in the contacts area but also for his cautious conservative approach to interpretation of the regulations. Having determined, using a mode of analysis used by the Department, that Ms. Lewinsky was not represented with respect to the criminal investigation, he nevertheless continued to consult others, including senior prosecutors and supervisors, within the Office and on site about the approach. He circulated his script within the Office. He was involved in discussions with Department personnel about the approach, with respect to which

contemporaneous notes are ambiguous about any need to clarify the nature of Frank Carter's representation of Ms. Lewinsky. Potentially disparaging remarks to Ms. Lewinsky about Carter appear to have been made by others, and [REDACTED] discouraged them as well as he could at the time.

The only clear potential inducement to forego a lawyer occurred in the explanation to Ms. Lewinsky of "cooperation made known" -- that contact with anyone, including Carter, could reduce the value of her cooperation if others found out. This is hardly comparable to the disparagement referenced in the concurrence in *Weiss* (cited in the Report) where the prosecutor said a particular lawyer was under investigation and questioned the quality of the representation for a \$200 retainer. The evidence also conclusively establishes that Ms. Lewinsky was told that she was free to go, was not prevented from calling a lawyer, and only asked questions about whether she should have a lawyer, never asking outright for a lawyer. Given the determination that Ms. Lewinsky was not represented, this conduct does not demonstrate Poor Judgment under applicable OPR standards. Whatever the concerns about this conduct, it is not "in marked contrast" to the exercise of good judgment.

This recommendation is not intended to suggest that the conduct in question was entirely appropriate under all the circumstances. The situation could have been handled in a different way that would have raised no questions concerning the conduct at issue. For example, the prosecutors involved might have construed Ms. Lewinsky's questions about obtaining a lawyer as really requests for a lawyer. We do not doubt that if Ms. Lewinsky had simply asked [REDACTED] outright for a lawyer, the discussion would have ended and she would have contacted either Mr. Carter or a different lawyer.

The Report also notes the absence of a clear plan and delineation of responsibilities between [REDACTED] and others. While we agree that addressing these matters might have prevented some of the conduct, such as comments by agents, it is not clear that [REDACTED] conduct would have been different, and, perhaps more importantly, it is not clear that [REDACTED] was the person responsible for the failure to have such a plan or to delineate responsibilities clearly.

Such after-the-fact analyses and realizations about how things could have been done better do not, however, justify a conclusion of Poor Judgment. Had [REDACTED] failed to explain cooperation made known, Ms. Lewinsky might justifiably have been upset when, if she had contacted Carter, he had contacted others and she did not get credit for cooperation. Although things could have been done better to avoid these questions, the fact that they were not is not in marked contrast to good judgment.

Accordingly, our recommendation is that you reject the finding of Poor Judgment. It is not supported by a preponderance of the evidence.