Original SC report

SPECIAL COUNSEL REPORT

DECEMBER 6, 2000

ORIGINAL

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

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BACKGROUND

On February 16, 2000, Robert W. Ray, then recently appointed Independent Counsel (In re: Madison Guaranty Savings and Loan), named the undersigned to act as Special Counsel to the Office of Independent Counsel ("OIC"). Paralleling the organization of the Department of Justice ("Department" or "DOJ") and its Office of Professional Responsibility ("OPR"), Ray assigned Special Counsel to act in the same capacity for the OIC for the purpose of resolving certain allegations arising from the OIC's confrontation of Monica Lewinsky on January 16, 1998.

When Ray assumed office in the late fall of 1999, these allegations were under consideration by the Department's OPR as part of a previous broader inquiry generated by demands for the Attorney General to dismiss then Independent Counsel Kenneth W. Starr for cause pursuant to provisions of the Independent Counsel Act. OPR had closed all allegations without action except for these, which remained pending because OPR had been asked by OIC to refrain from interviewing witnesses while the OIC was conducting its investigation and preparing its report to Congress.

Ray asked the Attorney General to refer this matter back to the OIC for resolution and, when she agreed, he asked the undersigned to handle the matter. Our task has been to investigate and submit to Ray this report regarding the allegations that OIC attorneys violated the Department's regulation and other policies and rules bearing upon contact by federal prosecutors with persons represented by lawyers. In this connection, Ray pledged complete cooperation from his office and independence for us. He has met both commitments. Ray also promised that after

his review, regardless of his final decision, our report would be forwarded to the Attorney General. Beyond making recommendations based upon our findings, we have no further role in this matter.

By the time the referral had been made to us, all of the lawyers involved had left federal service except for former Associate Independent Counsel [redacted] who had since returned to the Los Angeles United States Attorney's office. Although [redacted] is the only person remaining in federal service, this fact has not altered our findings nor do we believe it has caused an unwarranted focus on him. [redacted] was the OIC lawyer responsible during the confrontation with Lewinsky on January 16, 1998, and the lawyer who had virtually all of the contact with her. Additionally, it was his legal analysis that guided the OIC in its planning of the confrontation. Nonetheless, because we believe context is important for an understanding of [redacted] conduct, our report also names and discusses generally the conduct of others who were involved in the confrontation and its planning. Moreover, we retain limited jurisdiction over the conduct of all involved for the purpose of better assessing the litigation impact of the alleged misconduct and to permit the Attorney General, the Deputy Attorney General (and in this case, the Independent Counsel) to judge the need for changes in Department (or Office) policies or practices.

Summary of Findings

We find that no lawyer involved in the confrontation with Monica Lewinsky committed professional misconduct. Nonetheless, we find that then Associate Independent Counsel [redacted] exercised poor judgment and made mistakes in his analysis, planning and execution of the approach to Lewinsky. We also note that the matter could have been handled better by all of the OIC lawyers involved.

The entire office knew that Frank Carter represented Lewinsky in the Paula Jones case. This fact should have set off alarms during the week of January 12-16, 1998, as the OIC prepared to confront and try to "flip" her. The President of the United States was the eventual target. Intense public scrutiny was inevitable; any misstep would exacerbate the criticism already directed at the office. [redacted] as a Department lecturer on the issues involved, specifically knew that there was a Department regulation and related DOJ policies guiding these types of contacts. He knew as well that those provisions were complicated, not self-evident, highly controversial and vulnerable to attack from many quarters. The confrontation of Monica Lewinsky demanded a high standard of care and sensitivity.

[redacted] did not exercise the care required for his role in the confrontation. Because of his background, [redacted] was looked to for the legal analysis. He reached a conclusion quickly and relied only on his memory in analyzing the regulation and rules proscribing the conduct of Department attorneys when dealing with a person represented by a lawyer. Because we find an ambiguity in the regulation as applied to the facts of this case, [redacted] decision as to whether Lewinsky was represented on the subject matter involved may have been correct or incorrect. Either way, he failed to appreciate that the question was a close one, requiring great care in choosing an approach to Lewinsky. The other part of his analysis, that pre-indictment contact was always allowed, was simply wrong. Thus, both in his planning and subsequent actions, [redacted] failed entirely to consider the Department's pre-indictment proscriptions against negotiating legal arrangements with represented persons and against interfering with attorney-client relationships as well as the policies underlying those proscriptions.

We find that [redacted] together with others, developed a strategy for discouraging Lewinsky from calling Carter cloaked as a generality: "if you call anyone, it may hurt your

chances to help yourself." They did not appreciate that their strategy would be driven, in part, by what Lewinsky said or asked, and that it could be converted very quickly from the general "anyone" to the specific "her attorney" if she simply questioned whether she could contact him, a likely and predictable scenario. They therefore failed to see that, even in theory, the plan had a high probability of leading to statements regarding Carter and interfering with the relationship between Lewinsky and Carter. In practice, the strategy cascaded into a series of very pointed statements to Lewinsky about Carter, or her attorney, that interfered both with the relationship and with her desire to contact a particular lawyer for advice. It ultimately resulted in [redacted] offering a Hobson's choice to Lewinsky, and then pushing her for an immediate answer. Boiled down to its essentials, that choice was: "full immunity, *or* call the lawyer you desire," but not both.

Perhaps it was because [redacted] failed to recognize the impact of the strategy as it unraveled, or perhaps it was [redacted]s desire not to leave the confrontation without some resolution. Whatever the reason, on site, [redacted] plowed ahead and never reconsidered his original legal analysis or strategy, despite a clear indication by Lewinsky that she wished to consult with a lawyer – her lawyer, if it did not mean forfeiting the benefits being promised by the government for her cooperation. Once on the slippery slope, [redacted] did not stop.

Investigation by Special Counsel

As noted, all of the lawyers involved have since left the OIC; and only one remains in federal service. The agents have moved onto other FBI assignments. The regulation at issue has since been supplanted by the McDade Amendment, 28 U.S.C. § 530B,[1] and there is a new DOJ

[1] The McDade amendment was passed by the Congress and became effective on April 19, 1999, over the strong objection of the Department of Justice. The amendment appeared to be driven, in part, by high profile claims of abuse by federal prosecutors.

regulation implementing this statute that simply requires federal prosecutors to follow state ethical rules. The Independent Counsel Act has not been renewed, replaced by DOJ regulations controlling the appointment of "Special Counsel" when appropriate, 28 C.F.R § 600.1, et seq.

Nonetheless, resolution of this referral is appropriate for several reasons. The Department of Justice made a strong commitment to enforce vigorously the contacts rules when they were in effect; the principles and the related policies involved here remain a vital part of the Department's ethical guidance. Thus, there is an important internal need for a demonstration of the seriousness with which federal law enforcement regards the obligation to perform prosecutorial duties in accordance with the highest ethical standards. Further, our investigation has identified certain vulnerabilities extant in the concept of stand-alone special prosecutors' offices, and to that extent, we believe our findings are relevant in light of new Department regulations that contemplate the appointment of independent "special counsel" when deemed appropriate by the Attorney General. Finally, it appears that the McDade Amendment abrogating the Department's contacts regulation may itself be amended to reinstate federal power, through a Supreme Court rule, to regulate the conduct of federal attorneys and their "contacts" with people with lawyers, possibly raising similar issues in the future.[2]

Our investigation began in late February 2000. We hoped to finish by midyear with a relatively brief report. There are number of reasons why the term of our work has been extended longer and our record is greater than we anticipated. We determined that it was necessary to examine the Department's documentary record for the legislative history of the regulation at issue, the manner in which the Department had formulated its positions, and the guidance the

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[2] See S. 855, "The Professional Standards for Government Attorneys Act" (introduced by Senator Leahy on April 21, 1999); see also Senator Patrick Leahy's remarks, Cong. Rec. S4446-9, May 25, 2000.

Department had given to federal prosecutors on how to analyze situations involving represented individuals. The record is voluminous and spread throughout the files and archives of many Departmental components. In discussing this process, we do not, at all, suggest that OIC lawyers should have done the research we have undertaken. To the contrary, we undertook the examination in order to ensure that [redacted] is treated evenhandedly, not better and not more harshly, than any other Department lawyer facing the same kind of allegation.

We also assumed the pre-existing written record would provide us with a good view of the relevant facts, obviating the need for many personal interviews. We found that there was virtually no contemporaneous record of the events during the week of January 12-16, 1998. Instead, the OIC lawyers had reconstructed the record, bit-by-bit, after-the-fact, in response to a variety of inquiries relating to the OIC's conduct of the Lewinsky investigation. Nonetheless, we thought we could rely upon the record and submissions made to the D.C. District Court, to the Congress, to the D.C. Bar Counsel and to the Department of Justice.

But after we spent valuable time following leads contained in some of these submissions, our confidence in the objectivity of this record was sufficiently shaken to cause us to disregard most of the submissions by the OIC on the subject matter of our investigation. We do not mean to say that the OIC presentations were wrong or improper; rather, we have concluded that, because of their strongly adversarial substance and tone, they simply could not be relied upon as a basis for a fair determination of the facts involved.[3]

We understand that within days of the OIC encounter with Lewinsky, her new lawyer was stoking a public firestorm about her treatment at the hands of the OIC lawyers. It appears to have

[3] Nor do we assign individual responsibility. We note some of these drafting excesses and more troubling assertions, as relevant, in our factual findings.

resulted in a state of siege influencing the OIC's development of the factual record and arguments to meet an intensely hostile array of critics. We believe this defensive posture carried over to the OIC's responses to some of the official inquiries. Thus, OIC submissions were written to make the best case, not an objective one. In the process, certain aspects of the OIC's story gained unwarranted certainty and primacy, and others – such as important differences in recollections – were glossed over as the OIC lawyers struggled to deal with fragmented allegations, after-the-fact.

Because of the lack of a contemporaneous record and less than complete and candid after-the-fact submissions, we found it necessary to interview virtually all the OIC lawyers and agents present, as well as others involved in the events of January 16, 1998, in order to fully and fairly understand the facts.[4]

We emphasize that the cooperation extended to us by the current Office of Independent Counsel has been exemplary. The people assigned to assist us have been cooperative, responsive and prompt, and we believe, very thorough and determined to help us locate relevant documents. The Department of Justice has likewise been cooperative and responsive.

Observations and Concerns by Special Counsel

We want to express certain concerns that cannot be ignored in this case. Let there be no doubt that we have been guided by the commitment of the Department of Justice and the Office of Independent Counsel to take very seriously allegations of misconduct made against federal lawyers. Public confidence in the federal criminal justice system depends upon a strongly-held

[4] We recognize that the more than two-year old recollections, however honest and searching, cannot be expected to render precise transcriptions of words spoken, or of the exact time-frame of the events witnessed. Thus, although we report the language recalled for us and are confident that we have found the basic objective facts, we have tried to note where recollections differ in relevant ways.

public belief that the Department will firmly and fearlessly take appropriate action when its attorneys are accused of ethical violations. We also are sensitive to the fact that every OPR investigation involves a lawyer who has chosen to devote a part of his or her life to public service. He or she deserves to be treated fairly. Thus, in the ordinary circumstance, the poor judgment or mistake of an individual attorney can be corrected and become the platform for positive change for both the lawyer and the Department, without damning either. This is the result we intend here.

Unfortunately, this is not an ordinary case. The extraordinary context for this ethics investigation is the Independent Counsel's investigation of the veracity of the President of the United States. We are concerned that our finding of poor judgment by [redacted] will be wrenched out of context and magnified several-fold to the unwarranted detriment of a man who is by all accounts a dedicated, talented public servant who, in this one instance, simply did not exercise the good judgment expected of federal prosecutors.

In this light, we urge utmost care and caution in the interpretation and dissemination of this report.[5]

FACTUAL FINDINGS

Introduction

On December 19, 1997, Monica Lewinsky, a former White House intern, was served with a subpoena in Jones v. Clinton, a case against President William Jefferson Clinton alleging sexual harassment. Lewinsky took the subpoena to presidential friend Vernon Jordan who had been helping her in a job search, and on December 22, 1997, Jordan took her in a limousine to meet

[5] See Memorandum from Philip Heymann, Deputy Attorney General to Michael J. Shaheen, OPR Counsel, Dec. 13, 1993.

with Francis Carter, a Washington, D.C. lawyer. Carter agreed to represent her. In Carter's office, on January 7, 1998, Lewinsky signed an affidavit designed to persuade Jones' lawyers that she knew nothing relevant to their lawsuit, and to cause them to cancel her deposition then scheduled for January 23, 1998. In the affidavit, she denied a sexual relationship with the President. The affidavit was not true.

In late December 1997 and early January 1998, Kenneth Starr's Office of Independent Counsel was attempting to wrap up old cases and wind down its investigations. In the words of one of Starr's deputies, "the issues were long of tooth." In Washington, there was a small cadre of lawyers, of those about a half dozen with prosecuting experience – most detailed from United States Attorneys' offices. Of these experienced lawyers, one was a Deputy Independent Counsel who was not directly responsible for cases; and two were very senior prosecutors who had each been chief of the public corruption unit in his respective United States Attorney's office. Many of those with longer experience in the office, including Starr, believed that stalling tactics by the President and his advocates had made it impossible for them to make viable cases; they thought that Clinton was guilty of something and would lie about anything. Even at that date, they had been attacked unmercifully, and they believed unfairly, for following the mandates of the Independent Counsel Act and the orders of the three judges of the Special Division of the Court of Appeals for the District of Columbia in charge of supervising independent counsels.

The doldrums at the Office of Independent Counsel ("OIC") were blown away on Monday evening, January 12, 1998, when Deputy Independent Counsel [redacted] who was in charge of the Washington office, received a telephone "tip" from one Linda Tripp. Tripp said that at the urging of the President and his friend Vernon Jordan, a former White House intern was preparing to file a false affidavit in the Jones v. Clinton case denying her sexual relationship with the

President. Tripp reported that the intern was trying to persuade Tripp to file a false affidavit as well. She later identified the intern as Monica Lewinsky and said that Jordan had gotten Lewinsky a lawyer in the Jones case. His name was Frank Carter.

To exploit this information, the OIC had to marshal its resources to assess the credibility of the informant, figure out how to get the Department of Justice to agree that the OIC should have jurisdiction to investigate the matter, organize an investigative team, and make tactical and strategic decisions as to how to approach Lewinsky. To complicate matters, FBI support in Washington had been reduced to one fairly junior FBI agent, [redacted] who was working on matters requiring his accounting expertise. By chance, [redacted] was in town for a brief interview of a witness in one of the Arkansas matters. But he was not familiar with the personnel at the FBI Washington Field Office and knew none of the procedures for getting equipment, cars and extra agents needed for the type of operation they contemplated.

And finally to add to the pressure, Michael Isikoff of Newsweek Magazine knew possibly more than the OIC lawyers did about the story and, later in the week, began breathing down their necks, threatening to contact the subjects before any law enforcement strategy could be implemented.

In short, the challenge was every prosecutor's dream – and nightmare. With Lewinsky, the OIC had a potentially explosive witness who seemed to be in the middle of committing several federal crimes. She could break open a real case against the President. But the timing of the investigation was being driven, in part, by outside forces and ultimately by a member of the press corps. If the potential targets of the investigation learned of the information possessed by the

OIC, this alert would chill, if not kill, any hope of obtaining incriminating evidence by covert means through Lewinsky.

At the end of the week, on January 16, 1998, Associate Independent Counsel [redacted] confronted Lewinsky with her false affidavit and other criminal activities relating to the Jones case. In an effort to gain her cooperation, [redacted] told her she could be prosecuted on multiple criminal charges, but said that if she cooperated, the OIC would take it into account in charging decisions and "make known" the value of her cooperation to the sentencing judge.

Although the OIC knew from the beginning that Lewinsky was represented by Carter in the Jones case, they believed that, at worst, he was complicit in the scheme, and at best, he would alert Jordan and others if he found out about the OIC's interest in Lewinsky. Because they feared she would want to call Carter, OIC lawyers devised a deliberate strategy to discourage her from doing so. When Lewinsky asked them if she could contact her lawyer, [redacted] and others told her that although she was free to do so, if she called anyone, including Carter, she would get less value for her cooperation. Lewinsky got the message that there would be serious repercussions if she called the man she referred to as "my lawyer." Indeed, after offering immunity from prosecution for her cooperation, [redacted] told Lewinsky that if she called Carter, the immunity offer would be withdrawn and she would have to go back to a "cooperation made known" arrangement.

For nearly twelve hours, the OIC lawyers were in a hotel room with this hysterical but very focused young woman who, in spite of their successful efforts to discourage her from contacting Carter, resisted to the end their attempts to persuade her to cooperate. The OIC plunged into an investigation involving the President's veracity about his sexual relationship with Lewinsky. Ultimately it resulted in the President's impeachment by the House of Representatives

and a barrage of vitriolic attacks on the OIC and its lawyers. One of the main thrusts of the attacks was the treatment of Lewinsky on January 16, 1998.

The Context — The Office of Independent Counsel

Prior to his appointment as Whitewater Independent Counsel in the Summer of 1994, Kenneth W. Starr held a number of prestigious positions, including Solicitor General of the United States and Judge of the District of Columbia Court of Appeals. Highly regarded as an appellate lawyer and jurist, Starr had no prosecuting experience when he became Independent Counsel. Starr's background and experience led to a management style and hiring strategy important to an understanding of the decisions made, how they were made and who made them in this case.

Starr emphasizes that he tried to foster a collegial, nonhierarchical structure in the office, calling for the entire legal staff to meet on all important issues, and providing everyone the opportunity to express an opinion. The goal was to develop a decision by consensus.[6] This management model was the result of Starr's very strong belief in, as he calls it, "the deliberative process."[7] Starr generally was less involved in tactical decisions regarding specific prosecutorial

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[6] Before the Lewinsky encounter, the agents were left out of this process. This changed after the encounter.

[7] Starr described the "process" during his testimony in the Impeachment Hearings as follows:

> That process calls upon each attorney, drawing upon his or her background and experience, to offer views on issues in question. This deliberative process is laborious, sometimes tedious, but it is an attempt to ensure that our office makes the best decisions it can.

Impeachment Inquiry: William Jefferson Clinton, President of the United States, Hearing Before the Committee of the Judiciary, House of Representatives, Nov. 19, 1998, at 39 ("Impeachment Hearings"). The lawyers involved in this "process" characterize it in many ways, some positive, but many say that it consumed enormous amounts of time and was unwieldy.

strategy, but nonetheless wanted to be involved whenever appropriate and had an open door policy for any problems.

Recognizing the different nature of his own experience, Starr sought and hired, in the main, very strong prosecutors from Main Justice and the various United States Attorneys' offices around the country. He looked to these senior lawyers not only for seasoned judgments regarding the exercise of prosecutorial discretion, but also for their knowledge of the practices and policies of the Department of Justice, which his office was bound by statute to follow.[8] Every OIC lawyer should have known that it was his or her responsibility to follow DOJ policies and to bring issues calling for review of DOJ policies to the group "process" established by Starr. In addition, Starr hired prominent Washington lawyer and law professor Samuel Dash to serve as an ethics consultant and encouraged OIC lawyers to seek his advice on ethics matters. But Dash says that he was hardly ever consulted by the OIC prosecutors before action was taken, and was not consulted on this occasion.

The Context — The Scope of Carter's Representation of Lewinsky

Unknown to Lewinsky, Jordan had taken her to a first-class lawyer. The 1998 Martindale-Hubbell biography of Francis Carter describes an experienced criminal and civil practitioner who had served as a law clerk to the Chief Judge of the D.C. Superior Court and, from 1979-1985, was the Director of the Public Defender Service of the District of Columbia.

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[8] See 28 U.S.C. § 594(f)(1). Starr also testified before the Congress that:

> [W]e have made every effort to follow Department of Justice policy and practice and to utilize time honored law enforcement and investigative techniques. Of course, with their vast experience in the department and the FBI, our prosecutors and investigators embody such policy and practice. Nonetheless, it was often the case during an all-attorneys meeting that we would repair to the United States Attorney's Manual to be sure that we had it right.

Id.

Thereafter, in addition to his private practice, he continued to serve the community on various legal committees, including a term as a member of the District of Columbia Board on Professional Responsibility. He was also a member of the prestigious American College of Trial Lawyers.

During Carter's interviews with Lewinsky, she denied having a sexual relationship with the President and urged Carter to get her out of the deposition. On that basis, Carter's strategy was to try to persuade Jones' lawyers to withdraw the subpoena and, failing that, to file a motion to quash the subpoena with the judge assigned to the case in Little Rock.[9] For use in this strategy, Carter told Lewinsky that he would draw up an affidavit for her to sign, incorporating what she had told him. On several occasions, Carter warned Lewinsky about the perils of perjury and obstruction of justice. Although Lewinsky signed the affidavit on January 7, 1998, Carter did not finish the motion to quash until the early morning hours of January 16, 1998, and the motion and the affidavit were not sent to the court until Carter's office did so by an express service later that day.

Following a rule of the District of Columbia Bar, Carter required Lewinsky to sign a fee agreement. This document, produced in later proceedings, is titled "Engagement Agreement." Among other things, it recites that Carter "will provide representation in connection with her subpoena for the deposition in the Jones v. Clinton and Ferguson" case and that Lewinsky would have the chance to retain him under a new engagement agreement should any additional legal services be necessary.

Carter believes the OIC confrontation of Lewinsky on January 16, 1998 fell within the scope of his representation of Lewinsky. He says, "they approached her about a clear component

[9] In connection with his representation, Carter filed a notice of appearance with the court in Little Rock, binding him to represent Lewinsky in this matter until relieved by the court. He was not told he was relieved by the court until January 22, 1998.

of my representation" and "their investigation was totally entwined with my representation." He states without hesitation that if he had been called by Lewinsky, or anyone on her behalf on January 16, 1998, he would have immediately asserted his representation of Lewinsky.[10] Though not with as much certainty, Carter also says he "probably" would not have insisted on a further retainer agreement.

The Week Between January 12 and January 16, 1998

Monday, January 12, 1998

On Monday evening, January 12, 1998, Deputy Independent Counsel [redacted] received a telephone call he had been led to expect. The call was from a woman who eventually identified herself as Linda Tripp, a Pentagon employee. She claimed that a young woman who had a sexual relationship with the President was filing a false affidavit in the Jones v. Clinton sexual harassment case and was attempting to persuade Tripp, who had also been subpoenaed, to do the same thing. [redacted] grabbed [redacted] and members of the staff who were still around, [redacted] and [redacted] both prosecutors detailed from United States Attorneys' offices. They headed for Tripp's home in Columbia, Maryland. Tripp repeated her allegations. She said that the woman's name was Monica Lewinsky and that Lewinsky had said to Tripp that the President was telling Lewinsky to lie in the Jones case; that Vernon Jordan, a friend of the President had helped Lewinsky to get a job; and that he had taken her by limousine to meet with a lawyer who would represent her in the case. As reported by Tripp, in the car Jordan encouraged Lewinsky not to tell the truth and told Lewinsky that the lawyer, Frank Carter, was his personal attorney.

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[10] Lewinsky, likewise, says she regarded Carter as her lawyer regarding the subject of the OIC confrontation. She states that she would have called Carter and would have kept him for the investigation except that she was persuaded otherwise by the OIC during the January 16, 1998 confrontation.

Tripp said she had a multitude of tapes of telephone conversations with Lewinsky to corroborate her allegations, although she handed none over until later in the week. Leery of the uncorroborated tip, the OIC persuaded Tripp to wear a wire, monitored by the FBI, for a meeting with Lewinsky the next day, January 13, 1998.

Tuesday, January 13, 1998

The FBI's state-of-the art recording equipment malfunctioned during the Tripp/Lewinsky meeting making it impossible to expedite copying of the tapes, and delaying the OIC's ability to assess the actual contents of the conversations. But surveillance agents stationed close enough to overhear the pair reported that Tripp's allegations had been confirmed. Also, after the taping, Tripp was interviewed by [redacted] and [redacted] She repeated and enlarged upon the facts incriminating Lewinsky and Jordan, and reported that Lewinsky said the President was going to lie in his Jones deposition scheduled for Saturday, January 17, 1998.

If kept secret through Saturday, the OIC had the unexpected opportunity to conduct an undercover investigation with the potential of catching the President not only in an obstruction of justice as to Lewinsky, but in perjury at his own Jones deposition.

The OIC also saw the chance of producing evidence in a then pending investigation involving Jordan and Webb Hubbell. In that case, the OIC was investigating whether Jordan had illegally caused corporations to pay Hubbell "for legal work" in order to buy Hubbell's silence in the Whitewater investigation. Jordan seemed to be playing a similar role in the Lewinsky matter.

Wednesday, January 14, 1998

Although there was no general announcement, by Wednesday afternoon, all of the OIC lawyers knew about the case. Associate Independent Counsel [redacted] former chief of the Public Corruption and Government Fraud Unit for the Los Angeles United States Attorney's

office, who eventually led the OIC confrontation with Lewinsky, learned about the Tripp allegations on Wednesday when [redacted] asked him to listen to the Tripp/Lewinsky tape with him and others. [redacted] another very experienced senior federal corruption prosecutor and former supervisor of corruption cases, was detailed from the Miami United States Attorney's office. On Wednesday afternoon, [redacted] and [redacted] listening on an office "boom box," tried unsuccessfully to get any meaningful specifics from the Tripp/Lewinsky tape. [redacted] took over the job of producing relevant quotes from the Tripp tape. At that time, he was the only OIC lawyer with a specific task.

Facing the OIC lawyers was the question of jurisdiction to investigate the federal crimes they thought were being committed. Unlike the general federal jurisdiction conferred upon United States Attorneys' offices and the prosecuting divisions of Main Justice, the OIC's power to investigate was limited by the jurisdictional statement included in the enabling orders of the Special Division. There were two basic ways to analyze the jurisdictional issue. The proposed investigation could be called "related" to the OIC's current jurisdiction, in which event the OIC could seamlessly move to the new matter without further order of the court; or, if it was not viewed as related, the cooperation of the DOJ would generally be necessary to get a court order expanding the OIC's jurisdiction.

According to Starr, this issue raised not only esoteric constitutional issues, but as a practical matter, if the OIC later was found to have exceeded its jurisdiction, it would have meant disaster for the case. Thus, whether and how to engage DOJ to ensure there could be no viable jurisdictional challenges to the OIC's investigation and potential prosecutions was an important issue. In Starr's words, the matter was "exquisitely jurisdictionally sensitive" based on past relations with DOJ. Some staff claimed that the matter could be termed "related" because of the

parallels to the Hubbell/Jordan matter. Others said that even if "related," the OIC should seek DOJ's concurrence in that determination. [redacted] is quoted by virtually everyone as urging that the OIC should "run, don't walk" to the DOJ. [redacted] good judgment on this matter prevailed.

To a person, the OIC people with whom we interviewed say that Wednesday, January 14, 1998 was consumed with the question of how to deal with DOJ on the jurisdictional question. Every lawyer in the office participated in one meeting or another while various ideas were vetted and talking points were refined. Eventually, very late in the evening, [redacted] called Deputy Attorney General Eric Holder and cryptically told him that OIC had a matter of utmost sensitivity to talk about with DOJ.[11] [redacted] deliberately asked for and got a meeting time late in the afternoon of the next day, January 15, 1998, "so [the OIC] could pull it together."

By Wednesday's end, no one claims to have started considering investigative strategy for the approach to Lewinsky, and no prosecutor had been assigned to manage the case. Indeed, [redacted] says that he had not given thought as to who would approach Lewinsky, or to the issues involved in the approach. Most of the OIC staff we interviewed say that, in fact, for most of the week, no one was in charge of the case. Instead decisions were made, or not made, in "rolling meetings," with spontaneous groups here and there gathering, dispersing and then reforming. [redacted] says that he was probably in charge of the case at that time because he was the titular head of the office, but on Wednesday he was much more focused on the DOJ issues, and not on formulating an investigative plan or making investigative assignments. [redacted] notes that he did not think strategy was yet on the screen Wednesday evening because they did not regard the matter as urgent.

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[11] At least two versions of talking points had been generated for this call. Starr believed, and made clear his belief, that it was important to be covered with "belt and suspenders" for sensitive matters such as this.

Thursday, January 15, 1998

On Thursday morning according to [redacted] the OIC staff began brainstorming how to approach Lewinsky. [redacted] says the stronger personalities dominated the discussion and deference was given to [redacted] and [redacted] of their experience. [redacted] that although no one was in charge of the case, by default [redacted] started relying on [redacted] and [redacted] of their experience with corruption cases. Others tell us there was a clash as to who was in charge and that [redacted] and [redacted] "glommed" onto the case. [redacted] noting that no one seemed to be in charge of the case, says that as the OIC staff seemed still to be working on the jurisdictional issues (for the meeting with Holder later that day), there was "general milling around."

Although everyone knew by Thursday that Carter represented Lewinsky in the Jones case and some had concluded that he was involved in the scheme, no one flagged for deliberative discussion the issues raised by the plain fact that Lewinsky had a lawyer. The nature of Carter's representation of Lewinsky and his bona fides would become one of the central aspects of the OIC strategy, yet no thought seems to have been given to gathering information on Carter, then or at any time before the confrontation.[12]

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[12] The way in which Lewinsky ended up with Carter caused some of the OIC staff to have suspicions that Carter was complicit in the scheme. Starr tells us that he drew from this and other facts an inference that Carter was involved in Lewinsky's crime. This was so because, in Starr's words, it was their "instinct based upon experience with the Clinton people." Starr referenced in particular an exchange on the Tripp/Lewinsky wire when Lewinsky told Tripp that Carter had taught her that "you don't very often say 'no' unless you really need to. The best is, 'well, not that I recall, not that I really remember; [m]ight have, but I don't really remember; [m]aybe, but I don't remember.'" Tripp/Lewinsky tape transcript, Jan. 13, 1998, at 61, 114. But there was little evidentiary basis for concluding that Carter was involved in any scheme to commit perjury.

In fact, there was important information on the Tripp/Lewinsky tapes and in Tripp's statements made to the FBI agents suggesting that far from participating in the scheme, Carter may have been a victim of Lewinsky's deception. For example, during their taped conversation on Tuesday, Lewinsky repeatedly made clear to Tripp that she had lied to Carter, stating that you cannot tell your own lawyer the truth if you want him to represent you. See id. at 39, 46, 54, 120, 156. Also on this tape, in response to Tripp's prodding about Carter's complicity, Lewinsky said she thought that Carter was "real." Id. at 44. And in a phone call to [redacted] on Wednesday, Tripp stated that

The focus in the office was still on preparation for the meeting with Holder scheduled for after 6:00 p.m. The topic of how to approach Lewinsky became more important only after [redacted] who was also in charge of press relations for the OIC at the time, talked with Isikoff on Thursday morning and then, along with [redacted] and [redacted] met with him beginning at 12:55 p.m. Isikoff made it clear that he had known about Lewinsky for a year, that he knew what OIC was doing and in fact had known about the Tuesday's Tripp/Lewinsky taping before it occurred. He said that the White House was aware of inquiries about Lewinsky and warned that he was going to start making calls that day. In the end, after [redacted] described the harm to the investigation of any overt inquiries, Isikoff agreed to hold off until 4:00 p.m. on Friday.

With this 24-hour window, as [redacted] says, they lost the initiative in the timing of the approach to Lewinsky and the pressure caused "triage in analysis."

Yet even with the Isikoff pressure, according to the notes of Stephen Bates,[13] the office continued to plan its meeting with Holder, not its confrontation with Lewinsky.[14] [redacted] did not advance the time of the meeting with Holder, and the OIC's senior prosecutors [redacted] and

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Lewinsky again told Tripp that the thing to do before lying under oath is to lie to your attorney.

It does not appear there ever was a consensus among the OIC staff as to their view of Carter's role. The agents thought he was involved in the crime, as did Starr. On the other hand, [redacted] a Deputy Independent Counsel assigned to Little Rock at the time, consulting by telephone, acknowledges that they had information from Tripp that Lewinsky was misleading Carter and that there was no real evidence on him. [redacted] says they had "no reason to believe whether Carter was straight or crooked," adding "we had never heard of Frank Carter."

Further, [redacted] made clear on Friday morning that he did not believe the OIC yet had sufficient evidence to apply the crime-fraud exception to Carter's interactions with Lewinsky. [redacted] also tells us that he did not believe there was sufficient evidence of a conflict of interest at that time to allow them to inform her of such a conflict pursuant to section 77.9 of the Department's contacts regulation.

[13] Bates was a part-time lawyer at the OIC who was also a writer. He had no prosecuting experience. During the week of January 12, Bates took notes of the meetings at which he was present and was specifically asked to serve as a "scribe" for some of the meetings.

[14] At least three sets of talking points were developed during the day for this meeting with Eric Holder.

[redacted] instead of focusing on the other issues presented by the case, accompanied [redacted] to Holder's office.[15] In the meeting with Holder around 6:00 p.m., [redacted] reported the status of the matter and asserted that they believed they had "related" jurisdiction, seeking DOJ's blessing for that theory. Holder said he would get back to OIC, although it appeared to the OIC lawyers that he thought if the matter was to go any further, there would have to be an "expansion" of OIC jurisdiction.

Soon after the meeting with Holder, [redacted] Chief of the DOJ Criminal Division's Public Integrity Section, called one of his deputies, [redacted] and asked him to go to the OIC offices. In the meantime, Holder had called [redacted] and told him that [redacted] was coming over to review the facts to help DOJ determine the jurisdictional issue. No one claims that [redacted] was there for any purpose other than assessing jurisdiction, or that he had the authority to evaluate the OIC's tactical plans.

After [redacted] arrived at the OIC, there was another "rolling meeting" with lawyers milling around and chiming in; one OIC lawyer says that [redacted] was "pelted" with the facts. At various times, most of the OIC lawyers, including Starr, were in and then out of the room where [redacted] was stationed. Not all of them were there at any given time. There was no formal presentation. [redacted] recounted some of the statements on the Tripp/Lewinsky tape for [redacted] was told the OIC had facts implicating Carter in the scheme to file a false affidavit and to commit perjury. [redacted]'s notes read: "VJ (Vernon Jordan) got me to an attny who told her how to lie . . ." In fact, there was and is no record support for the assertion that Tripp or Lewinsky in so many words made the allegation reported to [redacted] To the contrary,

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[15] Originally, [redacted] designated [redacted] Bates to accompany him to this meeting with Holder – [redacted] because he knew Holder previously and Bates for note-taking. We are told [redacted] insisted on attending as well and that [redacted] did not say no.

as noted above, there was considerable evidence available to the OIC at the time that Lewinsky was lying to Carter.

While being briefed by [redacted] there was some discussion in [redacted]s presence about the approach to Lewinsky. [redacted] recalls that Starr and [redacted] were among the OIC people present. Having been told earlier that Lewinsky was represented in the Jones case, [redacted] suggested that if the OIC had concerns about Carter's reliability or complicity, they should serve Lewinsky with a grand jury subpoena which could bring the question of Carter's possible conflict before a court for determination.[16] Such a strategy would have placed Carter in a position that bound him not to reveal what was happening, or face allegations of obstruction of the grand jury.

[redacted] also raised DOJ's regulation regarding contacting a person who has a lawyer. [redacted] says he told the OIC lawyers that if he were they, he would not go forward without first seeking the guidance and protection provided by DOJ through the "Margolis Procedure," a process established by the Department to help federal prosecutors evaluate issues involving the regulation proscribing contacts with represented people, on a case-by-case basis. By using the process, prosecutors not only received advice from Department experts, but obtained authority to proceed, thus providing protection from later charges of abuse.[17] [redacted] says that someone,

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[16] Even if Carter did not know about the falsity of the affidavit, there was a basis for a court to rule that he should be relieved from the case because he was a possible witness against Lewinsky. In any proceeding involving the affidavit, he would have a conflict of interest. Indeed, as it played out, a federal judge eventually did rule that Lewinsky had used Carter, negating the attorney/client privilege between them and compelling Carter to testify in the grand jury against her. The OIC does not appear to have been focused on this potential conflict at the time.

[17] The "Margolis Procedure" is named after the Associate Deputy Attorney General who signed letters of advice authorizing certain contacts and was widely promoted throughout the Department as a means of getting advice and protection on difficult contacts issues. The Margolis procedure was announced by then Deputy Attorney General Jamie Gorelick in the fall of 1994 at the First Annual Conference for Professional Responsibility Officers (PROs). PROs were selected from each United States Attorney's Office and litigating division and were to provide ethics advice and training in those offices. The contacts regulation had just recently been promulgated, and the conference included extensive training on the regulation. The PROs were provided training materials and videotapes from this meeting to use for their further training of attorneys in their respective offices. We refer to

he believes it was [redacted] responded that the OIC had looked at the issue of contacting Lewinsky without her lawyer and concluded it was okay. From this response, [redacted] states it was clear to him that the OIC did not feel any desire to consult with DOJ on the issue of Lewinsky's lawyer. Rather, Starr simply returned to the subject of jurisdiction and told [redacted] that he believed the OIC had "ancillary" [related] jurisdiction but that he wanted DOJ concurrence. Ultimately, Starr gave to [redacted] a letter to take back to DOJ. In it, he asserted once again that OIC had "related" jurisdiction, but sought the Department's opinion and a referral to the OIC if the Department concluded to the contrary.

Also on Thursday evening, [redacted] recalls that [redacted] walked past his door, backed up and said, "I know you are the contacts guy. Are there any contacts problems here?" [redacted] says that he sat back, and after about 5-10 seconds said: "One, she's not represented here; and

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tapes or other materials provided during this or subsequent PRO conferences as relevant to the Department's position on the "contacts" issue.

At the conference, Gorelick addressed the PROs, in part, regarding the "contacts" regulation. She emphasized to the PROs that there were people available for consultation regarding the regulation and its applicability in various factual settings. Moreover, she offered the assistance of Associate Deputy Attorney General David Margolis in particularly sensitive "contacts" situations. Margolis could be approached to review the facts in sensitive cases and decide whether he personally would "authorize" the contact so as to insulate a line attorney from attack. See Talking Points for The Deputy Attorney General, First Annual Professional Responsibility Officers' Seminar, Oct. 18, 1994.

At the Second Annual PRO Conference, Gorelick again referred to the Margolis procedure and urged attorneys to take advantage of it. See Deputy Attorney General's Talking Points, Second Annual Professional Responsibility Officers' Seminar, Nov. 6-7, 1995. At the 1996 PRO Conference, PROs were reminded of the Margolis procedure and were informed that, as of that time, Margolis had authorized contacts in 60 cases. "Update: Contacts With Represented Persons," Oct. 30, 1996.

We reviewed redacted versions of the Margolis authorization letters relevant to the issues raised by the OIC's conduct on January 16, 1998. Where necessary to understand the facts, we also reviewed underlying materials and incoming requests for authorizations. We cite to these materials when relevant to our analysis or findings.

two, it's pre-indictment. No problem."[18] [redacted] remembers the incident. He calls it a "superficial" meeting, no more than five minutes, in which [redacted] said "he's her lawyer in a civil proceeding; his representation is to do the affidavit in the civil case; whatever arrangement they have it is in the civil proceeding; our investigation is only four days old." [redacted] says that he did not know about the state of the DOJ policy at the time, but was confident that [redacted] knew.[19] [redacted] says that he assumed from the beginning that Carter was "the civil guy, not the criminal guy and beyond that didn't spend much time thinking about it." He also says that earlier he had considered the contacts issue in a "low-level way" and then disregarded it.[20]

Most of the OIC lawyers with whom we talked, including [redacted] tell us that [redacted] was regarded as one of DOJ's top experts on the subject of contacts with represented persons. He had lectured widely about ethics and contacts in DOJ training programs and had participated in the vetting of some versions of the proposed regulation through the Los Angeles United States Attorney's office. Although all of the OIC lawyers involved had the obligation to ensure that they

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[18] [redacted] did not pull out the regulation or the Manual prior to responding to [redacted] Because he had lectured on the subject for the Department, he did not believe he needed to read the rules to give [redacted] his answer. He failed to appreciate that whether Lewinsky was represented could be considered a close question, and was wrong in asserting that because it was pre-indictment, there was no problem. The Department's rules specifically limit certain types of contacts pre-indictment, including contacts with targets, contacts to initiate or negotiate legal agreements and contacts that interfere with the attorney-client relationship. USAM 9-13.240; 28 C.F.R. §§ 77.8 and 77.9.

[19] It is unclear whether the [redacted] conversation occurred before or after [redacted] raised the issue of "contacts." [redacted] points out that although in hindsight this is a big issue, at the time it was not a big matter. The analysis did not approach the level of detail later developed in submissions in litigation before the D.C. court, and even later to the Congress, to the D.C. Bar Counsel and to DOJ.

[20] [redacted] says that after this decision, he regarded Carter just like any other person, not Lewinsky's lawyer. This position colored all that occurred thereafter.

were proceeding ethically, they were relying on [redacted] to advise them on this issue.[21] After [redacted] opined on the issue, [redacted] says that his attitude was "we've looked at it; we don't need Department approval; we are our own office."

By Thursday night, they had decided to have Tripp arrange a meeting with Lewinsky at the Ritz Carlton Hotel at Pentagon City across the Potomac, in Virginia. Tripp would lead Lewinsky to the agents who would try to convince her to accompany them to a hotel room upstairs. There she would be confronted with the evidence of her crimes and an attempt would be made to gain her cooperation for an interview and further covert investigation. There was no script for the agents' confrontation, but the agents who were "gaming" by themselves on Thursday night concluded that if Lewinsky asked for her lawyer, he would be contacted and the confrontation would be lawyer-to-lawyer thereafter.

Also during the evening of January 15, 1998, [redacted] [redacted] and [redacted] met to discuss the plan.[22] It included offering Lewinsky a "cooperation made known" deal, in which the quality

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[21] [redacted] says that they did not "tarry long" on the issue of contacts. He was unsure whether they even specifically discussed the DOJ rules. But he points to [redacted] expertise and says the conclusion was clear that Lewinsky could not be represented as to their criminal investigation. [redacted] reports that he never saw a problem regarding the "contacts" rules and that, at some point he discussed it with [redacted] He does not recall the issue raised in any general meeting with all the lawyers. He says he and [redacted] concluded that Carter was involved in the fraud and that in any event Carter did not represent Lewinsky in the criminal matters.

[redacted] says [redacted] told him that there was no problem approaching Lewinsky without her lawyer because she was not represented in the case. He reports that the OIC lawyers had "supreme confidence" that it was okay to approach Lewinsky" because, as [redacted] told him, "Carter represented her in a completely separate case."

[22] From Little Rock by telephone, [redacted] participated in many meetings during the week of January 12-16, although he says that as the week wore on there was so much going on in Washington that the Little Rock staff was not plugged into every meeting. He was very concerned about "[w]here are we going, and started an investigative plan that he first e-mailed to Washington before January 16. This plan itemizes investigative tasks to be done on the basis of Tripp's information, including a subpoena for Carter. In this connection, [redacted] says that on the morning of January 16, he checked the United States Attorneys' Manual provisions regarding subpoenas to lawyers. He did not check the DOJ contacts rules and regulations because he "didn't even flag that as an issue" and no one else raised the issue with him.

[redacted] also says he was "a little surprised" after the fact to learn that these strategy sessions were taking

of her cooperation would be taken into account in charging decisions and made known to the sentencing judge. [redacted] believes they discussed how they might discourage Lewinsky from contacting Carter without explicitly suggesting Carter was involved; he says they did not want to tell her "Carter was a target."[23] According to [redacted] they decided that if she raised the issue of contacting a lawyer, they "would say that if she were to contact anyone, there was a risk she would be exposed and lose her chance to cooperate." No one seems to have taken any steps at this time to try to determine whether this was a proper means of discouraging her from contacting Carter, whether other means might be available, or whether encouraging her to forego contacting Carter was appropriate at all.[24] In this meeting they decided that [redacted] would lead the

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place without his knowledge or involvement. With sensitive issues such as this, there was usually more contemporaneous "give and take" in keeping with Starr's "process."

[23] This was apparently because he and [redacted] did not believe they had sufficient evidence that Carter was either complicit or conflicted. See *supra* note 12.

[24] The submission to the Department in connection with OPR's earlier inquiry on this matter suggests that the OIC relied in its decision making and planning, in part, on [redacted] previous experience in the Greenpalm investigations. The statement is made:

> The OIC understood that the *Department had approved similar approaches to request the cooperation of represented and unrepresented subjects and targets* in the Greenpalm . . . investigations . . . and [redacted] experience informed *our evaluation of our plans.*

Submission of the Office of the Independent Counsel (In Re: Madison Guaranty Savings and Loan) Relating to the Inquiry of the Department of Justice Office of Professional Responsibility, May 28, 1999, at 22 n.16 (emphasis added)("OIC Submission to DOJ").

We find this representation troubling. First, both [redacted] tell us that the subject of the Greenpalm investigations was never raised prior to the confrontation of Lewinsky. Rather, [redacted] raised Greenpalm after the contacts allegations surfaced with regard to January 16, 1998. Second, we tried to substantiate what, in fact, the Department had approved with regard to "contacts" in the Greenpalm case. The Department has no record of any consultation or approval in that case regarding "contacts" matters. Margolis, who had been consulted regarding other issues in Greenpalm, remembered no such consultation and indicated he would have ensured that a "contacts" consultation would have been handled like any other, requiring a written memorandum for his approval. Finally, when asked about the facts of the approaches in Greenpalm, [redacted] explains a very different scenario than that employed with Lewinsky. He states that one person was represented and they approached the attorney for that person's cooperation. As to unrepresented persons, they made their pitch for cooperation, but made sure the person obtained an attorney before any cooperation arrangement was finalized.

confrontation with Lewinsky the next day. Although he had no prior experience in such confrontations in any of his cases, [redacted] says that he felt he was the best person to make the presentation to Lewinsky, and therefore agreed to be the "speaker." He says that in his view at the time this selection as "speaker" did not make him responsible for the conduct of the confrontation; he thought he would just make his 15 minute pitch and it would be over, one way or the other. He acknowledges, in hindsight, that he was closer to being in charge than anyone else. Thursday night, [redacted] undertook to script out his presentation and circulated it to other lawyers in the office.[25]

Friday, January 16, 1998 – Preparations for the Lewinsky encounter

At 6:45 a.m., James Moody, Tripp's new attorney, delivered to [redacted] at the OIC one of Tripp's phone tapes with Lewinsky. Moody had been up all night listening and later identified the one he produced as "the best."

[redacted] and [redacted] arrived at the OIC offices Friday morning at about 9:30 a.m. after a high level meeting at the DOJ where it was decided that OIC needed an expansion in order to proceed. Starr was not yet in. [redacted] arrived after [redacted] and [redacted] The two DOJ lawyers explained the DOJ position regarding jurisdiction and arranged to call Judge David Sentelle, the presiding judge of the Special Division, as soon as Starr arrived. They also met with [redacted] and [redacted] and were told that [redacted] and [redacted] had listened to (and [redacted] had

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See USAM 9-13.230. There appeared to be no suggestion made to persons in Greenpalm that they would fare better without an attorney or without a specific attorney, or that they would fare worse if they called a specific attorney.

Asked about the representation in the OIC Submission to DOJ, which was filed after [redacted] left the OIC and the Department, [redacted] says he never understood how the facts related to the Lewinsky confrontation, but that [redacted] it must have been in his mind as they planned.

[25] [redacted] says he did not circulate the script to [redacted] because "it would be odd to ask for approval and that would have been too much DOJ involvement."

listened to parts of) the new Tripp tape and it contained even stronger and more explicit evidence of witness tampering.[26]

At about 10:00 a.m., Starr arrived. He and [redacted] called Sentelle, explained that the matter involved an emergency investigative situation and asked for a verbal order expanding the OIC's jurisdiction pending the submission of appropriate documents later that day. Sentelle said he would consult with his two colleagues and get back to [redacted]

After the phone call to Sentelle, Bates' notes indicate that Starr said that, given the Department's decision regarding jurisdiction, they should stay in "complete contact" with [redacted] until jurisdiction was conferred, so that there would be no questions about appropriate federal jurisdiction. Starr says he knew [redacted] and respected his views, and was pleased that the OIC and DOJ seemed to be working cooperatively together, although he is quick to say that whatever decisions were made during this interim period were in fact the OIC's, not [redacted] Indeed, at this point the OIC knew it was getting jurisdiction; the case was the OIC's. [redacted] regarded himself as a "patch" to avoid later legal challenges to a gap in OIC's jurisdiction. In Starr's words, [redacted] stayed behind to provide a DOJ "overlay" until the order was entered.

At 10:33 a.m., [redacted] called the OIC and said that the Special Division had expanded the OIC's mandate to include the investigation of Lewinsky. The written statement of jurisdiction authorized the OIC to investigate "whether Monica Lewinsky or others suborned perjury,

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[26] Unnoticed, or ignored, or simply regarded as not relevant in this taped conversation is Tripp's comment to Lewinsky that "you didn't even tell your own attorney . . . ," indicating again that Carter was not in on the scheme.

> MS. TRIPP: Listen. You're in a position where you – you have not even told your own attorney the truth. And so you're getting what I consider to be diluted legal advice because they don't have any clue — or the attorney representing you doesn't have any clue of what he's dealing with.

Tripp tape, 12/22/97, at 37.

obstructed justice, intimidated witnesses, or otherwise violated federal law . . . in dealing with witnesses, potential witnesses, attorneys, or others concerning the civil case Jones v. Clinton."[27]

After Starr and [redacted] talked with Sentelle, planning for the confrontation with Lewinsky shifted into high gear.[28] [redacted] reported that Tripp had arranged to meet Lewinsky at 12:30 p.m. at Pentagon City; two rooms had been reserved at the Ritz Carlton; and the equipment was ready for phone or body recording. Then, according to Bates' notes, [redacted] proceeded to lay out a game plan. Tripp, he said, would be wired, and "[i]f Monica stops interview midstream, we'll send her out — e.g., if says wants attorney — we'll have Linda come in screaming and they leave together, [Tripp] taping." Although this suggestion again indicated that the agents had concerns about what to do if Lewinsky asked for her lawyer, there was no further discussion of other potential courses of action in this regard. [redacted] reported later that they had decided not to tape the encounter because they were worried that "Monica may freak, leading to bad tape." No other consideration of the question: "what if she asks for her lawyer?" seems to have surfaced at that time. [redacted] was not in these meetings; the OIC planned all morning without him.

The OIC staff asked [redacted] to join them at about noon.[29] He reports that the meeting was no more than 10-15 minutes. Starr, [redacted] [redacted] [redacted] and Bates were there; [redacted] [redacted] and [redacted] were not. Some were in and out of the meeting; it was "very rushed as the OIC were going out the door." Tripp and Lewinsky were due at the Ritz Carlton in less than an hour.

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[27] The order granting jurisdiction was faxed to the OIC at 12:43 p.m.

[28] Because Starr told Bates to "Stick with me," Bates made a cryptic record of the meetings the morning of January 16. Concerns recorded by Bates range from what to do about Isikoff, to surveillance reports that Lewinsky was driving very erratically during the morning, to [redacted] outline of the logistics for the confrontation.

[29] [redacted] says that he was "summoned" to the meeting "to tell me what they had decided to do."

Bates' notes of this meeting focus on [redacted] query as to what they would do if Lewinsky asked for an attorney; Bates recorded shorthand ideas tossed out by [redacted] and [redacted]

[redacted] Going to advise her of her rights, keep a log. Won't arrest. Will tell her she's free to leave anytime.

[redacted] What if she wants an attorney?

[redacted] Okay. Don't say a word. Just listen to me for five minutes.

([redacted] looks skeptical)

[redacted] We'll explain the evidence. Do you still want an attorney?

[redacted] We can tell her that if she has an attorney, she gets lesser rewards — concern about our ability to work undercover.

[redacted] This is a criminal investigation — as far as we know, you're not represented in this. It would be to your benefit to hear us out.

Ken: Are you comfortable with that?

[redacted] I don't love it. But I'm satisfied.

[redacted] notes of the meeting suggest that they told him again that they regarded Lewinsky as "Not represented for crim (criminal) investigation."[30]

[redacted] says that he took from this ambiguous exchange that [redacted] had no serious objection with the OIC approach to Lewinsky.[31] He says said that if [redacted] had expressed

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[30] [redacted] remembers that in this meeting Starr said they did not see a problem, the OIC did not consider Lewinsky represented for these purposes.

[31] According to [redacted] his memory of this discussion is "impressionistic." That is, although he could not recall the words used and although he did not remember [redacted] stating a conclusion of his own on the issue, [redacted] recalls concluding that [redacted] did not seem to disagree that Carter's representation was limited to civil matters. [redacted] also states he generally recalled being reassured by [redacted] reaction or lack of reaction to his analysis. [redacted] reports that [redacted] was in and out of this meeting, and gone for a large part of the time. [redacted] says that he was preparing for the confrontation.

disagreement, the process at the OIC would have been to stop and develop a consensus. But [redacted] also says, he was "real sure, so sure that he didn't believe he would have paid attention to [redacted][32] Without necessarily disagreeing with the OIC's analysis of her representation, however, [redacted] was suggesting a way to allow the OIC to clarify the status of Lewinsky's representation before proceeding further. [redacted] now states that he took [redacted]

After the OIC came under attack for their actions during the Lewinsky confrontation, [redacted] "impression" came to be characterized as "*discussions* with other OIC lawyers and a Department of Justice official in which we considered the question of the scope of Mr. Carter's representation. *Our conclusion* was that Mr. Carter did not represent Ms. Lewinsky for purposes of our criminal investigation." [redacted] Affidavit, Jan. 29, 1999. [redacted] states that he did not mean for the reader of the affidavit to infer that he had discussed the issue with [redacted] and other OIC lawyers together on more than this single rushed occasion Friday morning, nor did he mean to imply that [redacted] had specifically "concluded" with them.

[32] By the time that the OIC began responding to inquiries, [redacted] presence was converted into Department of Justice approval for the OIC analysis and actions. In a response to an inquiry from D.C. Bar Counsel, the OIC claimed:

> [B]efore Mr. [redacted] even considered whether to offer immunity to Ms. Lewinsky, we had *obtained DOJ's opinion* that Mr. Carter's representation of Ms. Lewinsky did not extend to the criminal investigation. *This advice,* from the then-Deputy Chief of the Public Integrity Section and current Chief of the Fraud Section, demonstrates the reasonableness and sincerity of our belief. It also establishes that the DOJ contemporaneously agreed with our analysis of the scope of Mr. Carter's representation.

OIC Response to Bar Counsel, Board of Professional Responsibility, District of Columbia Court of Appeals, Jan. 29, 1999, at 16 ("Response to D.C. Bar Counsel"). Although [redacted] did not disagree with the OIC's analysis, we have found no support for the proposition that he independently offered an opinion or advice regarding the status of Lewinsky's representation. The OIC knew that [redacted] was present not to deal with their contacts analysis or with the planned approach to Lewinsky but rather with the question of jurisdiction; that he had no independent knowledge of the facts; that he was not present for most of the planning and had not been provided a copy of the planned script; and that he had no authority to overrule a decision made by OIC. Indeed, [redacted] specifically told the OIC on Thursday evening that if it were his case, he would go to Margolis for advice on the contacts issue.

In its submission to DOJ, [redacted] concurrence and approval is described somewhat less assuredly, see OIC Submission to DOJ at 7, 21, 22, 25, 76-77. Yet, even here, there are certain aspects that we find troubling. For example, the submission sets forth the agents' response downstairs when Lewinsky said "talk to my lawyer." The agents are reported as saying that they would not tell the lawyer as much so why didn't she come upstairs and listen. The submission then continues: "This response had been discussed with Mr. [redacted] and he appeared to accept it." OIC Submission to DOJ at 25. Bates' notes show that, in fact, [redacted] suggested a very different tack if she inquired about her lawyer (let alone if she directed the agents to her lawyer), a tack that would have clarified whether Lewinsky had a lawyer for the purposes of the investigation. See Bates' notes, 1/16, 11:45 a.m.

suggestion to be conditioned on something happening that could change the OIC analysis of her representation and that [redacted] seemed to suggest that such a something, in [redacted] view, would be Lewinsky asking to talk to her lawyer.[33] [redacted] says he had a higher threshold for triggering a clarification because he was so certain his "contacts" analysis was correct.

Bates' notes do not record any reaction to [redacted] suggestion that if Lewinsky asked about calling her lawyer, they would say that it would decrease the value to her of cooperation, and it became the centerpiece of the OIC's strategy to keep Lewinsky from calling Carter.[34] [redacted] having chimed in with his own suggestion immediately after [redacted] did not remember [redacted]s suggestion, but says the suggestion makes him very uncomfortable.[35]

There were apparently no other options discussed; they did not "game out" whether there was anything that would change their assessment of Lewinsky's status as unrepresented; what to do if she pressed to contact Carter, or "her attorney," as opposed to just "anyone"; or what they would do if she pressed for information about Carter. In short, no one specifically thought of or

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[33] During our first interview with [redacted] he did not remember [redacted] suggestion or even that [redacted] had made a suggestion. Nor when he reviewed Bates' notes did he understand [redacted] statement to be a suggestion.

[34] It should be noted that Bates, who had no law enforcement experience and was hired as a writer of reports, candidly told us that he had never heard of the DOJ regulations circumscribing contacts with people who have lawyers. He would not have known that Carter was an issue and although he does not remember this discussion, it raised no red flags. He said he had "no framework to think about the whole exchange about a lawyer; I just wrote words down."

[35] [redacted] surmises that maybe this is why he raised his own, alternative, suggestion immediately thereafter.

raised for Starr all of the issues and possible options involved in the approach to Lewinsky, some largely dependent upon what she might say.[36]

told us several times of his discomfort in these meetings with the OIC and reiterated that because this was OIC's investigation and in light of the independence required by the law, he did not feel he should, or could, stop them from any course of action. He says, "I believed they had made an evaluation with fuller facts. I could not veto that."[37]

Friday, January 16, 1998 – The Lewinsky encounter

OIC personnel headed to the Ritz Carlton sometime before 1:00 p.m. remembers that he and waited in the car for who was delayed upstairs in a meeting.[38] When joined them, he said they had received authorization from the court. Also stating that there would be more than one or two attorneys present, said something like, "I can't believe

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[36] says that one more meeting occurred before they left for the Ritz Carlton. The meeting, according to included various personnel with Starr in Starr's office. was not there. As the meeting broke up, says that he pulled Starr aside and got permission for the lawyers on the scene to offer full immunity to Lewinsky if it became necessary. No one else, including Starr, remembers this meeting. who is positive he was not in such a meeting, says that the significance of immunity negotiations without a person's lawyer present is so far removed from the issues Starr dealt with that he might very well not have remembered the meeting because he would not have recognized its importance. This issue took on large proportions during a time when D.C. Bar Counsel was examining whether or not Starr had personally breached rules of ethics by approving immunity negotiations under circumstances that might have violated DOJ regulations.

As much as this difference in recollections caused an internal dispute, we do not find it particularly relevant here in that we believe the "immunity" regulation was triggered by the original plan to offer a "cooperation made known" deal. Further we believe the matter is resolved with Starr's statement to us that he would have approved an immunity offer because he was interested in the information Lewinsky had, not in sending her to jail. It is clear that if Starr did approve the immunity offer, it was without knowledge that the matter was potentially covered by DOJ regulations, rules and policies, since had not thought of the immunity proscriptions himself.

[37] was asked why remained after the 10:33 a.m. call in which the OIC learned it had been granted jurisdiction. He stated: "We wanted to pick his brain. He had no veto power."

[38] was a former supervisory FBI agent then on contract with the OIC. He states that he was first briefed about the confrontation on the way over to the hotel. It was his understanding that he was to "baby-sit" Tripp in a hotel room adjoining the one where and would be trying to convince Lewinsky to cooperate.

it. It's going to be a field trip."[39] [redacted] and [redacted] headed for the Ritz Carlton separate from the agents. On the way, [redacted] recalls a specific conversation he had with [redacted] about the risks of the confrontation and that they needed to be especially careful not to cross the ethical line. Pressed as to what he meant, [redacted] says that he meant that they should not say "bad things" about Carter. He cannot be more specific than this.[40]

It would appear that there had never been a meeting of the minds between the agents and the lawyers as to roles and strategy, nor was there a final meeting at the hotel. According to [redacted] the plan was "a work in progress; that there had not been much time to script out strategy, or the roles of various people, or to rehearse." In [redacted]s words, "we had to wing it." [redacted] echoed [redacted]s sense of the situation. He says that there was no script for the initial confrontation, but that he had the tape cued-up and was prepared to play it for Lewinsky upstairs. When they entered the hotel room later with Lewinsky, [redacted] states that he learned for the first time that [redacted] was the "main guy." Until then, [redacted] thought agents would be leading the confrontation. [redacted] who was handling logistics, was not present at any of the Friday morning meetings. He, too, thought the agents would do the presentation. He thought the attorneys would be in the next room in case legal questions arose, or if Lewinsky got an attorney involved.

[redacted] says that although he was in charge upstairs, the agents had their own ideas regarding downstairs. [redacted] agrees, stating that "the FBI did the downstairs meeting on their own; I expected more of a vetting of a plan." According to [redacted] the lawyers and the agents

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[39] [redacted] describes the activity during the whole week as "kids playing a game of T-Ball," with everyone dropping their assignments and gravitating to the action. [redacted] who compares the activity of the week to an "anthill," says he was not sure what role was assigned to the OIC lawyers arriving throughout the day.

[40] [redacted] says, regardless of the regulation, he did not want to "disparage" any attorney. [redacted] remembers earlier general discussions about taking care, but does not remember any specifics. [redacted] did not share his concerns with the agents.

had separate jobs. [redacted] says that he expected to present "the pitch" and then turn Lewinsky over to someone else for an interview and to make calls because, as he says, he had not even listened to the tapes.

The food court downstairs

[redacted] and [redacted] arrived downstairs for the meeting with Tripp and Lewinsky at about 1:00 p.m. They approached Lewinsky and showed their credentials as Tripp faded into the background. [redacted] told Lewinsky that she was in trouble and that she was the subject of a federal criminal investigation. According to [redacted] she said: "go fuck yourself." He continued telling her that "there are OIC lawyers upstairs who would tell you about the investigation." The FBI 302 reported that [redacted] told Lewinsky that:

> [T]he agents and the attorneys wished to discuss her culpability in criminal activity related to the PAULA JONES civil lawsuit. LEWINSKY was advised that she was not under arrest and the agents would not force her to accompany them to the hotel room.
>
> *LEWINSKY told SSA [redacted] he could speak to her attorney.*
>
> SSA [redacted] advised the offer to discuss her legal status was not being offered to her attorney, but to LEWINSKY alone. SSA [redacted] explained to LEWINSKY she was being offered an opportunity to meet with the OIC attorneys and agents and hear them explain why they felt she was in trouble without being required to make any statement. SSA [redacted] further explained LEWINSKY would then have the opportunity to ask clarifying questions of the attorneys and be better informed as to whether she wanted legal counsel before making any statements, or whether she thought it better to cooperate with the OIC.[41]

FBI 302, 1/16/98 (capitalization original, emphasis added). [redacted] says he told Lewinsky that she had two choices: "1) call your lawyer, I won't tell him much; or 2) come upstairs and listen."

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[41] [redacted] remembers thinking this was a great approach that he had never heard before. Usually when a person asks to talk to their lawyer, the FBI follows up with "okay, we'll have to talk with our attorneys." He noted, "that never works."

Lewinsky describes the encounter in similar terms, saying that she said: "I'm not talking with you without my lawyer." She says the agents told her that they were giving her a chance to cooperate and get out of trouble. Lewinsky says that one of the agents said: "[I]f you do [get your lawyer], we won't give him as much information and you won't be able to help yourself as much." Lewinsky and the agents agree that they told her that she was not under arrest and free to go. She elected to go upstairs with them. It was shortly after 1:00 p.m.

Upstairs in the hotel room

The written record of what occurred between 1:05 p.m., when Lewinsky arrived in room 1012, and when she left with her mother almost twelve hours later is sketchy at best. After a detailed statement of what happened downstairs in the food court, the FBI 302 reported, in the main, amenities offered to Lewinsky. It contained very little regarding the key discussions taking place throughout the day in the hotel room.[42]

Both in terms of the OIC "pitch" to Lewinsky and discussions regarding Frank Carter, we roughly divide the day in half. The first half, between approximately 1:00 p.m. and shortly after 5:00 p.m., ended with a blind call to Carter's office, made in response to Lewinsky's concern as to how she might later reach Carter. The second half was consumed waiting for Lewinsky's mother to arrive by train from New York City, and later by discussions involving the OIC, Lewinsky, her parents and finally, Los Angeles lawyer William Ginsburg.

We find that, prior to the call to Carter's office, Lewinsky raised the subject of Carter on several occasions. As [redacted] sought to impress upon Lewinsky the seriousness of her

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[42] When asked about this sparse record, [redacted] stated that he saw no need for notes during his "pitch." [redacted] says he also assumed the FBI would take any notes necessary during the day.

[redacted] says that he suggested to Starr the next day that they all write memos about the events of January 16. [redacted] never completed a memo of the events himself, nor did anyone else.

position while seeking her cooperation, Lewinsky referred to Carter as "my lawyer" and sought, in various ways, to call him, to consult with him, to visit him. [redacted] and [redacted] responded with the strategy earlier devised to discourage her from contacting Carter.[43] As articulated by [redacted] and noted by Bates: "tell her that if she has an attorney, she gets lesser rewards – concern about our ability to work undercover." Thus, [redacted] and [redacted] said, multiple times in so many words, that Lewinsky was free to call anyone, but that if she called anyone, including Carter, it would decrease the value of her cooperation. Lewinsky did not call Carter, she says, because these statements led her to believe that calling him would result in serious repercussions to her, and later she thought, to her mother. As Lewinsky and OIC personnel waited while Lewinsky's mother was on her way from New York City, Lewinsky made one last inquiry about whether she could consult with Carter and still keep the promise of immunity that had been offered to her. [redacted] told her she could not. Lewinsky then wondered how she would be able to reach Carter later if she decided to call him; [redacted] made the call to Carter's office and established that his answering service could reach him. Ultimately that night, Lewinsky's father arranged for Lewinsky to be represented by William Ginsburg in the case.

For much of the day, Lewinsky could be characterized as "hysterical" – crying, sobbing, regaining her composure, screaming. [redacted] describes her hysterics as having an unsettling effect on his own state of mind. It appears that he was genuinely concerned throughout the day about her physical and mental well-being.

Introductions. There is a difference in recollections as to what happened as the agents and Lewinsky entered room 1012, trailed by Tripp and [redacted] The agents, in [redacted] words,

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[43] [redacted] says that his concern that Carter might tip off others and interfere with the investigation was only a portion of his analysis; he also thought it important that Lewinsky understood the "risks" of such a call to her own situation.

are "as clear as anything was clear that day" that [redacted] came into the room and that [redacted] reported verbatim what Lewinsky had said downstairs about her lawyer. Indeed, they say [redacted] told [redacted] in front of Lewinsky what Lewinsky had said in order to give her the opportunity to correct them. Lewinsky says that right after [redacted] introduced himself, she said to [redacted] something like "I want my lawyer" or "I'm not talking to you without my lawyer" or "[c]an I call my lawyer." She says she told him that she had said the same thing to the agents downstairs. She recalls the agents then recounted for [redacted] how they had responded downstairs – she could call her lawyer but then they would tell her less and she would not be able to help herself as much.

[redacted] remembers none of this, but tells us that it would not have changed his analysis of the contacts issue. He says "it was pre-indictment anyway," and because of that "even if she had said that 'he represents me in the criminal case,' it would not have made a difference." He also says that he was so sure of his conclusion that she was not represented that her references to "my attorney" at that point would not have caused him to question that analysis.[44]

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[44] [redacted] says he first learned of the downstairs conversation when he read the FBI 302 some time later, that he was very upset by this, and that he went directly to [redacted] remembers an issue about the lawyers not being aware of everything done by the agents on January 16. [redacted] recalls [redacted] reaction to the 302. [redacted] stated there was "stuff" in the 302 he did not know about, but did not say what stuff. Later [redacted] said the "stuff" in dispute included the paragraph in the 302 in which Lewinsky is quoted as saying, "Talk to my lawyer." [redacted] did not pursue the 302 issue with the agents. [redacted] says he is sure that the agents reported the downstairs conversation to [redacted], but has a hazy recollection as to whether he learned about it then (on January 16) or later. He believes it was on January 16.

In its submission to DOJ, the OIC dealt with the discrepancy between the agents' recollection that they told [redacted] what Lewinsky had said downstairs, and [redacted] lack of recollection, as follows:

> At 1:05 p.m., Ms. Lewinsky (and Ms. Tripp) arrived at room 1012. See Pentagon City 302, at 1. There was a brief conversation at the doorway, and Ms. Lewinsky took a seat in a chair by the window. Mr. [redacted] entered from room 1014 and took a seat in a chair that was across a small table from Ms Lewinsky's chair. After some introductory remarks by the FBI agents, Mr. [redacted] began his presentation.

OIC Submission to DOJ at 26. It would have been far more candid and useful if the OIC had disclosed the differences in recollection this paragraph glossed over.

[redacted] also reports that Lewinsky said "[y]ou can't do this, I know you can't talk with me because I don't have my attorney here." Lewinsky confirms this, saying that she picked up her line from watching television. [redacted] replied that this was not true, because he had told her that she did not have to come and she had not been asked any questions. He stated, "The only purpose for that rule is to keep out statements; we have not asked for statements." [redacted] suggested that Lewinsky hear what the OIC had to say.

The "pitch." [redacted] began his pitch stating that it was an OIC investigation and that it involved the Paula Jones case. [redacted] outlined to Lewinsky the charges she was facing, the possible penalties, and the value she would get from cooperating.[45] He used the "cooperation made known" model. Lewinsky says that [redacted] told her the charges were about the Paula Jones case and involved perjury, obstruction of justice, witness tampering, subornation of perjury and conspiracy. He told her that if she cooperated, the government could bring no charges at all, or file something with a judge who could reduce her sentence to no jail time or probation depending upon the value of her cooperation. Lewinsky remembers that [redacted] kept telling her that the matter was time-sensitive.

Between periods of crying, Lewinsky asked a number of questions about "cooperation made known" and also asked about calling her attorney, Frank Carter. She says she asked [redacted] what he meant by cooperation, and he described three levels: debriefing, placing

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In the end, we find that the agents and Lewinsky did report in [redacted] presence what was said downstairs, but we do not question [redacted] statement that he did not hear this. It may well be that [redacted] so certain of his earlier analysis regarding contacts and so tense and focused on what he was about to say, simply failed to process Lewinsky's statements at this time.

[45] He did not discuss the sentencing guidelines and how they would affect the possible sentences. It is fair to say that the sentencing guidelines yield a substantially lower sentence than the maximums represented to Lewinsky as potential penalties.

monitored phone calls, wearing a wire. She asked: "what if I partially cooperate?" "What if I screw up?" "What does 'ask' the judge to be lenient mean?" She assumed it meant she could still go to jail. According to the 302, it was 1:33 p.m. when, despite an earlier decision not to give her Miranda warnings, something Lewinsky said ([redacted] thinks it was a reference to her attorney) moved [redacted] to start the warnings, but then stop as Lewinsky burst into tears.[46] The OIC participants vary with respect to the language used to discourage Lewinsky from calling Carter, but they all agree that she raised the question of contacting her lawyer and was told that contacting anyone, including Frank Carter, would (or could) lessen the value of her cooperation. Lewinsky recalls that throughout the day whenever [redacted] told her she was free to contact Carter, it was followed by the admonition that doing so would result in less or no credit.[47] It was also suggested repeatedly to Lewinsky that before she decided to call Carter, "she should hear us out."[48] The 302 recorded that, at 2:13 p.m., Lewinsky asked "if I don't cooperate, I can talk to whomever I want?"[49]

[redacted] remembers that during these conversations, someone said "the fewer people who know, the better off you are" and that [redacted] or [redacted] told her that they didn't want her to contact Carter "because [he] may be involved in criminal activity, we don't want you to call

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[46] [redacted] believes that the rights were begun either because it appeared she was about to make a factual statement, or because Lewinsky stated that she had not been read her rights. It may be that [redacted] began the Miranda rights in response to Lewinsky's statement, discussed above, that they should not be talking to her without her attorney.

[47] As Lewinsky put it, "I was actively discouraged from calling Frank."

[48] Importantly, this strategy went beyond merely asking her to "hear us out." It included an offer of a "cooperation made known" agreement and later, an immunity agreement; a request for Lewinsky's response to the offers; and statements made with implications regarding Frank Carter and what would happen were she to call him.

[49] In discussing that Lewinsky's cooperation needed to be kept a secret, [redacted] thinks that Betty Currie (the President's personal secretary), Jordan and Carter were specifically named as people whom she could not contact.

him."[50] [redacted] remembers [redacted] getting perilously close to saying this, at which time he says he shot him a look, shutting him up.[51] Lewinsky also says that eventually they came out and said that "we really don't want you to call Carter because of how you got to him, he might call someone."[52] In response to this concern, as reflected in the FBI 302 at 2:50 p.m., Lewinsky suggested taking a taxi to her attorney's office. The OIC participants understood she was referring to Carter. At his office, she reasoned, they could prevent Carter from reaching for the phone without their knowledge. They responded that they "didn't believe that was such a good idea."

[redacted] recalls wrapping up the pitch by about 2:45 p.m. and asking Lewinsky for her decision regarding cooperation. Eventually, with the Isikoff deadline looming, [redacted] says he

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[50] [redacted] tells us that [redacted] told him after the fact that Lewinsky was told why they did not want her to contact Carter. [redacted] remembers [redacted] saying "we discussed with her 'he may be involved; you can contact him but it might affect our relationship; he might tip off others; less value for you.'"

[51] [redacted] believes that this happened later when he was questioning Lewinsky about her knowledge of Carter's criminal experience.

[52] This is consistent with statements on the charts prepared by [redacted] when he planned an oral presentation to the Attorney General to respond to these allegations of misconduct (which presentation never took place). It is noted at about 5:00 p.m. that Lewinsky "wonders if she should/might call atty. MWE: Can call, but we offered full imm[unity] for full cooperation; concern re calling D.C. people closely connected to the subjects. ("Coop made known?")." Upon reflection Lewinsky says that the OIC's statement about how she got to Carter gave her the impression that they were trying to say that Carter might not have her best interests at heart.

offered Lewinsky full immunity for full cooperation.[53] Still Lewinsky could not make up her mind.

[redacted] reports that, at about this time, Lewinsky asked things such as:[54] "Should I get an attorney regarding the immunity thing?" "I don't understand why Carter being my attorney in the Paula Jones case doesn't make him my attorney on this."[55] "[If] there is a difference in the criminal and civil case, what kind of attorney should I get?" "I might want Frank Carter for this." "Wouldn't Carter be good? Can't he do criminal law?"

[redacted] says that he told Lewinsky that "it is obvious he is a civil attorney because he represents you in a civil case; you should go to someone who is experienced in federal criminal law; we don't know about his experience." Although [redacted] strongly denies disparaging Carter, he says, "I admit I was trying to plant the idea [that Carter could not handle criminal cases]."

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[53] [redacted] who says he had been consulting with other OIC personnel throughout the day at the doorway to the adjoining room, describes that there was a joint decision to offer immunity to Lewinsky. Except for [redacted] other OIC lawyers claim not to have known about the offer of immunity until well after it was made. [redacted] says that when he learned about it later, he was surprised. [redacted] states that he first heard of the possibility for immunity while he was in the hotel room and that he was against it, but he did not express his disagreement as "they were more experienced" referring to [redacted] and Udolf.

Lewinsky says that she only "vaguely" remembers that there was a time when [redacted] walked in and said "okay, we won't prosecute at all, you won't go to jail." She believes her response was "do I still have to wear a wire?" [redacted] told her that this was what cooperation was all about.

As for the timing of the offer of immunity, [redacted] says he offered immunity for both Lewinsky and her mother before [redacted] arrived (see *infra* pp. 44-45), but [redacted] did not know about the offer before he met with Lewinsky. Lewinsky is certain that the offer had not been made, at least as to her mother, before [redacted] arrived. We cannot say with certainty whether the offer(s) occurred prior to or after [redacted] visit.

[54] [redacted] does not necessarily remember each of these questions being asked or statements made, but recalls the questions as the "gist" of the conversation.

[55] [redacted] recalls that he and [redacted] at some point explained to Lewinsky that the civil and criminal cases were separate and that Lewinsky could not be represented in the criminal case because she did not know about it. [redacted] says that he never explained this contacts analysis to Lewinsky, and Lewinsky does not recall such an explanation.

Because of these comments about Carter's expertise, Lewinsky says she came to believe that Carter had no criminal experience, and that his background would not fit her problem.[56] Lewinsky says that at that time, she asked to call Carter to ask him to recommend a criminal attorney. The response was — after a look was exchanged among the "group" — that this would be too suspicious. She suggested she call Carter's partner for a recommendation. They discouraged that call for the same reason, but [redacted] said she could call another attorney and gave her a telephone number. She did not take it, not trusting the OIC.

[redacted] recollection of the exchanges about Carter are consistent in the main, but are more limited than those reported by either [redacted] or Lewinsky. He says that at some point Lewinsky asked something about talking to her attorney. She said something like "[s]hould I get a criminal lawyer or can Frank represent me on this?" He recalls that she also asked something like "[s]hould I be talking to my attorney on this?" His response was to the effect that Lewinsky was free to leave, that they were not asking any questions, that she might want to hear them out; and if she talked to someone, there would be less value to her cooperation. Later in a conversation between [redacted] and Lewinsky, [redacted] reports that she asked: "should I hire Carter to represent me?"[57] and that [redacted] said something like "[d]oes he do federal work?" [redacted] remembers Lewinsky saying, "I don't know, could he make a referral?" [redacted] thinks that it

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[56] She wanted to make very clear, however, that the comments about Carter's expertise occurred in only one discussion and were not repeated throughout the day. [redacted] listened to, but did not partake in, this conversation. We are troubled that [redacted] did nothing to avert the implication regarding Carter's experience when the OIC knew nothing about Carter, not having researched his background.

[57] [redacted] tells us that he took from the discussion about "hiring" Carter confirmation that Carter did not represent her in the criminal case for purposes of the contacts analysis.

was at the end of this conversation that Lewinsky was given a phone number of the legal aid society.[58]

At some point, Lewinsky enlarged the focus of her statements and questions from her attorney, or Frank Carter, to include her mother, Marcia Lewis. [redacted] confirms that at about 3:00 p.m., Lewinsky said she needed to talk to someone else – "my attorney," or "my mom" or "something like that" before making a decision. He states that he again tried to talk her out of calling anyone as that was the "whole point of immunity." At about 3:10 p.m. according to the 302, she asked if she could be escorted to New York to talk to her mother. This idea was also discouraged by [redacted] although at some point she persuaded him that her mother had been paging her and would be very upset if Lewinsky did not return the page. After promising not to say anything about the situation, Lewinsky was permitted to call her mother from a phone in the hotel room. She says an agent held his finger over the switchhook during the call.[59]

[redacted] was called over from the OIC offices in the hope that his approach, regarded as more emphatic than [redacted] might tip the scales toward cooperation. [redacted] arrived around 3:30 p.m., and after a briefing from [redacted] and [redacted] went into the room with Lewinsky.[60] Although there is a difference of opinion as to the language used, [redacted] and Lewinsky agree as

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[58] To demonstrate that they were not attempting to keep Lewinsky from consulting with a lawyer other than Carter, the OIC submissions to the court, to Congress, to Bar Counsel and to the Department of Justice all rely upon the fact that they gave her the number of the legal aid society or public defender's office. [redacted] says he does not specifically recall this, does not know how the number was obtained, whether it was for a D.C. or Virginia office or how the OIC determined whether that office had criminal jurisdiction. There is no Federal Defender's Office in the Eastern District of Virginia where the Ritz Carlton is located and where Tripp had taped Lewinsky three days before.

[59] [redacted] says that Lewinsky had been asking about her mother much earlier as well. He also states that the call preceded the suggestion about traveling to New York. The 302 places the suggestion that she be escorted to New York at 3:10 p.m., and the first call to her mother at 3:20 p.m. [redacted] says he thought the 302 was wrong in many respects.

[60] [redacted] reports that neither [redacted] nor [redacted] said anything about Lewinsky asking for her attorney at that time. Nor was [redacted] told at that time that Lewinsky had been offered immunity.

to the gist of the conversation. [redacted] told Lewinsky that time was running out and she had to make a decision. Lewinsky reports that she said to [redacted] "how can I make a decision if you won't let me call anyone?" At this point [redacted] said to her that she was a grown-up and that she did not need her mother to make a decision.[61] [redacted] left the room. Soon Lewinsky was permitted, without forfeiting the immunity offer, to go to a downstairs phone to call her mother in New York.[62] She then returned to room 1012, and according to the 302, at 4:12 p.m., she again called Lewis who asked to speak with an OIC attorney. Lewis told [redacted] and [redacted] that she would travel to Washington via Amtrak.

After arranging for her mother to come to Washington, D.C., at around 5:00 p.m., Lewinsky asked if she could still have complete immunity if she talked with Carter. [redacted] says that he explained to her that complete immunity required complete cooperation, and meant that "we don't want you talking to anybody." He told her that she could go back to "cooperation made known" if she wanted to call Carter.[63] Lewinsky then asked how she would be able to reach Carter if she decided later to accept the "cooperation made known" model.[64] [redacted] made an

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[61] Lewinsky recalls vividly that [redacted] suggested her mother had potential criminal liability of her own. Lewinsky says this was the first she understood her mother might be implicated and is therefore certain that [redacted] said nothing about immunity for her mother previously.

[62] Asked why she did not call Carter when she was out of the room, downstairs on outside lines, Lewinsky said that she was afraid she was being followed, that the downstairs phones were tapped and that she would lose the opportunity to help herself. She also noted that she was afraid, in spite [redacted] assurances, that she would be arrested if she crossed the OIC staff. Nonetheless, Lewinsky did try, unsuccessfully, to alert others, including Betty Currie.

[63] See also *supra* note 52, describing charts prepared by [redacted] for presentation to Attorney General and specifically the entry at approximately 5:00 p.m.

[64] Bates' notes are consistent with this order of events. Although most of his notes for the afternoon of the January 16 relate to the counter-point of the day, the attempt to keep the press away from the story, and to persuade Isikoff to extend his deadline, Bates recorded one briefing that he received summarizing certain aspects of the Lewinsky confrontation. With a heading of JB ([redacted] 5:25 1/16, Bates' notes report:

. . . .

anonymous call to find out how to get in touch with Carter, and, according to Lewinsky and most others present, reported back that Carter could be reached through his answering service.[65]

The end of the day. Lewinsky says that at this point, she "closed down." And, in a sense, so did the OIC lawyers. Lewis's train was delayed en route. While they waited for Lewis to arrive, they ate together with Lewinsky; they shopped with Lewinsky; they watched television with Lewinsky.

Lewis arrived at 10:20 p.m., talked with Lewinsky and the OIC lawyers, called her former husband and Lewinsky's father, Bernard Lewinsky. Within an hour, Bernard Lewinsky told the OIC lawyers that William Ginsburg represented his daughter. After a brief and unfruitful conversation about immunity, the evening ended at 12:45 a.m., and so did the OIC's hopes of

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> She also wanted to call attorney.
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> . . . .
>
> Wanted to call Frank Carter, attorney. We winced, said want to ask Mom? We called firm, found out how to get in touch with him after hours.

The first entry cited above may refer to any one of the several occasions when Lewinsky indicated that she wanted to talk with her attorney during the day. The second is consistent with events around 5:00 p.m., after [redacted] had offered full immunity, and when Lewinsky asked again if she could have full immunity if she called Carter. In addition to explaining again what full cooperation entailed, from Bates' notes it appears [redacted] suggested she wait to consult with her mother, who was on the way from New York, and that they made the blind call to Carter's firm attempting to allay her concern about getting in touch with Carter after hours in case she decided to call him.

Asked about these notes, Bates did not recall whether [redacted] was reporting in person or over the phone; he also did not recall whether [redacted] used the word "winced" or whether he made a facial gesture that Bates interpreted as "winced." [redacted] states the later statement regarding Carter must have been a combination of two different conversations because he noted the question about Carter occurred about 3:00 p.m. However, in our first interview with [redacted] and as related in the charts prepared for the presentation to the Attorney General, [redacted] reports two separate incidents when Lewinsky inquired about talking with Carter about the immunity offer. According to [redacted] the first occurred at about 3:00 p.m. when Lewinsky said she needed to talk to someone – "my attorney" or "my mother" regarding the offer; she was told then that the whole point of immunity was that she would talk to no one. Ultimately, however, [redacted] allowed her to talk with her mother without compromising her immunity prospects. The second inquiry regarding immunity and Carter occurred at about 5:00 p.m. when Lewinsky asked if she talked to her attorney, could she still get immunity.

[65] This event is not in [redacted] 302. [redacted] says that he directed [redacted] to take it out of a draft because none of the other conversations about a lawyer were in the document and it was too late to try to reconstruct them.

conducting a covert investigation. Months of negotiation would pass before Lewinsky was eventually given the full immunity offered to her by [redacted] on January 16, 1998.

ANALYTICAL FRAMEWORK APPLICABLE TO SPECIAL COUNSEL INVESTIGATION

Background

Any analysis of the conduct of federal prosecutors must begin with an understanding of the Department of Justice's commitment to fairness and the rule of law and the history of enforcement of the highest ethical standards by the Department's Office of Professional Responsibility. The Department's Principles of Federal Prosecution "promote the reasoned exercise of prosecutorial authority, and contribute to the fair, evenhanded administration of the federal criminal laws" by providing a general structure for prosecutorial decision making. Ultimately, however, the process is dependent on those applying the principles:

> The availability of this statement of Principles . . . serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. . . .
>
> Important though these principles are to the proper operation of our Federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the Federal criminal justice process.

"Principles of Federal Prosecution," USAM 9-27.001.

The Department's commitment to fairness and the highest ethical standards was restated by Deputy Attorney General Eric Holder in connection with the issues underlying the rules we address in this investigation:

> I want to say at the outset that the Department of Justice demands that its attorneys carry out their law enforcement responsibilities in

> conformity with the highest ethical standards. And they do so. That is what the American public expects of its government attorneys, that is what the Congress expects, and . . . that is what federal judges expect. . . .
>
> . . . Department attorneys are subject to discipline not only by state bars and federal courts, but also by the Department's Office of Professional Responsibility, which Attorney Janet Reno has more than tripled in size during her tenure.[66]

Ethical rules and other established policies of the Department of Justice apply to employees of the Office of Independent Counsel just as they apply to other Department of Justice attorneys. See 28 U.S.C. § 594(f)(1). Because the actions of OIC employees should be subject to no greater and no lesser standards than those for other attorneys in the Department of Justice, the standards applicable to OPR's investigations of allegations of professional misconduct provide the framework for this investigation and report.[67]

OPR Analytical Framework

> It is the attorney's *professional duty to attempt in good faith to ascertain the obligations and standards imposed on him or her* and to comply with them.

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[66] Statement of Deputy Attorney General Eric H. Holder, Jr., before the Subcommittee on Criminal Justice Oversight, U.S. Senate Judiciary Committee, concerning the Impact of 28 U.S.C. § 530B on Federal Law Enforcement, March 24, 1999. Section 530B contained the "McDade amendment" abrogating the regulation at issue here. In the Fall of 2000, the Department is urging the Congress to repeal the McDade amendment citing harm to federal law enforcement. See "Repeal the McDade Law," Washington Post editorial, Oct. 19, 2000.

[67] As part of our investigation, OPR provided us with documents outlining the analytical framework applicable to their investigations, as well as copies of Annual Reports and redacted copies of reports of various closed investigations. Additionally, we met with personnel from the office to discuss OPR's framework for decision making as well as its procedures for conducting investigations. These documents and meetings were useful in ensuring that our investigation and recommendations, to the extent possible, would be consistent with OPR's own standards and process.

Relevant to an understanding of OPR's investigation of misconduct allegations were documents titled "Analytical Framework Used by the Office of Professional Responsibility in Investigations and Inquiries Into Allegations of Professional Misconduct" (represented to us as a redacted version of a Sept. 9, 1999 document codifying OPR's previous practice)("OPR Analytical Framework") and "U.S. Department of Justice Office of Professional Responsibility Policies and Procedures," Jan. 7, 2000.

OPR Analytical Framework at 3 (emphasis added). Those obligations and standards may arise from a variety of sources including statutory and constitutional law, Department regulations and policies, and applicable rules of professional ethics. Id. at 2-3.

In investigating allegations of professional misconduct, OPR has a number of conclusions, or findings, available to it. OPR may make a finding of professional misconduct, either intentional or reckless. Id. at 1, 2. If it determines that professional misconduct did not occur, OPR may nonetheless find that an attorney "exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances."[68] Id. at 1, 8. A brief review of OPR's potential findings and the standards applicable to those findings follows.[69]

Professional Misconduct

The most serious finding available in an OPR investigation is a finding of professional misconduct. To establish professional misconduct, OPR must find 1) that the attorney violated or disregarded an applicable obligation or standard; and 2) that the attorney acted either intentionally or with reckless disregard for the obligation or standard.

A finding of intentional misconduct can be based on conduct that is either purposeful or knowing. Thus, an attorney intentionally violates an obligation or standard when he or she

> (1) engages in conduct with the purpose of obtaining a result that the obligation or standard *unambiguously prohibits,* or (2) engages in conduct knowing its natural or probable consequence and that consequence is a result that the obligation or standard *unambiguously prohibits.*

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[68] When OPR does not find sufficient evidence that the attorney engaged in the complained of conduct, it finds the allegation unsubstantiated. OPR Analytical Framework at 9-10.

[69] OPR uses a preponderance of the evidence standard of proof for its factual determinations, including its determinations regarding intent. Id. at 4.

Id. at 3 (emphasis added). In contrast, an attorney acts with reckless disregard in committing professional misconduct when:

> (1) the attorney knows, or should know *based on his or her experience* and the *unambiguous nature of the obligation or standard,* of an obligation or standard, (2) the attorney knows, or should know *based on his or her experience* and the *unambiguous applicability of the obligation or standard,* that the attorney's conduct involves a substantial likelihood that he or she will violate . . . the obligation or standard, and (3) the attorney nonetheless engages in the conduct which is objectively unreasonable under all the circumstances.

Id. at 5 (emphasis added). As an example of reckless disregard, OPR refers to a case in which an attorney indicted and prosecuted an individual based solely on hearsay evidence and then had to dismiss the indictment at trial. OPR found that the attorney recklessly disregarded the obligations placed upon her by "The Principles of Federal Prosecution" and that her failure to prepare adequately for indictment and trial "despite the unambiguous nature of her obligation to do so" was in reckless disregard of her obligation to represent the interests of the United States. Id. at 5-6.

In sum, in determining whether professional misconduct occurred, OPR considers both the actions an attorney takes as well as those he or she fails to take.[70] Id. at 3. OPR considers whether the obligation or standard alleged to have been violated is unambiguous, as well as whether its applicability to the circumstances is unambiguous. Finally, OPR considers the attorney's purpose and knowledge, along with knowledge the attorney should have based on his

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[70] OPR also recognizes a "good faith" exception to a finding of misconduct. Thus, "an attorney who makes a good faith attempt to ascertain the obligations and standards imposed on the attorney and to comply with them in a given situation does not commit professional misconduct." Id. at 6-7. Some examples indicating good faith might include an attorney's review of the applicable obligations or standards, consultation with an ethics advisor or supervisor, notification of a court or an adverse party of the intended course of action, or other affirmative steps taken to comply with the standard or obligation.

or her past experience, to determine whether a violation was committed either intentionally or with reckless disregard.

Other Potential Findings

Assuming no professional misconduct is found, OPR may nevertheless find the conduct complained of inappropriate, and that an attorney exercised poor judgment or made a mistake; or it may determine that the attorney acted appropriately under all the circumstances.

Poor Judgment. In addition to requiring adherence to specific standards and obligations, the Department expects that its attorneys exercise good judgment in carrying out their professional duties. In attempting to define judgment, OPR states 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.
>
> * * * *
>
> [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.

Id. at 9.

Mistake.[71] Regarding mistake, OPR states:

> A mistake results from excusable human error despite an attorney's exercise of reasonable care under the circumstances. Whether an attorney's error is excusable depends upon factors including: the attorney's opportunity to plan, and to reflect upon the possible and foreseeable consequences of, a course of conduct; the breadth and magnitude of the responsibilities borne by the attorney; the importance of the conduct in light of the attorney's overall responsibilities and actions; and the extent to which the error is representative of the attorney's usual conduct.

OPR provides examples of mistakes that include a poor choice of words in unplanned remarks; a misunderstanding of facts despite a reasonable attempt to learn them; and a misunderstanding of the law despite a reasonable attempt to research, interpret, and apply it. More specifically, OPR refers to a mistake determination in a case in which an attorney reviewed the government witnesses' criminal records in order to disclose applicable Brady material but failed to notice a pending charge against one witness and thus did not disclose that pending charge.[72] Finally, OPR contrasts mistake with poor judgment: "Poor judgment differs from mistake in that an attorney [makes a mistake] as a result of normal human error despite an attorney's choice of an appropriate course of action."

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[71] After we had begun to draft our report, OPR provided us an updated "Analytical Framework" changed only in that it further discusses a finding of mistake. It is this updated framework, which we received on November 6, 2000, that informs this discussion of mistake. OPR tells us the standard itself has not changed.

[72] In our review of OPR closed files regarding contacts violations, we found one case that OPR closed with a "mistake" determination. OPR Report, July 18, 2000. In that case, an AUSA permitted certain individuals to contact a defendant's wife to determine if she knew whether a relative of her husband's attorney was representing a co-defendant. During the contact, the individuals suggested that, based on their perception of a possible conflict if this were the case, the defendant's attorney might not have his best interests in mind. OPR found there was no contacts violation as the wife was not a represented person or party. Regardless of this initial determination, however, OPR went on to consider section 77.8. They found that the AUSA, although he had authorized the individuals to inquire about the co-defendant's representation, had not authorized the individuals to question the loyalty of defendant's counsel. OPR went on to determine, however, that such a conversation was foreseeable and, at a minimum, the individuals should have been instructed against such a suggestion. Ultimately OPR determined the AUSA made a mistake in this case.

Appropriate conduct under all the circumstances. Assuming it finds neither professional misconduct nor poor judgment or mistake, OPR will specify whether it finds an attorney's conduct to be appropriate under all the circumstances. Id. at 9. OPR notes that it sometimes finds neither professional misconduct nor poor judgment or mistake, yet may not be able to say that the attorney acted appropriately under all the circumstances. Without making a specific referral, OPR may note problems of communication or organization or identify other problems to be addressed by management.

Institutional Matters. As a final matter, OPR makes clear that in its final report, it may "identify for review and consideration by Departmental officials any issues relating to Department policies, practices and procedures or to possible management deficiencies raised in the investigation. OPR can also identify for review and consideration by an office's managers possible systemic problems found in the office during OPR's investigation." Id. at 10.

CONDUCT AT ISSUE

At issue in our investigation is the conduct of the OIC, and in particular that of [redacted] relating to the confrontation of Monica Lewinsky on January 16, 1998. More specifically at issue are allegations that [redacted]

- contacted Monica Lewinsky on January 16, 1998 outside the presence of, and without the permission of her attorney, Frank Carter;
- offered a deal (whether that be "cooperation made known" or immunity) to Monica Lewinsky on January 16, 1998 outside the presence of, and without the permission of her attorney, Frank Carter; and
- disparaged Frank Carter, sought to induce Monica Lewinsky to forego representation by Carter, or otherwise improperly sought to disrupt the relationship between Lewinsky and Carter.

APPLICABLE LEGAL STANDARDS

Background

In January of 1998, the conduct of Department of Justice Attorneys in criminal investigations with respect to "contacts with represented persons" was governed by 28 C.F.R. Part 77 ("the regulation") and USAM 9-13.200.[73] The regulation had a long history beginning at least as early as 1988, when the court, in the Hammad case, found that the New York state's anti-contact ethics rules could govern a federal prosecutor's supervision of a pre-indictment undercover contact with a represented person.[74] United States v. Hammad, 846 F.2d 854,

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[73] The final version of the regulation was published in the Federal Register on August 4, 1994, accompanied by an extensive history, explanation and analysis of its provisions. 59 Fed. Reg. 39910 et seq. (Aug. 4, 1994)("commentary"). The regulation and United States Attorneys' Manual provisions became effective simultaneously on September 6, 1994. The regulation has now been superseded by the McDade legislation, 28 U.S.C. § 530B, which became effective in April, 1999.

[74] During our investigation, we were provided access to dozens of archived Department files regarding the the regulation and its history. We reviewed all relevant files from the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, and various files from the Criminal Division and the Executive Office for United States Attorneys. Having reviewed these files, we determined the best "legislative history" for the regulation is that contained as commentary at 59 Fed. Reg. 39910 et seq. Throughout this report, we note

amended, 858 F.2d 834 (2d Cir. 1988), *cert. denied,* 498 U.S. 871 (1990). Every state had a version of the anti-contact rule prohibiting lawyers from contacting individuals who were represented by counsel about the subject matter of the representation. See, e.g., ABA Code of Professional Responsibility, DR 7-104(A)(1); ABA Model Rules of Professional Conduct 4.2. In the criminal context, if applicable at all, the rules had previously been interpreted not to govern undercover contacts and generally were not deemed relevant to contacts with a suspect prior to an indictment being filed. See generally 59 Fed. Reg. at 39911. Because federal criminal investigations often included covert and overt governmental contact with witnesses, subjects and targets prior to the initiation of formal charges, Hammad raised serious concerns among federal prosecutors who were now worried about state ethics rules previously thought inapplicable to their conduct.

Although Hammad was later modified, the Department remained concerned that the underlying principle would seriously interfere with federal law enforcement investigative strategies, and could subject federal prosecutors to the different ethics rules and disciplinary procedures of the fifty states. Undertaking to protect federal prosecutors in the proper exercise of their law enforcement duties, in 1989, then Attorney General Dick Thornburgh issued a policy statement declaring that "contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104,"[75] and the Department began the process of drafting a formal regulation so as to fit within the "authorized by law" exemption contained in most states' anti-contact rules.

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other materials when we deem them relevant to specific points at issue.

[75] Memorandum to All Justice Department Litigators from Attorney General Dick Thornburgh, June 8, 1989.

There followed years of intense internal and external efforts by the Department to draft and gain acceptance for such a regulation.[76] Drafts were circulated to United States Attorneys and their Assistants, the Department's Criminal Division, the Deputy Attorney General's office, the Executive Office for United States Attorneys, the Federal Bureau of Investigation and other Department law enforcement agencies, organizations of defense attorneys, representatives of state bar committees, and groups of judges in an effort to forge a consensus. The regulation was revised, widely distributed and revised again as the Department struggled to defuse one of the most explosive issues affecting federal law enforcement of the decade, and to demonstrate that its proposed regulation satisfied the purpose and principles underlying the states' anti-contact rules.[77]

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[76] The first draft of the regulation was published for comment on November 20, 1992, and required little more from prosecutors than that they adhere to the Sixth Amendment. See 57 Fed. Reg. 54737 (Nov. 20, 1992).

With the advent of a new administration in 1993, the regulation was reissued for comment and the process of considering the content of the regulation reopened. See 58 Fed. Reg. 39976 (July 26, 1993). The newly drafted regulation and United States Attorney Manual provisions attempted to confront more directly the Bar Association and defense bar's substantive concerns about various contacts while also ensuring that the government was not hindered in vigorous law enforcement by "state disciplinary rules that were never intended to govern police behavior." 59 Fed. Reg. at 39911.

[77] The purpose and principles underlying the anti-contact rules have been stated many ways. The Department's Office of Legal Counsel, for example, stated "the most obvious rationale is the fear that an attorney can lead an untutored layperson to make a damaging admission or to settle a case for less than its fair value because of the attorney's expertise in legal matters." Office of Legal Counsel, U.S. Dep't of Justice, "Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations," 4B Op. O.L.C. 576, 583 (1980)("1980 OLC Opinion"). Similarly, it has been stated the purpose is "to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the integrity of the lawyer-client relationship." ABA Annotated Model Rules of Professional Conduct, Rule 4.2, Legal Background, at 424 (1983). On a more general level, the rule has been characterized as recognizing that "the legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." Model Code of Professional Responsibility EC 7-18 (1969). And, in its commentary, the Department summarized the rationale as "when two parties in a legal proceeding are represented, it is generally unfair for an attorney to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party." 59 Fed. Reg. at 39910-11.

With the issuance of the regulation, the Department believed it had met its goal to reconcile the principles underlying the traditional anti-contact rules with the obligation of Department of Justice attorneys to enforce the law vigorously:

> This part ensures the Department's ability to enforce federal law effectively and ethically, consistent with the principles underlying Rule 4.2 of the American Bar Association Model Rules of Professional Conduct while eliminating the uncertainty and confusion arising from the variety of interpretations given to that rule and analogous rules by state and federal courts and by bar association organizations and committees.

28 C.F.R. § 77.1(a). To supplement its commitment to the principles underlying the regulation and the states' anti-contact rules, the Department issued policy in the United States Attorneys Manual to further guide and restrict federal attorneys' conduct in this area.[78]

A summary of the Department's final rules illustrates how they accomplish the goal set forth.[79] During the investigative stage, the rules generally allow an attorney to supervise and conduct investigations using all of the tools previously available to the police without respect to ethical rules that had never been drafted or intended to govern police conduct. Thus, before a person is arrested or charged, the prosecutor can direct undercover investigations and can develop facts through witness or suspect interviews without concern for contacts. When an attorney, however, even during this phase, is engaging in contacts involving "legal matters," or

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[78] We refer to the regulation and Manual provisions together as the "rules" governing contacts. In differentiating between what was included in the regulation as opposed to the United States Attorney's Manual, the need for clarity and unambiguity was emphasized. "[T]he Department determined that the regulation should be broad in scope and should provide unambiguous guidance that would not adversely affect federal law enforcement efforts" while the "Manual provisions . . . require that government attorneys consider the principles underlying the basic prohibitions in a much wider variety of circumstances." 59 Fed. Reg. at 39927-28.

[79] For further background, explanation, and defense of the balance struck by the rules, see 78 Judicature No. 3, "Justice Department Contacts: A Sensible Solution," by Jamie S. Gorelick and Geoffrey M. Klineberg, Nov.-Dec.1994; 1 Reasonable Doubt No. 3, "Contacts With Represented Persons: Myths and Reality," by Jamie S. Gorelick, Fall 1996.

those that typically would involve attorneys, the rules change. Regardless of the timing of the contact, therefore, "to protect the untutored layperson," government attorneys are not allowed to negotiate legal agreements with persons represented by counsel. 28 C.F.R. § 77.8. Likewise, supporting the general deference and respect given to attorney-client relationships by the ethics rules as well as the courts, the Department made clear that an attorney for the government should not seek to disrupt or interfere with an attorney-client relationship, regardless of the manner this might be accomplished. 28 C.F.R. § 77.9.

The Department also recognized that although the time that a person is arrested or charged with a crime may be a clear line denoting the end of an investigation and the beginning of the legal adversarial process, that line could also be drawn at the time the government anticipates seeking the charges in question, or when a person becomes the target of the investigation.[80] But there is no bright line determining when a person has become a target, and the Department determined that certain investigative tools should remain available even as to targets (e.g., undercover investigations). In the Manual, therefore, the Department proscribed overt, but not covert, contacts with targets.

As for interpretation and enforcement of its rules, the Department claimed sole authority and emphasized the wide variation in the interpretation and scope of state anti-contact rules as a factor compelling the promulgation of a "uniform federal rule." See, e.g., 59 Fed. Reg. at 39911.

> The current situation, in which the state contact rules purport to govern the substantive conduct of federal law enforcement attorneys, has proven unsatisfactory because the standards of ethical conduct are uncertain and subject to unpredictable and varying interpretations.

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[80] Cf. 1980 OLC Opinion, *supra* note77 (regarding the then applicability of states' anti-contact rules to federal investigations, OLC stated: "As the investigation becomes focused on subjects and targets and the nature of the charges becomes clearer, the [anti-contact] rule could come into play.").

Id. at 39913. Although conceding that generally its attorneys "are subject to the bar rules and disciplinary proceedings of the states in which they are licensed," the commentary emphasized that "the Department believes it must be the final arbiter of the scope of policing with respect to ex parte contacts involving federal prosecutors." Id. at 39912. Only by interpreting the regulation itself could "the basic purpose of [the] regulation . . . to provide a uniform rule of ethics regarding contacts with represented persons . . . be consistently and be predictably applied." Id. at 39913. Thus, the Attorney General claimed exclusive authority to enforce the regulation (28 C.F.R. § 77.11(a)); and the regulation preempted state and local federal rules on the same subject (28 C.F.R. § 77.12).[81]

The Department also promised strong enforcement of the accompanying provisions in the Manual, while emphasizing that the regulation and the Manual provisions needed to be read together before deciding the appropriateness of a contact. E.g., USAM 9-13.210; Memorandum for All Department of Justice Attorneys from Deputy Attorney General Jamie S. Gorelick, August 26, 1994 ("DAG Gorelick Memo to All DOJ Attorneys"). When criticized by outside groups for its inclusion of certain contacts policy in the Manual rather than the regulation, the Department referenced the "great number of significant Department of Justice policies" contained in the Manual, and promised that "the failure to follow such policy [would be] taken very seriously" (59 Fed. Reg. at 39918), and would "result in appropriate departmental action." Id. at 39928.

The Regulation: Definition of Represented Person

The regulation distinguishes between "represented parties" and "represented persons" in setting forth whether contact with such an individual is allowed. Contacts with represented

[81] The regulation provided that the Attorney General would refer any willful violations of the regulation to appropriate state disciplinary authorities. 28 C.F.R. § 77.12.

parties are prohibited except for a few enumerated instances whereas contacts with represented persons are allowed except in a few enumerated instances.[82]

An individual is considered a "represented party" if:

> (1) The person has retained counsel or accepted counsel by appointment or otherwise;
>
> (2) The representation is ongoing and concerns the subject matter in question;
>
> (3) The person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.

28 C.F.R. § 77.3. An individual is considered a "represented person" if the first two circumstances are met, but not the third – that is, if he or she has retained counsel, and the representation is ongoing and concerns the subject matter in question. Id. If there is doubt as to whether an individual is represented, whether previous representation is continuing, or whether a

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[82] The regulation does not specifically proscribe contacts when an individual is neither a "represented person" nor a "represented party." However, to the extent bar rules (other than anti-contact bar rules) or other Department policies may be relevant to such communications, those rules and policies govern. See 59 Fed. Reg. at 39912 ("The Department also recognizes that respect to most matters, Department attorneys are subject to the bar rules and disciplinary proceedings of the states in which they are licensed.").

ABA Model Rule 4.3 deals with contacts with unrepresented persons as follows:

> In dealing . . . with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In commentary, the Model Rule carries forth the black letter from DR 7-104(a)(2) stating "the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel." ABA Model Rules of Professional Conduct, Rule 4.3, Comment. Because the commentary seemingly goes beyond the black letter, the scope of Rule 4.3 with respect to giving advice is unclear. ABA Annotated Model Rules of Professional Conduct, Rule 4.3, Comment, at 435 (1983). Likewise, its applicability to the conduct of federal prosecutors is also unclear. See United States v. Dempsey, 740 F. Supp. 1295 (N.D. Ill. 1990)(court ultimately did not decide whether prosecutor's confrontation of person, which included advising of federal violations and penalties and seeking cooperation, violated rule (DR7-104(a)(2)) as rule had not previously been applied to prosecutors and court determined it would not suppress the resulting confession in any event).

"particular subject falls within the scope of the representation" (59 Fed. Reg. at 39920), the regulation specifically allows for "communication . . . to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding." 28 C.F.R. § 77.6(a).

The Regulation: Restrictions on Communications with Represented Persons

Although the regulation generally allows communication with represented persons, in deference to attorney-client relationships and the principles underlying the states' anti-contact rules, there are two specific limitations on permissible communications. These limitations are set forth in sections 77.8 and 77.9 of the regulation.

Section 77.8

> An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges . . . or sentences or penalties with a represented person or party.

28 C.F.R. § 77.8.[83] In including this section, the Department recognized "the importance of the attorney-client relationship and the desirability that an individual who is represented by counsel be fully advised by counsel before negotiating legal agreements" and "the heightened risk in this context of the prosecutor's superior legal training being used to the detriment of the untutored layperson." 59 Fed. Reg. at 39911-12.

In addition to the agreements specifically described in section 77.8, the Department has consistently interpreted the section to prohibit the initiation or negotiation of cooperation agreements or any other similar legal agreement or arrangement. This interpretation is evidenced

[83] There is only one exception to this proscription, that being if the communication was initiated by the person rather than the government and the person has specifically waived counsel. See 28 C.F.R. § 77.6(c).

in the Department's training materials,[84] public statements,[85] and in individual advice letters from Associate Deputy Attorney General David Margolis regarding specific contacts.[86]

Although only in dicta, a federal court considered the applicability of section 77.8 to a prosecutor's confrontation of a represented person to discuss cooperation options, and agreed with the Department's own interpretation. The court stated: "While one can engage in word-play to argue that a discussion of cooperation options does not fit precisely within [77.8], it is apparent to the Court that the policies underlying Rule 4.2 and this new regulation would counsel against

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[84] For example, in the training videotape distributed at the time the regulation became effective, which was to be made available to all DOJ attorneys, section 77.8 is characterized as prohibiting "legal discussions including cooperation agreements" with a represented person. Videotape, "Contacts With Represented Persons," distributed with Memorandum to All Component Heads from Deputy Attorney General Jamie Gorelick, Sept. 2, 1994 ("DAG Gorelick Memo to All Component Heads"). Likewise, the training outline provided to the PROs shortly thereafter states: "Contact is not permissible for the purpose of engaging in legal discussions, such as negotiating settlement in . . . *a cooperation agreement*, or an immunity agreement." "Contacts With Represented Persons," PRO Seminar, Oct., 1994, at 8 (emphasis added); videotape of lecture presented at PRO Seminar in October, 1994 (same). Accord DAG Gorelick Memo to All DOJ Attorneys ("The regulation permits . . . contacts with represented persons unless such contacts involve the negotiation of a plea agreement, settlement, *or similar legal arrangement* (77.8) or would unduly infringe the individual's attorney-client relationship (77.9)."(emphasis added)); "Investigation of a Civil Case," 1995 Ethics and Professional Responsibility Manual at 4.35, available in USA Book, Ethics, 4.35 ("USA Book, Ethics") ("DOJ attorneys may not negotiate legal agreements with a represented person, although the DOJ lawyer may answer questions (narrowly and factually).").

Indeed, even [redacted] training outline indicated there should be "no negotiation of deals," but "only discussion of facts." "Ethics: Contacts With Represented Persons," [redacted] 4/27/95 ("[redacted] Outline").

[85] See, e.g., Letter from Associate Deputy Attorney General Seth Waxman to United States District Court Judge Maryanne Trump Barry (Chair of Criminal Law Committee), Aug. 2, 1994 ("an attorney for the government may not communicate with a represented person . . . in order to negotiate plea agreements or similar legal arrangements"); Letter from Associate Deputy Attorney General Seth Waxman to Newman Flanagan, Executive Director, NDAA, Aug. 2, 1994 (same); Talking Points distributed to All United States Attorneys for discussions with their Supreme Court Justices and federal judges (Aug. 1, 1994) ("At the same time, the regulation proscribes lawyer communications that are inconsistent with the spirit of the model rules: for instance, the regulation generally does not permit federal prosecutors to attempt to negotiate plea agreements, settlements, or similar arrangements with individuals represented by counsel").

[86] Thus, in advice pertaining to whether certain "contacts" were permissible in actual cases (see *supra* note 17), Margolis cautioned when dealing with a represented person that "you may not negotiate any plea agreement, cooperation agreement, or any other legal agreement." Margolis Advice Letter, March 29, 1996; accord Margolis Advice Letter, March 22, 1996 ("you should not attempt to negotiate any type of legal agreement, including a plea agreement").

[the AUSA's] contact with Ward as it occurred in this case." United States v. Ward, 895 F. Supp. 1000, 1008 (N.D. Ill. 1995)(dicta because regulation was not in effect at the time of the questioned conduct).[87]

Section 77.9

> *Deference to attorney-client relationship.* (1) An attorney for the government, or anyone acting at his or her direction may not, when communicating with a represented person or represented party:
>
> (i) Inquire about information regarding lawful defense strategy or legal arguments of counsel;
>
> (ii) Disparage counsel for a represented person or represented party or otherwise seek to induce the person to forego representation or to disregard the advice of the person's attorney; or
>
> (iii) Otherwise improperly seek to disrupt the relationship between the represented person or represented party and counsel.
>
> (2) Notwithstanding [the above paragraph], if the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney finds that there is a substantial likelihood that there exists a significant conflict of interest between a represented person or party and his or her attorney; and that it is not feasible to obtain a judicial order challenging the representation, then an attorney for the government with written prior authorization from an official identified above may apprise the person of the nature of the perceived conflict of interest, unless the exigencies of the situation permit only prior oral authorization, in which case such oral authorization shall be memorialized in writing as soon thereafter as possible.

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[87] More generally, courts have found cooperation agreements to be analogous to plea agreements and have applied contract principles to their interpretation. E.g., Thomas v. INS, 35 F.3d 1332, 1337 (9th Cir. 1994)("cooperation agreement is analogous to plea agreement" citing United States v. Carrillo, 709 F.2d 35, 36 (9th Cir. 1983)); United States v. Mattison, 153 F. 3d 406, 412(7th Cir. 1998)("cooperation agreement is a contract"). Likewise, in the "Principles of Federal Prosecution," an agreement to reduce potential charges is listed on a continuum with non-prosecution or immunity agreements as a potential means of ensuring cooperation. USAM 9-27.600.

28 C.F.R. § 77.9(a).

In adopting this section, the Department stated its intent to codify the principle recognized by federal courts that it is "improper for an attorney for the government to disparage counsel for a party [or person] or otherwise seek to disrupt the relationship between that party [or person] and his attorney." 59 Fed. Reg. at 39923. The Department specifically cited two cases to illustrate the behavior it intended to proscribe, United States v. Morrison, 449 U.S. 361 (1981) and United States v. Weiss, 599 F.2d 730 (5th Cir. 1979). In evaluating the conduct in connection with the Lewinsky confrontation, it is important therefore to understand the facts of the cases cited by the Department and the governmental conduct which the courts there deemed "egregious" and improper.

In Morrison, the defendant was under federal indictment for distributing heroin and had retained counsel to represent her in that case. Knowing of the indictment and the representation, two federal agents approached Morrison without the knowledge of her counsel and sought her cooperation "in a related investigation."[88] In the course of this meeting, as characterized by the Supreme Court,

> the agents disparaged [Morrison's] counsel, stating that [Morrison] should think about the type of representation she could expect for the $200 retainer she had paid him and suggesting that she could be better represented by the public defender. In addition, the agents indicated that [Morrison] would gain various benefits if she cooperated but would face a stiff jail term if she did not.

449 U.S. at 362. Morrison did not cooperate and gave no statements to the agents. The Court assumed, without deciding, that Morrison's sixth amendment right to counsel had been infringed upon, but finding that Morrison failed to demonstrate "prejudice of any kind . . . to the ability of

[88] Notably, there is no suggestion in the Court's opnion that either Morrison or her attorney was aware of this "related investigation" at the time she was approached by the agents for her cooperation.

her counsel to provide adequate representation," determined dismissal of the indictment to be inappropriate. Id. at 366. The Court went on to state, however, that "[i]n arriving at this conclusion, we do not condone the *egregious behavior* of the Government agents." Id. at 367 (emphasis added).

The conduct in Weiss was similar although it occurred *before* any federal criminal charges were brought against Weiss. Weiss, who was represented on a state court charge for receipt of a stolen handgun, was approached by federal agents seeking his cooperation in a federal investigation. Weiss was confronted with evidence that he bribed an agent in connection with the state handgun charge and potential federal handgun charges, was told that the agents did not want to question him about the bribery, but rather wanted to ask his cooperation in investigating organized crime in the nightclub industry in town. The agents cautioned Weiss that, although he was free to consult with an attorney, "it might not be in his best interest" to consult with the attorney he had previously retained regarding the state charge. 599 F. 2d at 734. Weiss later met with a federal prosecutor who made a pitch similar to that of the agents. The prosecutor offered to consider Weiss' cooperation in his determination as to what charges to bring and to inform the sentencing judge of Weiss' cooperation. The prosecutor told Weiss he could have an attorney present, but that he believed it would "be in Weiss' 'best interests' to be represented by someone other than [the attorney in the state matter]." Id. Although Weiss agreed to cooperate in the investigation into the nightclub industry, that cooperation fell through, and Weiss was ultimately indicted and convicted federally of unlawfully receiving a handgun as a convicted felon, bribing a police officer and obstruction of justice.

The court first found no Sixth Amendment violation as Weiss was not interrogated on any of the matters for which he was later charged. In any event, like in Morrison, Weiss had given no

statements; thus, there was no evidence to suppress even if a violation were found. The court went on, however, to question the tack taken in telling Weiss that it would be in his "best interests" not to consult the attorney representing him on the state charges. First, the court questioned whether Weiss' decision not to have counsel involved was voluntary given the government's warnings about his contacting his state counsel:

> The only evidence that Weiss' decision not to have counsel present was not voluntary was the evidence that both [the agent] and [the prosecutor] told him it would not be "in his best interests" to consult [the attorney], although he could do so if he wished. In the context of the government's hardball game, with Weiss hoping for some favorable treatment, reference to Weiss' "best interests" might have appeared menacing and conceivably could have deterred him from consulting counsel.

Id. at 739. The court further noted that Weiss had been told the attorney was a target of the investigation and would have had a conflict of interest in representing Weiss, all of which the district court found to be true. On these facts, the court failed to find that the warnings "coerced" Weiss to forego counsel.

With respect to whether the prosecutor violated the state's anti-contact ethical rule, the court stated: "it does appear they flirted with violation . . . both by approaching Weiss directly when they were about to seek an indictment against him and knew he had been represented by [state counsel], and by discouraging him from consulting [state counsel]." Id. at 740. Without determining whether the conduct was therefore appropriate, the court merely held that the conduct did not merit reversal of the conviction. Id.

Especially relevant because it too is cited with approval in the Department's commentary on section 77.9 of the regulation, is Judge Godbold's strongly worded concurrence. Judge Godbold separately concurred to emphasize that, although not warranting reversal, the conduct of the prosecutor was improper.

> [S]ince the government, in both brief and oral argument, insists that the act of its attorney was correct, I think we should say forthrightly that it was wrong. . . .
>
> Government counsel has no business advising any citizen defendant or witness about his choice of counsel. Where at trial there is a possible conflict of interest on the part of defense counsel that may infect a conviction, the government can, and perhaps is obligated, to call it to the attention of the court. . . . *But it is inappropriate for government counsel, in the process of investigating suspected crime, to advise any person represented by counsel, potential defendant, witness, or anybody else that his chosen counsel is not acting in his best interests. The citizen's choice of, and relation with, his attorney is none of the investigating government's business. It does not become the government's business because it fears the citizen will tell his attorney of his conversation with government counsel. . . . Nor can the government justify its intrusion on the ground it suspects the attorney of wrongdoing related to the matter under investigation.* However well founded its suspicion, the government has no authority to chill the citizen's right to the advice of counsel by this kind of Big Brotherism.
>
> Arguably the government was correct this time in the predicate it asserted for giving unsolicited advice to Weiss about his relationship with the attorney of his choice. The next time the government may be wrong. To leave the impression in this case that the governmental intrusion was possibly acceptable leaves the next government attorney to persuade himself of reasons for a similar intrusion in the next situation. *Therefore, for my part I prefer to make unmistakably clear that this kind of government conduct is not acceptable. On its part, the government, rather than trying to justify an impropriety, should make equally clear that it will not tolerate it.*

599 F. 2d at 741(Godbold, J., specially concurring)(emphasis added).

The Department, in enacting section 77.9(a), followed Judge Godbold's advice and made clear that government conduct of the type exhibited in Morrison and Weiss would not be tolerated. Simply stated, government counsel should not seek to dissuade a person from contacting the attorney of his or her choice.

In limited circumstances, however, there is a need to deal with significant conflicts of interest that may arise; section 77.9(b) addresses that need. The government attorney may seek disqualification of the attorney in court. If that is not feasible, and if an enumerated Presidential appointee determines "there is a *substantial likelihood* that there exists a *significant conflict of interest*" and agrees that it is not feasible to seek a judicial ruling, "then an attorney for the government with written prior authorization . . . may apprise the person of the nature of the perceived conflict of interest." 28 C.F.R. § 77.9(b)(emphasis added).

United States Attorneys' Manual Provisions: Additional Policy and Guidance

The United States Attorneys' Manual sets forth further guidance and restrictions on government attorneys' contacts with represented persons, and also includes various authorization procedures before certain contacts are to be undertaken. 59 Fed. Reg. at 39910. As an overarching principle, the Manual provisions generally advise caution in any contacts situation. Thus, the Manual states:

> Both this section and 28 C.F.R. Part 77 should be consulted by Department attorneys before engaging in any communications with represented individuals or represented organizations.
>
> * * * *
>
> Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect bona fide attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.
>
> * * * *
>
> The rules set forth in 28 C.F.R. Part 77 . . . are not intended to create any presumption that communications are necessary or advisable in the course of any particular investigation or

> proceeding. Whether such a communication is appropriate in a particular situation is to be determined by the government attorney (and, when appropriate, his or her supervisors) in the exercise of his of her discretion, based on the specific circumstances of the individual case.
>
> * * * *
>
> Attorneys for the government are strongly encouraged to consult with appropriate officials in the Department of Justice when the application or interpretation of 28 C.F.R. Part 77 may be doubtful or uncertain.

USAM 9-13.210.

The Manual further makes clear that when an attorney for the government does meet with a represented person, there should be at least one witness present and, "[t]o the extent feasible, a contemporaneous written memorandum should be made of all communications with the represented person." USAM 9-13.231.

In addition to this general guidance and suggestion for care and caution regarding contacts, the Manual specifically restricts communications with a represented person who is the "target" of an investigation and "who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation." USAM 9-13.240. A target is defined as a "person as to whom the attorney for the government: (a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding." USAM 9-13.240. There are exceptions to this prohibition, including the ability to communicate to determine whether representation exists (USAM 9-13.241(a)) and to communicate in the investigation of "additional, different or ongoing criminal or wrongful conduct." USAM 9-13.241(e). The Manual requires supervisory approval prior to invoking an exception relating to overt communications. USAM 9-13.250. As part of the approval process, "the attorney for the

government should write a memorandum describing the facts of the case and the nature of the intended communication." Id.

FINDING: NO PROFESSIONAL MISCONDUCT

We find that no OIC attorney committed professional misconduct in connection with the confrontation of Monica Lewinsky on January 16, 1998. Under the OPR's analytical framework, such a finding is compelled by our finding that the applicable regulations and standards do 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.

Was Lewinsky a Represented Person?

Under the regulation, a "represented person" is a person who has retained counsel, where the representation is ongoing and "concerns the subject matter in question."

On January 16, 1998, Monica Lewinsky was approached by federal agents who told her OIC attorneys were waiting in a hotel room and that, together, they "wished to discuss her culpability in criminal activity related to the Paula Jones civil case." At that time, Monica Lewinsky was represented by Frank Carter "in connection with her subpoena for a deposition in the case of Jones v. Clinton"; Carter's representation was ongoing and included the preparation of Lewinsky's affidavit regarding her relationship (or purported lack thereof) with the President of the United States. The OIC and [redacted] knew of Carter's representation, that the representation was ongoing, and that it concerned Lewinsky's possible testimony in and the preparation of an affidavit for the Jones v. Clinton case.

For purposes of deciding whether Lewinsky was a "represented person," therefore, the only issue is whether the OIC confrontation of Lewinsky concerned the same subject matter as her representation by Carter. We find that neither the regulation, its commentary, nor other

Department materials provide a clear and unambiguous answer to this question.[89] Instead, we find support for two different ways to analyze the question of "subject matter" that lead to different conclusions. We refer to these differing means of analysis as the "subject-based analysis" and the "matter-based analysis."

From a purely semantical viewpoint, the issue seems clear – Lewinsky was represented regarding the Paula Jones case; the OIC said they wanted to talk to her about criminal activity related to the Paula Jones case. The OIC's planned and actual confrontation of Monica Lewinsky included the topic, or subject matter, of her testimony and affidavit in the Jones v. Clinton case. She had ongoing representation on that subject matter and the OIC knew of that representation. Thus, based on the plain language of the regulation, Lewinsky would be considered a "represented person" when she was confronted by the OIC on January 16, 1998.[90]

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[89] ***Engagement Letter.*** The OIC argues that the Engagement Letter between Carter and Lewinsky should control the analysis here and that it conclusively proves that Carter did not represent Lewinsky for purposes of the OIC investigation. We do not find this argument persuasive. First, at the time of their confrontation of Lewinsky, the OIC had no knowledge of the contents of the Engagement Letter. It in no way affected the decision regarding the scope of her representation. Second, the Agreement itself does not resolve the issue. Carter agreed to represent Lewinsky "in connection with her subpoena for a deposition in the case of Jones v. Clinton." The only relevant issue here is whether the confrontation was also "in connection with her subpoena for a deposition" and the Agreement does nothing to answer that question. It can only be answered by interpreting the regulation.

In contrast to the OIC's view of the Engagement Letter, Frank Carter unequivocally asserts that, had he been called on January 16, 1998, he would have considered himself Lewinsky's lawyer in the matter of the OIC investigation and confrontation of her. We conclude that none of these after-the-fact claims are dispositive as to the scope of Carter's representation. What is relevant is what the OIC lawyers knew at the time of their original decision to treat Lewinsky as unrepresented and what they knew, or avoided knowing, throughout the day regarding her representation.

[90] Well after the confrontation, [redacted] reviewed the regulation and, in an internal memo, candidly conceded a plain reading of the regulation could lead to the conclusion that Lewinsky was represented on the subject matter of their confrontation. [redacted] Memorandum, 4/11/98.

Further support for the "plain language" interpretation came, after the confrontation, from the D.C. District Court. In considering allegations that the OIC attorneys violated Rule 4.2 of the D.C. Rules of Professional Conduct and the Department's regulation, Judge Johnson implicitly found that Carter represented Lewinsky regarding the subject matter of the confrontation. In re Grand Jury Subpoena to Francis D. Carter, Misc. Action No. 98-068(NHJ), Amended Memorandum Opinion, April 28, 1998. In its filings, the OIC did not seek reconsideration of this finding or of the portion of Judge Johnson's original opinion in which she considered

Neither [redacted] nor any other OIC attorney reread the regulation prior to the confrontation with Lewinsky, and they did not consider the regulation's plain meaning. They engaged in a different analysis, which we refer to as a "matter-based analysis." Thus, rather than considering the subject matter underlying their investigation, the OIC considered the investigation itself to be the "subject matter" referred to in the regulation. The OIC concluded that Carter represented Lewinsky regarding the civil case of Jones v. Clinton and, since the investigation was only four days old, neither Lewinsky or Carter could know of it. Therefore, they reasoned she could not be represented as to their investigation.

We find support in the Department's materials for both a "subject-based analysis" and a "matter-based analysis"; therefore, we cannot say that the applicability of the rules proscribing certain contacts with "represented persons" was unambiguous in this case. We go on to demonstrate, however, that in similar cases where the different methods of analysis could lead to opposite conclusions, the Department usually advised a cautious approach, assuming without deciding that the person was represented.

"Subject-Based Analysis." This analysis relies very simply on the plain language of the regulation. There is no definition of the phrase "concerns the subject matter" in either the regulation or the United States Attorney's Manual.[91] Nor is there any specific elaboration on its

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section 77.8 of the Department's regulation and expressed "concern that the Office of the Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky *without the presence of her counsel*." In re Grand Jury Subpoena to Francis D. Carter, Misc. Action No. 98-068(NHJ), Memorandum Opinion, March 31, 1998, at 17 (emphasis added).

[91] In our review of archived files (see *supra* note 74), we discovered that during the drafting of the regulation, one United States Attorney suggested that further definition of "subject matter" was needed. Memorandum from Linda Akers, United States Attorney, District of Arizona to Deborah Daniels, United States Attorney, Southern District of Indiana re: Comments on Proposed Regulation, Jan. 6, 1992("Scope of Rule. Representation as to Subject Matter. We believe there should be a defination (sic) of the subject matter because it is at the very heart of the issue and cannot be relegated to comments (emphasis in original).")

meaning in the commentary to the regulation.[92] Indeed, the plain language of the regulation is quite straightforward, both as to what it says and what it does not say. Nothing in the language of the regulation suggests, for example, that for representation to "concern the subject matter," it must also be in connection with a specific, known investigation.[93] Rather, as stated in the commentary, "witnesses, suspects, and targets of investigations who have not been indicted or arrested, but are represented regarding the subject matter in question, are considered represented

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[92] Department training materials recognize this absence of definition. In materials handed out as part of the 1995 DOJ PRO Training Seminar, the following question is presented regarding differences between the ABA Model Rule 4.2 and the Department's regulation:

> **What is the scope of the subject matter about which communication is prohibited?**
>
> **Rule 4.2:** The subject matter must be "defined and specific, such that a communicating lawyer can be placed on notice of the representation." ABA Formal Opinion 95-396, at 23.
>
> **DOJ Rules:** Not addressed.

USA Book, Ethics, at 18-16.

At the 1996 DOJ PRO Training Seminar, Contacts With Represented Persons was again on the agenda and materials were provided to the PROs on the subject. Update: Contacts With Represented Persons, Oct. 30, 1996, by Charysse Alexander, Counsel to the Director, Executive Office for United States Attorneys. "Subject matter" was raised in the presentation of common questions and hot issues. A hypothetical was presented to emphasize the importance of determining "subject matter." The hypothetical presumed an ongoing federal investigation into a suspected arson with the owner of the building the target of the investigation. (The facts do not state whether the owner is aware of the federal investigation.) When the insurance company refused to pay on the owner's insurance policy, the owner filed a civil suit against the insurance company. (The facts do not state the cause of action presented in the lawsuit or any defenses raised to date.) The owner was represented in the lawsuit. The question is asked whether it is permissible for the federal law enforcement agents to interview the owner (presumably without the presence of counsel). In providing an answer, the question arises: "Is the subject matter the same?" There is no specific response to this question, adding no specific guidance on how to analyze the issue of "subject matter." But the answer goes on to cite the proscription against an overt interview of a represented target in the event that the subject matter is the same.

[93] But compare the regulation's definition of a controlling individual, that is, a person who should be treated the same as the corporation in terms of deciding the appropriateness of contacts. "A 'controlling individual' is a current high level employee who is known by the government to be participating as a *decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.*" 28 C.F.R. § 77.10(a)(emphasis added). Here, the Department was clear to indicate that, in the corporate context, the regulation only barred contacts when the attorney-client relationship concerned the "investigation of the subject matter," as opposed to the underlying matter.

persons." 59 Fed. Reg. at 39920. Neither the regulation nor the commentary states that the representation has to be "in the current investigation" or "regarding the current investigation," but merely "regarding the subject matter in question."

Support for this subject-based or plain language analysis can be found in the Department's training materials. For example, in distinguishing a "represented person" from a "represented party," the Department stated the following:

> A person is not considered a "represented party" if he or she has been arrested or charged by state authorities, or is a party to civil law suit. . . . This is true, even if there is substantial overlap or similarities between the state charges or civil law suit and a federal investigation. *However, depending on how similar the subject matter is, the person may qualify as a "represented person." For example, a person who has been arrested on state drug charges, and who is represented by counsel on those state drug charges, would be considered a represented person under these rules if the state defendant was also being investigated by federal authorities on the same or related illegal drug activity.*

USA Book, Ethics, at 25.05 (emphasis added). This guidance does not require the person be represented in the same proceeding or matter for him or her to be considered a "represented person." Nor does it require that the federal investigation be known by the person or by his or her attorney, or that the attorney have been retained as to the federal matter. Rather, the guidance suggests, as does a plain reading of the regulation, that it is the underlying "subject matter" involved in the representation that determines whether an individual should be considered a "represented person."

"Matter-Based Analysis." The Department has wavered between the subject-based analysis set forth above and equating "subject matter" to "on a current matter" or "in the matter." Thus, just as support for the subject-based approach can be found in DOJ's materials, support for a "matter" or "investigation-based" analysis can be found in the commentary and other

Department materials regarding the contacts regulation. For example, in explaining the Manual provisions, the commentary states:

> The guidelines that the Department intends to add to the Manual will make clear that once an individual is in a likely adversarial situation with the government *and has retained an attorney to represent . . . herself with respect to the particular subject matter under investigation,* the government attorney must take greater care before making any *ex parte* contacts.

59 Fed. Reg. at 39912 (emphasis added). This suggests a person must know of an investigation and have retained counsel as to the investigation before she will be considered represented as to the subject matter of the investigation. Likewise, the discussion in the Department's Ethics Manual regarding whether representation "concerns the subject matter in question" seems more focused on whether there are different matters rather than the similarity or relatedness of the underlying subject matter. "When the government has been informed . . . that an attorney represents him or her on a particular matter . . . the person obviously is represented on that matter. The question may arise in such circumstances is whether the representation extends to other matters."[94] USA Book, Ethics, at 25.04. The discussion also notes that a continuing relationship with a particular attorney does not mean that a person is represented on a current matter. "Rather there must be some objective indication that the person has referred *the particular matter* to counsel for representation." Id. (emphasis added). This discussion suggests that the analysis of subject matter is more of an analysis of whether a person has sought

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[94] The Department cites three cases in support of the proposition that representation by counsel in one matter does not necessarily extend to other matters. United States v. Masullo, 489 F.2d 217, 222 (2d Cir. 1973)(representation on state drug charge does not extend to later federal investigation of later unrelated drug transaction); State v. Russell, 230 N.W. 2d 196, 202(1975)(representation of defendant on probation following juvenile proceeding did not extend to investigation of later unrelated crime); United States v. Brown, 569 F.2d 236, 239(5th Cir. 1978)(Hill, J., concurrence)(Florida public defender appointed as counsel in state criminal case did not represent Brown in federal investigation arising out of same circumstances as state charge).

representation with regard to a particular case or investigation rather than with regard to the subject matter underlying the case.[95]

Standard as Applied. Finding the Department's statements inconclusive as to how to interpret the words purporting to control whether an individual's legal representation concerns the same subject matter as a proposed contact, we consider the Department's application of this concept. We do not mean to suggest that we believe either [redacted] or the OIC could have or should have sought to access these bodies of precedent. Rather, we believe that a consistent application or means of analyzing "subject matter" would aid our determination of the Department's intended meaning.[96] There are two potential bodies of precedent for the Department's own application of the regulation and Manual provisions on contacts: first, the advice provided to Department attorneys considering whether a specific contact would be

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[95] Given the history of the Department's regulation, this "matter-based" interpretation is understandable. The first iterations of the regulation were solely based on a Sixth Amendment analysis. Thus, not only must there have been a specific criminal matter that the person was represented with regard to but the person must already have been charged before contacts were deemed inappropriate. See 57 Fed. Reg. 54737 et seq., Nov. 20, 1992 (draft of regulation published for comment). In the final regulation, however, the Department "imposed ethical restrictions on [its] attorneys that extend significantly beyond what the Constitution requires." 59 Fed. Reg. at 39915.

It is perhaps ironic that one of the persons who appreciated the ambiguity that could be caused when the Department moved away from a strict Sixth Amendment model was [redacted] See Memorandum to Mike Chertoff, United States Attorney, D.N.J., and Irv Nathan, Principal Associate Deputy Attorney General from Terree Bowers, United States Attorney, C.D.Ca., Nov. 3, 1993 attaching Memorandum to Terree Bowers from [redacted] Nov. 3, 1993. We discovered these comments as part of the review of archived Departmental materials (see *supra* note 74), and were also provided a copy by [redacted] after he had reviewed his own files relating to "contacts."

[redacted] argued that if the regulation allowed for undercover contact with a target, overt contact should also be allowed. He argued any other rule was *"illogical, unworkable, and unprincipled."* Ultimately, the Department included the proscription against overt contacts with targets in the Manual rather than the regulation.

[96] Moreover, we wanted to ensure that [redacted] and the OIC are held to the same standards as those to which Department attorneys have been held.

appropriate in a particular case[97]; and second, OPR's previous findings on allegations of misconduct relating to "contacts with represented persons."[98] We find no definitive or consistent manner for determining "subject matter,"[99] but also find that, consistently, a cautious approach is

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[97] See *supra* note 17 regarding the "Margolis procedure."

[98] We found no OPR report that required a determination of the issue of whether representation concerned the same subject matter. In one opinion, however, OPR found that the witness "arguably" was a represented person and then analyzed the conduct pursuant to the regulation's proscriptions. The issue involved the propriety of agents contacting a witness in a criminal investigation who had been represented in a civil suit against a mutual fund. The civil attorney was currently the target of the criminal investigation into whether he had bribed certain government officials in order to obtain the names of other investors in the same mutual fund. OPR found that the witness "arguably" was a represented person "because the attorney still had ongoing obligations with respect to the settlement agreement he entered into with the brokerage firm" on behalf of the witness. OPR Report, Oct. 14, 1997, at 7 n.9.

[99] **Subject-based analysis used.** In the following cases, the plain language analysis is used and the underlying subject matter stressed. Thus, in an investigation into a chiropractor's alleged fraudulent billing practices, the question was raised whether the AUSA could interview patients of the chiropractor who had been referred to the chiropractor by their personal injury attorney. Although the personal injury attorney knew of the criminal investigation, he had never asserted that he represented any individuals for purposes of that investigation. In providing advice, Margolis found the patient witnesses to be "represented persons" for purposes of the regulation because "each of [the chiropractor's] patients whom you wish to interview is represented by counsel . . . in connection with a personal injury matter, and the subject matter about which you seek to question each individual is related to that personal injury matter, in that involves information such as the nature of injuries sustained, the reason for seeking consultation and/or treatment from [the chiropractor], etc." Margolis Advice Letter, Nov. 24, 1998, at 2-3.

Another case involved two investigations related to a sealed *qui tam* action – a civil investigation to determine whether to intervene and a criminal investigation into the alleged underlying fraud. The investigations involved two companies, and the question was raised whether it would be appropriate to engage in certain undercover contacts with the president of one of the corporations. Although the agents requesting authority for the contact were uncertain as to whether the companies were represented on the matters involved in the litigation, and there was no indication that either the sealed *qui tam* action or the government's investigations were known to the companies, for purposes of his advice, Margolis assumed both the companies and the president "to be represented by counsel *on the matters involved in the qui tam action*" and thus "represented persons" under the regulation. Margolis Advice Letter, June 12, 1997, at 2 (emphasis added). Margolis approved overt agent contact as well as undercover contact with the president of the corporation subject to the limitations set forth in sections 77.8 and 77.9 of the regulation. Margolis further suggested that one could argue that the criminal investigation would be a separate matter, but, citing cases, noted that because "charges raised in a criminal indictment would be intimately intertwined with the allegations in the civil proceeding, the distinction might not be dispositive." Margolis Advice Letter, June 12, 1997, at 2 n.1.

Matter-based analysis used. In determining whether an AUSA could use undercover agents or informants as nurses at nursing homes as part of an investigation into fraud at those homes, Margolis stated: "Since none of the nursing homes . . . are aware of the existence of this investigation, it follows that they cannot have retained counsel to represent them in the subject matter under investigation." Margolis went on to note,

taken when the issue is close. That is, when it may be questionable that the "subject matter" of an attorney's representation concerns the federal investigation, the advice generally cautions against the types of contacts that would be impermissible were one to find the subject matter the same.[100]

Cautious Approach. The Department's cautious approach is evidenced by the following analysis and advice in a case in which the person to be contacted knew of the grand jury investigation generally, but did not necessarily know of the "specific conduct that forms the basis of the current investigation of him."

> Although Mr. A is represented by counsel, it appears that his counsel Mr. E has represented him in a number of contexts and for a period of time. Therefore, it is unclear whether Mr. E's

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however, that the covert contacts would be allowed even if the nursing homes were deemed represented. Margolis Advice Letter, date not supplied, at 2.

Likewise, in a case where the government had obtained a sealed indictment alleging the illegal export of weapons against an individual located in a foreign country and desired to engage in undercover contacts to "lure" the person to the United States, part of Margolis' determination that the individual was not "represented" concerning the subject matter was based on the fact that the individual did not know of the investigation and indictment. Margolis Advice Letter, May 7, 1998, at 2. The individual had previously been represented by counsel in a divorce matter and that counsel had appeared with the individual at a meeting with the press where the general subject of restricted exports was discussed, along with the exports at issue in the indictment.

[100] This cautious approach to contacts is also evidenced by the various United States Attorneys' Manual provisions detailed *supra* pp. 68-70. See also *infra* pp. 84-88. Department trainers, including [redacted] consistently urged caution and restraint in considering contacts matters. In [redacted] outlines for his "contacts" lectures, for example, he talks of the "reams of approvals" required by the rules; suggests that assistants stay "back from the line" in interviewing targets "unless necessary to obtain key information"; emphasizes the need to "avoid all appearance of coerciveness or trickery"; and tells assistants to "paper themselves," presumably by creating a record of pre-contact approvals and discussions as well as a record of the contact itself. In this context, [redacted] also provides his thoughts regarding the substance of certain "contacts" stating:

> a. It is always OK to contact the person and inquire about the fact of representation.
>
> b. It is rarely OK to contact the person, find out about the representation, and ask if he is willing to talk anyway.
>
> c. It is never OK to continue to ask questions after the person has said he wants his attorney there (even though the DOJ position seems to permit it).

[redacted] Outline. But cf. USAM 9-13.240; 28 C.F.R. §§ 77.8 and 77.9.

> representation of Mr. A "concerns the subject matter in question" under Section 77.3(2) of the Regulation. Nevertheless, for the purposes of this analysis, and in an abundance of caution, I am assuming that Mr. E indeed represents Mr. A concerning the subject matter of your investigation.

Margolis Advice Letter, date not supplied, at 4.

Another investigation involved allegations that an individual was using his company to sell bogus trusts as part of a tax evasion scheme. The individual appeared *pro se* in various matters relating to the case, including in response to a contempt citation, but also had appeared with counsel in response to a subpoena for certain trust documents.

> From the facts presented, it is not clear whether Mr. A in fact is represented by counsel. All of his appearances with counsel to date have been in contexts in which Mr. A himself was acting in a representative capacity as custodian of records subpoenaed by the grand jury. Nevertheless, you have identified Mr. A as a target of your office's investigation. Moreover, since Mr. A's company, Company X, apparently sells the trusts in question, and since it is likely that he is a "controlling individual" of Company X, I think it is appropriate, in an abundance of caution, to consider him a represented person in both his individual and his corporate capacities.

Margolis Advice Letter, November 10, 1997, at 3.

Similarly, the cautious approach was suggested after a civil tax audit was suspended due to the opening of a criminal tax fraud investigation. The subjects of the civil audit proceeding had counsel who was appointed to represent the subjects "before the IRS" for "certain tax matters." Although counsel was informed of the criminal investigation, she never informed the government that she represented the subjects in that investigation. Nevertheless, in advising the investigator as to what contacts would be appropriate with these subjects, Margolis assumed both to be "represented persons" for the criminal investigation. Margolis Advice Letter, March 22, 1996.

Other Precedent. In promulgating the regulation, the Department was insistent that only its interpretation would govern. Thus, without some indication that the Department has relied on or adopted the rationale of a specific case, we believe that ethics opinions and court decisions construing the scope of Rule 4.2 and DR 7-104 with regard to "subject matter" are largely irrelevant to determining the appropriate scope of the Department's regulation.[101] Having said this, we also note that there seems to be no clear answer as to the breadth of the meaning of "subject matter" in either body of precedent. See "Summary of the Preliminary Inquiry of the Office of Professional Responsibility into Allegations Against Independent Counsel Kenneth W. Starr Concerning Contact With Monica Lewinsky," November 23, 1999, at 28-37 ("OPR Submission to OIC")(discussing cases).[102] Rather, the cases illustrate, as we find here, the determination is a peculiarly fact-bound one.

The ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that dealt, in part, with the meaning of "subject matter" in Model Rule 4.2.[103] ABA Committee

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[101] Additionally, the language of the regulation differs from the language of the rule in many states. For example, ABA Model Rule 4.2 was amended in 1995 to substitute "person" for "party." The Model Rule now reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

[102] We note OPR's overall summary of the cases, with which we agree: "No case, however, was found to have a fact situation sufficiently close to the present one to constitute strong precedent. Moreover, the cases regarding the subject matter of representation are not consistent in their results." OPR Submission to OIC at 30-31.

Nor do we find the cases cited by the OIC in their submission dispositive as to the application of the term "subject matter." OIC Submission to DOJ at 70. Those cases dealt with application of the Fifth and Sixth Amendment rights to counsel, not a definition of subject matter, and one suggested that the Sixth Amendment right to counsel might attach to a case "closely related" to pending charges if that case "derive[d] from the same factual predicate as the charged offense." United States v. Kidd, 12 F.3d 30, 33 (4th Cir. 1993).

[103] Note also that Model Rule is drafted slightly differently than the regulation and requires that the person be represented "in the matter."

on Ethics and Professional Responsibility Formal Opinion 95-396, "Communications With Represented Persons," July 24, 1995 ("ABA Opinion"). It is noteworthy that both OPR and the OIC cite to this Opinion in their submissions in support of opposite conclusions regarding the meaning of "subject matter."[104] We do not believe the Opinion, any more than the Department's guidance, leads inextricably to a single conclusion as to whether the subject matter of Carter's representation of Monica Lewinsky was the same as the subject matter of the contact.[105]

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[104] See OPR Submission to OIC at 26-27, and 27 n. 34; OIC Submission to DOJ at 63-74.

[105] Consider the following excerpt which could lead to the conclusion that the ABA would find the subject matter the same:

> By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of the this representation, she may not communicate with the represented person absent consent of the representing lawyer.

ABA Opinion at 23-24. As previously noted, Carter's representation was focused on the specific matter of Monica Lewinsky's affidavit and testimony in the Jones v. Clinton matter. As the OIC's contact involved both Lewinsky's affidavit and testimony, the ABA's Opinion suggests that Rule 4.2 would apply to the contact. But compare the following excerpt from the same Opinion supporting the opposite view:

> For example, suppose that Corporation A wishes to purchase a subsidiary of Corporation B. Corporation B has an ongoing relationship with outside counsel, law firm XYZ, such that the law firm represents the corporation on all of its legal matters. In addition, Corporation A knows that XYZ law firm always represents Corporation B in its legal matters. However, Corporation A has not broached with Corporation B the possible purchase of Corporation B's subsidiary, and thus the general counsel for Corporation A has no reason to believe, let alone to know, that Corporation B has consulted its counsel regarding such an acquisition. In such circumstances, because the representation by outside counsel is not specifically focused on the matter, the general counsel for Corporation A is not barred by Rule 4.2 from contacting the president of Corporation B to initiate discussions.

Id. at 25. The OIC reasoned that Monica Lewinsky was unaware of their investigation just as Corporation B above was unaware of the proposed acquisition.

In the end, despite the Department's efforts to draft a clear and comprehensive regulation, we find that the regulation does not clearly answer the question of the scope of Carter's representation as it related to the OIC confrontation of Lewinsky on January 16, 1998. But the fact is that no regulation or rule will clearly resolve the multitude of hard issues or changing circumstances federal prosecutors face in the exercise of their duties. That is why good judgment is paramount. While rules can aid in identifying pressure points, and provide a matrix for making the right decision, judgment is necessary to ensure the purpose and policies underlying those rules are honored.

FURTHER FINDINGS: POOR JUDGMENT AND MISTAKE

Summary of Further Findings

We begin by emphasizing that the manner in which the confrontation of Monica Lewinsky took place on January 16, 1998, is *not* "standard operating procedure" for federal prosecutors; nor should it be.[106] We believe the confrontation was poorly planned and executed and that it failed to be sensitive to important concerns about attorney-client relationships and a person's right to choose an attorney free from government interference.

We find that the OIC conduct was influenced, and indeed largely driven by the poor judgment [redacted] exhibited in his formulation and execution of the approach to achieve Lewinsky's cooperation. In this high profile case, carrying with it the certainty that the conduct of the OIC would become the subject of public scrutiny, and knowing that the regulation itself was controversial and vulnerable to attack from many quarters, [redacted] failed to appreciate the

[106] In contrast, Talking Points prepared for Starr's testimony in the impeachments hearings before the House Judiciary Committee in November 1998 suggested that telling Lewinsky the government would rather she not contact anybody, including "her lawyer and her mother" is "standard and reasonable operating procedure." Alluding to the tactics chosen, Starr testified that "it was [not] our place to discard *law enforcement practices that are used everyday* by prosecutors and police throughout the country" (Impeachment Hearings at 39 (emphasis added)), and referred to the confrontation as a "traditional technique that law enforcement always uses." Id. at 75.

closeness of the call as to whether Lewinsky was represented.[107] Thus, [redacted] failed to anticipate the myriad of issues that could arise from the fact that Lewinsky was represented, if not on the same "subject matter," on a closely related subject matter. Finally, [redacted] failed to reexamine and change course even as Lewinsky raised the issue of talking to her lawyer and as [redacted] and others strongly implied and blatantly stated that talking to her lawyer would inure to her detriment. The Department requires far greater respect for an individual's choice of attorney, for attorney-client relationships, and for the role of defense attorneys in the process than that exemplified in this case.

One further matter merits emphasis. [redacted] lectured repeatedly on the subject of contacts with represented persons for the Department of Justice. He has always emphasized a very careful and cautious, and indeed, deferential, approach to the sensitive issues involved. In his 11 years as a supervisor in the Los Angeles United States Attorney's Office, he advised attorneys regarding contacts, and from all indications, cautioned assistants to steer clear of any line that would draw unnecessary criticism. We do not believe that [redacted] intentionally sought to push the envelope in this case. Rather, in the heat of the moment, he seemingly forgot that many of the

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[107] As [redacted] emphasized on the day the regulation was promulgated: "The reason the reg[ulation] took so long is that the *problems are complex and politically charged.*" "Contacts with Represented Persons," [redacted] Sept. 2, 1994 (lecture to AUSAs in the Los Angeles United States Attorney's Office).

And in the aftermath of the Lewinsky confrontation, [redacted] wrote:

> Unhappily, the area of contacts with represented persons is very complicated. Recall that DOJ, after promising a regulation in a few months, took 5 years to draft a final regulation. And that regulation is still enormously controversial.

[redacted] Memorandum Re: [redacted] request for further analysis of Ritz Carlton Night, 12/1/98.

cautions about which he lectured (for example, the benefit of dispassionate review) applied to him as well as to others less versed in "contacts" history.[108]

Moreover, once his decision making took him out of the "contacts" arena and into an area with which he had no experience – personally confronting an individual for cooperation – he relied on no more than his general sense that they should say nothing "bad" about Carter. In the end, this was simply insufficient to deal with the reality of the confrontation. In short, on the basis of his experience, [redacted] was overconfident as to his contacts analysis; and, despite his lack of experience, he was overconfident in the planning and execution of the plan to confront Lewinsky.

We believe that had [redacted] displayed the judgment for which he is known and respected, the events of January 16 would have been much different.[109]

Standard of Care

The standard of care and exercise of judgment the Department expects from its attorneys generally, and that which it expects from its attorneys in analyzing and dealing with contacts issues and the underlying principles that protect individuals from prosecutorial overreaching, are clear. It is expected generally that federal prosecutors will exhibit the highest standards of "character, integrity, sensitivity, and competence" so as to ensure the public's trust and confidence in our criminal justice system. "Principles of Federal Prosecution," USAM 9-27.001. And in its issuance of the contacts regulation, the commentary to the regulation, and the

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[108] [redacted] tells us that he had never had to make a contacts analysis in an actual case before the Lewinsky matter; and that he had never before "braced" a target. His expertise came from his status as a DOJ lecturer on contacts issues. By [redacted] count he has given DOJ lectures on "Ethics: Contacts with Represented Persons" at least 16 times from 1991 through 1996.

[109] [redacted] outlines emphasize the need for "judgment." E.g., [redacted] Outline (*"Protect yourself with good judgment and sensitivity to DR 7-104; with preventative measures such as advisements to [undercover agents] . . .; with a complete written record of the events; with extensive approvals from above."*(emphasis added)).

accompanying Manual provisions, the Department emphasized its respect for the principles underlying the anti-contact rules and for appropriate deference to attorney-client relationships.

In considering whether certain contacts may be permissible and advisable, the Department consistently urged caution and restraint.

> Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care.
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> * * * *
>
> The rules set forth in 28 C.F.R. Part 77 . . . are not intended to create any presumption that communications are necessary or advisable in the course of any particular investigation or proceeding. Whether such a communication is appropriate in a particular situation is to be determined by the government attorney (and, when appropriate, his or her supervisors) in the exercise of his of her discretion, based on the specific circumstances of the individual case.

USAM 9-13.210. The Department emphasized that the regulation and the United States Attorneys Manual provisions should be read together before engaging in any contacts "with *represented individuals*." USAM 9-13.210 (emphasis added); see DAG Gorelick Memo to All DOJ Attorneys.

The regulation and the Manual both specifically provide a means for determining the status of a person's representation when the matter may be unclear – a cautious approach even as to the issue that we determine ambiguous in this case, the question of the scope of an individual's representation. Thus, the regulation states that an attorney for the government may communicate with a represented party and the Manual allows the same communication with a represented target "to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding." § 77.6(a); USAM 9-13.241(a). As stated in the commentary,

this provision recognizes that "[t]here may be uncertainty about the existence of representation with respect to whether it has been established, whether it may have been terminated, *and whether a particular subject falls within the scope of the representation"* 59 Fed. Reg. at 39920 (emphasis added), and suggests a manner for dealing with that uncertainty. The commentary goes on to state that "[w]hen inquiring about the status of representation, government attorneys an agents generally must refrain from stating whether it is necessary or desirable to be represented by counsel." 59 Fed. Reg. at 39920. Although the Department's Ethics Manual makes clear that there is no general duty under the regulation to inquire if a person is represented by counsel, "[a]ttorneys for the government are encouraged, however, to make inquiries where appropriate" (citing 77.6(a)), and "should never consciously avoid acquiring knowledge of representation simply to evade application of these rules." USA Book, Ethics, 27.04.

In addition to providing a means for clarifying the scope of an attorney's representation, the rules strongly suggest consultation whenever issues may be unclear. See USAM 9-13.210 ("Attorneys for the government are strongly encouraged to consult with appropriate officials in the Department of Justice when the application or interpretation of 28 C.F.R. Part 77 may be doubtful or uncertain."). Whenever the topic of contacts was raised, which was at virtually all of the Department's training sessions as well as meetings with Professional Responsibility Officers and Criminal Chiefs, federal prosecutors were reminded that advice was available. The Department and its lecturers constantly re-emphasized the value in consultation – whether with a supervisor or a Professional Responsibility Officer, or specified persons at Main Justice.[110]

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[110] See, e.g., PRO Seminars referenced *supra* note 17; DAG Gorelick Memo to All DOJ Attorneys; Videotape distributed with DAG Gorelick Memo to All Component Heads; Training Outlines from EOUSA re "Contacts With Represented Persons and Parties" (suggesting, as practical advice: first, to consider whether a particular contact is "worth the trouble"; second, suggested supervisory consultation and approval whenever there are questions, *even if not required*; third, offering Margolis as person who could authorize contacts directly).

The rules also require high-level supervisory approval whenever the rules might allow a contact that could be seen as interfering with the principles underlying the anti-contact rules. For example, United States Attorney approval is necessary for an overt contact of a represented target. USAM 9-13.250. Likewise, before informing a person about a potential conflict of interest that her attorney may have, a United States Attorney or other high level DOJ official must make specific findings "that there is a *substantial likelihood* that there exists a *significant conflict of interest* . . . and that it is not feasible to obtain a judicial order challenging the representation." 28 C.F.R. § 77.9(a)(2). These approval requirements accomplish two important goals: first, that decisions are made at an appropriate level of authority and responsibility given the ramifications of these contacts; and second, by generally requiring a written memorandum, that decisions are made after a full consideration of all the facts and circumstances.[111]

In order to protect against later claims of overreaching by the government and its attorneys, the rules suggest creating an adequate factual record of any contact with a represented person. Thus, the Manual emphasizes the need for a witness and the preference for a "contemporaneous written memorandum" of all communications with a represented person. USAM 9-13.231. Finally, we underline that the Department made clear during the debate over the promulgation of the regulations that the provisions of the USAM would be enforced

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Persons who lectured on contacts issues, including [redacted] recognized and lectured regarding getting approvals, consulting with supervisors, and with DOJ advisors. [redacted] says he was unfamiliar with the fact that Margolis authorized contacts, but was aware that Charysse Alexander was available in EOUSA for contacts advice. Indeed, he says he often referred to her availability in his lectures. See also [redacted] Outline.

[111] Deputy Independent Counsel [redacted] informs us that often the memorandum portion of adherence to DOJ policy was dispensed with at the OIC. We understand that, in a small office, the need for memoranda may be significantly less and that an oral presentation may generally suffice. In either event, an orderly presentation of the facts and rationale is necessary when seeking adequate supervisory input and consideration. Moreover, a memorandum, unlike oral approval, provides a record of the decision making process.

rigorously. In short, the provisions of the Manual are intended to be taken seriously by federal prosecutors.

Discussion

We have found poor judgment in [redacted] overall stewardship of the confrontation with Lewinsky, but there are certain pressure points where we believe his actions, or inactions, most specifically lead to this conclusion.

[redacted] was certain: "She's not represented in this case and it is pre-indictment." He was so certain he saw no need to take the elementary step of reading the rules he was interpreting. By his own admission, [redacted] rendered his opinion after a mere 5-10 seconds, having assumed from the beginning that Carter was "the civil guy, not the criminal guy and beyond that didn't spend much time thinking about it." He made his decision and did not give it a second thought.

[redacted] analysis failed in three respects. First, [redacted] failed to appreciate, and therefore to alert, the OIC that whether Lewinsky was represented could be considered a close question; second, he was wrong in asserting that because it was pre-indictment, there was no problem;[112] and third, his certainty had the effect of cutting short thoughtful consideration of all of the other issues implicated by the presence of an attorney. The Department's rules specifically proscribe certain types of contacts pre-indictment, including contacts with targets,[113] contacts to

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[112] In his lectures, [redacted] emphasized the need when dealing with the complexities of the contacts regulation to have two theories as to why the approach was correct. He looked for two theories here, but without consulting the regulation or Manual, was simply wrong on his second theory.

[113] Although [redacted] maintains that he did not view Lewinsky as a "target," we find otherwise. [redacted] himself told Lewinsky she would be prosecuted. See OIC Submission to DOJ at 31 (Lewinsky was told that without cooperation, "she would likely be prosecuted and go to jail."). However, we do not rely on the fact that Lewinsky was contacted as a target as a basis for our findings in this report. There was more than sufficient evidence for the OIC to determine that Lewinsky's criminal activities were ongoing at the time she was confronted (see USAM 9-13.241(e)) and every reason to believe that Starr rightly would have approved (and implicitly did approve) contact with her as to the ongoing criminal conduct. USAM 9-13.250. Unlike the target provision, however, the policies implicated by sections 77.8 and 77.9 are not trumped by ongoing criminal activity.

initiate or negotiate legal agreements, and contacts that interfere with the attorney-client relationship. See USAM 9-13.240; 28 C.F.R. §§ 77.8 and 77.9. Because [redacted] certainty, the OIC had little appreciation for the tenuousness of the decision that Lewinsky was not a "represented person," and had no appreciation for the fact that if she was considered represented, there were certain avenues they could not take in approaching her. Thus, no thought was given to the pre-indictment proscriptions on contacts with represented persons and the rationale behind those proscriptions.

There is no question and was no question that Lewinsky had an attorney on January 16, 1998. There also can be no doubt that the approach to Lewinsky was entwined with the very subject of her representation by Carter, her potential testimony and affidavit in the Paula Jones case. Certainly there were attorney-client issues to be skittish about, whether or not they fit within the black letter of the regulation. Had [redacted] read the rules, as he did much later, he might have appreciated the ambiguity of "subject matter" or at least that it was a close call.[114] Had the OIC known the issue of Lewinsky's representation was even in the gray area, it could have given the matter greater consideration and acted in a manner that would have left itself open to far less criticism.[115]

Additionally, the issues and policies underlying these sections were never highlighted for Starr's consideration.

[114] As [redacted] did later, after the confrontation, when he characterized the regulation as "vague" and recognized the subject matter of Lewinsky's representation and of their confrontation could be construed as the same. See [redacted] Memorandum, 4/11/98.

[115] For example, had they known the question was close, when [redacted] suggested the OIC lawyers call Margolis for an opinion they may have heeded this advice even though the OIC lawyers had no obligation to consult with Main Justice about their decisions. Had they consulted, their good faith could never have been questioned afterwards. This was exactly the type of "belts and suspenders" Starr employed in seeking DOJ's concurrence in his determination that there was "related" jurisdiction, even though concurrence was not strictly necessary.

Moreover, given the closeness of the original call as to Carter's representation, [redacted] and the OIC should have been especially mindful of the policies and principles behind the Department's restrictions on certain "contacts" with represented persons, whether those restrictions were contained in the regulation or the Manual. When faced with close cases, Department advice has cautioned that the agent and/or attorney's conduct should proceed, in an abundance of caution, as if the person were represented. Thus, the Department endorses an approach showing deference to attorney-client relationships even when the subject of representation may be unclear.[116] Had [redacted] pointed out these proscriptions to the OIC and Starr, we believe the OIC could have and most likely, would have (consistent with the Department's own approach in close cases), structured a far more cautious "strategy," further from the line.

[redacted] was briefed on Wednesday and was aware that Lewinsky had a lawyer as he began planning on Thursday. [redacted] and other OIC attorneys believed that Lewinsky's lawyer could be an impediment to the result they desired – flipping Lewinsky and gaining her cooperation. In devising the strategy to discourage Lewinsky from contacting Carter, however, [redacted] either failed to appreciate, or simply ignored, the problems inherent in the strategy chosen. If she asked to speak with Carter, they decided to tell her that contacting anyone could decrease the value of her cooperation. As reflected in Bates' notes, [redacted] articulated the

[116] The cautious approach does not detract from the value of the regulation to law enforcement. The pressure points of the states' anti-contact rules and effective law enforcement concerned issues such as whether those rules would allow for undercover contacts and operations involving represented individuals, whether an organization's counsel or "House Counsel" could insulate an individual from investigation and interrogation, and whether a represented individual could approach the government without his counsel when he was fearful of that counsel or no longer wanted to be represented. Never did the Department assert it crucial to law enforcement that it be able to negotiate legal arrangements absent counsel or to interfere with attorney-client relationships or an individual's choice of attorney.

strategy that, "We can tell her that if she has an attorney, she gets lesser rewards — concern about our ability to work undercover."

While a general statement about "not contacting anyone" may be appropriate, when it is directed towards "her attorney," it becomes far more problematic. Even in the abstract, we believe that the statement "[o]f course you can talk to your attorney, or anyone else, but if you do, the value of your cooperation might be less," implicates the proscriptions of section 77.9.[117] The intended effect of the statement is to discourage or dissuade an individual from calling her attorney in addition to anyone else. And the implication of the statement is disparaging as well – the suggestion that a person will receive less value if they consult with a specific attorney calls into question that attorney's abilities if not his *bona fides*.

If the theoretical implications were not risky enough, events as they played out in the hotel room on January 16, 1998, demonstrated that this strategy could lead, in reality, down a very slippery slope. Whether spoken by [redacted] or [redacted] statements made to Lewinsky about Carter became far less subtle in their implications. As she continued to press the subject of her attorney, the efforts to discourage Lewinsky from contacting Carter blatantly raised the specter of his complicity and his potential lack of loyalty. [redacted] says that either [redacted] or [redacted] stated "because [he] may be involved in criminal activity, we don't want you to call him."[118] Lewinsky also says that eventually they came out and said, "we really don't want you to call Carter because of how you got to him, he might call someone." [redacted] says he shot [redacted] a look, and [redacted]

[117] And if she were represented for purposes of the regulation, the statement would violate the regulation.

[118] See *supra* note 50.

says [redacted] deflected the conversation, but the statements were made and the damage done.[119] And finally, [redacted] himself admits that after offering Lewinsky immunity, when Lewinsky asked whether she could still get immunity if she talked to Carter, he said "no." Rather, she would have to return to the "cooperation made known" agreement with no guarantees of outcome.

These statements, whether in the more general format as planned or in the blunt format that evolved, represent exactly the tactic which Judge Godbold deplored in the Weiss case and which the Department meant to prohibit by section 77.9. As stated by Judge Godbold, *"The citizen's choice of, and relation with, his attorney is none of the investigating government's business. It does not become the government's business because it fears the citizen will tell his attorney of his conversation with government counsel. . . . Nor can the government justify its intrusion on the ground it suspects the attorney of wrongdoing related to the matter under investigation."* 599 F. 2d at 741.

In response to the similar approach disapproved in the Weiss case, the Department set forth standards to deal with the need to inform a person of a potential conflict that his or her attorney may have:

> [I]f the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General or a United States Attorney finds that there is a *substantial likelihood* that there exists a *significant conflict of interest* between a represented person or party and his or her attorney; and that it is *not feasible to obtain a judicial order* challenging the

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[119] In his affidavit on this subject, prepared for the proceedings before Judge Johnson, [redacted] noted a conversation with [redacted] "We therefore discussed and agreed that we should take special care so that our actions were always completely above board – legally, professionally, and ethically – and to err on the side of caution in trying to persuade Ms. Lewinsky to cooperate. In this regard, we specifically discussed the importance of using care and precision in answering any questions by Ms. Lewinsky regarding her attorney." [redacted] Affidavit, April 2, 1998. Notably, [redacted] admits he did not share any of these concerns with the agents who were to make the presentation downstairs and who were present throughout much of the afternoon in the hotel room. Nor did he say anything to the agents after the statements were made, even though, as he states, they were holding impromptu meetings at the doorway to the adjoining room all day.

> representation, then an attorney for the government with written prior authorization from an official identified above *may apprise the person of the nature of the perceived conflict of interest*, unless the exigencies of the situation permit only prior oral authorization, in which case such oral authorization shall be memorialized in writing as soon thereafter as possible.

28 C.F.R. § 77.9(a)(2)(emphasis added). The high standards and formal process required before a government attorney may notify a person of a potential conflict of interest emphasize the gravity of such notification. The commentary makes clear that this section is meant to be used "only in rare circumstances," and further cautions that, when invoking this section, "*any substantive discussion of the subject matter of the representation is permissible only insofar as it is authorized by some other provision of this rule.*" 59 Fed. Reg. at 39923 (emphasis added). [redacted] did not get approval to notify Lewinsky of the potential conflict he and others perceived in Carter's loyalty to Lewinsky. Nor later in the hotel room did he forthrightly state to her that Carter may have a conflict and discontinue further discussions. Indeed, [redacted] tells us that he recalled the conflicts provision and did not think the OIC had sufficient information to tell Lewinsky that Carter might have a conflict. Instead of realizing, therefore, that they should say nothing about Carter, [redacted] and the OIC chose a strategy that had implications about Carter and that discouraged Lewinsky from contacting the attorney they anticipated she would want to contact.

In addition to the tack regarding Lewinsky's attorney, [redacted] failed to appreciate the issues surrounding the offer and negotiation[120] of first, the "cooperation made-known" agreement,

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[120] The OIC submission suggested that because they simply "offered" immunity rather than "negotiated" an immunity agreement, they could not have violated section 77.8. See OIC Submission to DOJ at 84-85; see also Memorandum to Robert Ray, Independent Counsel from Donald P. Bucklin, Feb. 9, 2000 at 14 ([redacted] had no responsibility or involvement in this later memorandum).

We find this argument unpersuasive at best. The regulation states:

and later, an immunity agreement with Lewinsky.[121] The original plan was for [redacted] to persuade Lewinsky to cooperate in return for a "cooperation made known" deal. He told her that if she were to agree to cooperate (by not discussing her predicament with anyone, by giving a statement to the OIC, and by taping conversations with others), the government would take that cooperation into account and would inform the judge of Lewinsky's cooperation. The "heightened risk . . . of the prosecutor's superior legal training being used to the detriment of the untutored layperson"(59 Fed. Reg. at 39911-12) was inherent in the OIC plan. The plan suggests the very type of "overreaching," or potential perception thereof, to which section 77.8 was addressed.

Finally, we turn to the actual confrontation of Lewinsky. By all accounts, [redacted] was the responsible OIC lawyer. We recognize that [redacted] did not know the FBI agents, and that beyond the bare outlines, there was no apparent agreement between the lawyers and the agents as

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> An attorney for the government may not *initiate or engage in negotiations* of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges . . . or sentences or penalties with a represented person or party.

28 C.F.R. § 77.8. An "offer" serves to "initiate" negotiations for the disposition of potential criminal charges. And the facts here demonstrate an ongoing "negotiation" throughout the day. Lewinsky was first offered a "cooperation made known" agreement; she tried unsuccessfully throughout the day to modify the terms of the agreement offered, so that she would perform less cooperation for more benefit. She was unsuccessful in negotiating away the requirements that she be debriefed and that she agree to make undercover contacts but was successful in negotiating the ability to phone her mother. As to the greater benefit, she was able to negotiate immunity arrangements, first for herself and then for her mother.

Finally, even the OIC previously characterized the encounter with Lewinsky as involving negotiation. In a brief filed in the proceedings before Judge Johnson, the OIC stated: "The Office of the Independent Counsel ("OIC") has stated at all times that it attempted to *negotiate* an immunity agreement with Ms. Lewinsky without Mr. Carter's permission . . . ." Reply Memorandum of the United States of America in Support of Motion to Reconsider, filed April 22, 1998 (emphasis added).

[121] At the First Annual PRO Conference, Los Angeles Chief of the Criminal Division Steve Zipperstein presented a lecture on "Contacts With Represented Persons," during which he cautioned that it always made sense to ask if someone was represented by counsel before engaging in any type of negotiations. Videotape of lecture presented at PRO Seminar in October, 1994.

to what the agents would say downstairs at the Ritz Carlton, or what they could, and could not say upstairs.[122] We are aware of the difference in recollections as to whether the agents informed [redacted] that Lewinsky had told them to "talk with her lawyer," or described the response by the agents that "the offer to give her information was only for her, not her lawyer." But, the fact is that [redacted] was in charge upstairs and we believe it was his responsibility to take the time first to brief the agents on the sensitivity of their downstairs task, and to debrief them after their encounter with Lewinsky downstairs before beginning his presentation.[123] [redacted] conducted neither briefing nor debriefing.

Moreover, no one disagrees that the FBI 302 failed miserably as a record of what occurred during the confrontation of Lewinsky. [redacted] himself says he appreciated the sensitivity of the confrontation and the potential that she might raise the issue of her attorney, Frank Carter. He recalls discussing his concerns with [redacted] on the way to the Ritz Carlton. Yet he took no steps to ensure there was an adequate record kept of the time spent with Monica Lewinsky, what was said to her and what she said regarding Carter and other matters. Had there been a record, it would be far easier to reconstruct with precision the order of events in Room 1012 on January 16, 1998, and to know the precise words used (both by Lewinsky and the OIC) about Carter during the course of the day.

Finally, we are troubled by [redacted] actions and reactions in light of Lewinsky's comments about her attorney throughout the day. There is no doubt that, on several occasions,

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[122] This in itself is troubling as it is generally viewed as the attorney's responsibility in such encounters to make sure the agents do not run afoul any lines. [redacted] himself stressed that attorneys could be held responsible for agents' conduct in certain situations. E.g., [redacted] Outline.

[123] We have found that the agents did, in fact, tell [redacted] about Lewinsky's statements made downstairs, and that [redacted] nonetheless did not seem to hear or process the statements. See *supra* note 44. Had [redacted] taken the time affirmatively to debrief the agents, he surely would have heard about Lewinsky's statement downstairs and [redacted] response.

Lewinsky raised the possibility of talking to "my attorney" or traveling to see "my attorney." The responses to her were problematic. We have already described the slippery slope upon which the OIC embarked with their planned strategy to tell her that "[o]f course you can talk to your attorney, or anyone else, but if you do, the value of your cooperation might be less," leading to far blunter statements once they were on the scene such as "because [he] may be involved in criminal activity, we don't want you to call him" or "we really don't want you to call Carter because of how you got to him, he might call someone" and finally a statement to the effect that if she called Carter, she could not have immunity as already promised, but would have to return to a "cooperation made known" arrangement. These statements were meant to induce Lewinsky to forego Carter's representation and may be viewed as disparaging as well.[124]

The other planned response to Lewinsky's statements desirous of her attorney fared little better. [redacted] proposed and [redacted] followed the suggestion by telling Lewinsky, "[w]hy don't you wait and hear us out. We are not asking questions [at this point]." The problem with this response is that it is not geared to the policies underlying the Department's ethical rules. The Department was very clear in adopting its rules that they were not limited to interrogation and

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[124] In its defense to allegations that [redacted] improperly interfered Lewinsky's desire to consult with Carter about the immunity offer, the OIC wrote:

> [t]he OIC treated Ms. Lewinsky too well by offering her the greatest possible protection of her rights, complete immunity.

OIC Submission to DOJ at 87. This statement not only defies the policy considerations underlying sections 77.8 (protection against the prosecutor's superior legal knowledge and skills) and 77.9 (precluding interference with attorney-client relationships), as a practical matter, it demonstrates a failure to understand and respect the role of a defense attorney. An offer of complete immunity (or "cooperation made known") is an offer that subsumes within it issues such as: the nature of the cooperation required, the terms of a proffer, an assessment of the client's commitment to perform, the consequences if a prosecutor deems the cooperation is not honest or complete, the reality of turning one's life over to the government for an extended period of time. These are all considerations about which Lewinsky wisely thought she needed legal advice from a lawyer of her choice. She was right.

were not violated only when incriminatory statements were made.[125] When Lewinsky began asking whether she could call her attorney, we believe the better course would have been to inquire and clarify the scope of Carter's representation. Indeed, had [redacted] read the regulation and Manual provisions, he may have recognized the value [redacted] suggestion that the OIC should clarify the status, or lack thereof, of Carter's representation.

Moreover, [redacted] "hear us out" really was much more than that. As discussed above, there are times when the Department's rules suggest that a "hear us out approach" is allowed. Those times provide that after full consideration and authorization by a high-ranking official, an attorney may explain to a "represented person" that his or her attorney may have a conflict. But the rules are clear that this explanation is *not* to be followed by further discussion unless otherwise allowed for in the rules. Likewise, although an attorney may respond to questions regarding the general nature of plea agreements, and potential charges and penalties, the attorney "should refer the represented person to his or her counsel for further discussion of these issues" and "make clear that the attorney for the government will not negotiate any agreement . . . without the presence or consent of counsel." USAM 9-13.230. In contrast to this approach, [redacted] explained the OIC's case against Lewinsky; sought an immediate response regarding cooperation; and asked that she determine on the spot to forego representation by Carter, or else lose the immunity offered.

We understand the apparent state of disarray in the OIC office as the confrontation with Lewinsky approached. But we find there was time to consider the broad issues implicated by the fact that Lewinsky had an attorney in connection with the Jones case, including a thoughtful

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[125] Rather, the Department's regulation is violated "regardless of whether or not the communication results in eliciting an inculpatory statement or is otherwise prejudicial." 59 Fed. Reg. at 39919.

review of the DOJ rules regarding "contacts," and consultation with attorneys and agents more experienced in "bracing" targets and witnesses. Certainly, these issues were worth more than the cursory thought [redacted] gave them. Indeed, in these circumstances it was critical that [redacted] made the time to follow his own advice that counseled care, caution, consulting and "papering" in connection with contacts decisions and the contacts themselves. We also acknowledge that once on the scene, the tension was distracting, but it does not justify the fact that [redacted] remained so sure, so confident in his analysis and plan, that nothing said either by, or to, Lewinsky about Carter caused [redacted] to reconsider the appropriateness of his ongoing conduct.

* * * *

We believe that it was [redacted] general overconfidence in his own expertise that caused his judgment to suffer. Knowing the extensive and explosive history behind the Department's rules and the sensitivity of the attorney-client issues involved, [redacted] nonetheless, relied on his memory of the regulation, made a quick decision as to status of Lewinsky's representation, and failed to consider the policies underlying the provisions in either the regulation or the United States Attorneys Manual that urged care and caution. After that, he never looked back.

This is not the type of analysis and conduct that Starr had a right to expect from his career prosecutors. It exacerbated the public criticism of the Office of Independent Counsel and resulted in unwarranted and distorted public perceptions of the conduct of all federal prosecutors throughout the country.

RECOMMENDATIONS

On the basis of our investigation and report, we make the following recommendations.

[redacted] In some circumstances it is appropriate to recommend that Department of Justice attorneys who are found to have exercised poor judgment receive

counseling and special training in the area of concern. In this instance, we believe that no action is required. [redacted] is an experienced federal prosecutor who has returned to the United States Attorney's office for the Central District of California. His conduct in connection with this matter has now been critically examined by the D.C. District Court, the D.C. Bar Counsel, the House of Representatives, the Department of Justice, and this Office of Special Counsel. We trust that the extensive and continuing concern his conduct has caused will underline for him the necessity for the care and caution in the exercise of his duties as a federal prosecutor, regardless of his view of his expertise in a particular subject matter.

The Department of Justice — Pre-appointment Agreements. Part of the atmosphere fueling the adversarial relationship between the OIC and DOJ in this case, we believe, was the lack of a clear understanding of how the two offices would relate to each other in OPR matters. Although an agreement may have been problematic under the Independent Counsel Act, no such problem presents itself under the Department's Special Counsel regulations. Therefore, we recommend that there be a pre-appointment agreement setting forth clearly the manner in which the Special Counsel's office and the Department will relate to each other in matters involving allegations of ethical violations by Special Counsel's attorneys. We take no position with respect to the terms of such an agreement, but urge that an aspect of it be a strong statement that Special Counsel lawyers owe the investigating authority a duty of cooperation and candor.

Future Special Counsel. We note in our investigation that the OIC office had no one on the scene specifically charged with the ethics responsibility and knowledge of the Department's policies, rules and regulations. Although there was an attempt to fill this role with an outside consultant, he was not charged with knowledge of the Department's rules, and, not being an integral part of the office, was not consulted on day-to-day matters. We recommend that any

future Special Counsel follow the DOJ model and appoint one of the senior full-time lawyers in the office as a Professional Responsibility Officer (PRO). That attorney would be responsible for training where necessary, keeping abreast of DOJ regulations, rules and policies and would be available as an ethics resource for Special Counsel and all of the lawyers in the office.

December 6, 2000

Respectfully submitted,

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