IN THE SENATE OF THE UNITED STATES
Sitting as a Court of Impeachment

In Re	)
	)
Impeachment of	)
President William Jefferson Clinton	)

Factual Record

Materials Sent by the OIC
to the Committee
on September 29, 1998
Relating to Frank Carter's Motion
to Quash the Grand Jury Subpoena
Issued to Him

The United States
House of Representatives

HENRY J. HYDE
F. JAMES SENSENBRENNER, JR
BILL McCOLLUM
GEORGE W. GEKAS
CHARLES T. CANADY
STEPHEN E. BUYER
ED BRYANT
STEVE CHABOT
BOB BARR
ASA HUTCHINSON
CHRIS CANNON
JAMES E. ROGAN
LINDSEY O. GRAHAM

Managers on the Part of the House

Office of the Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, DC 20004
(202) 514-8688
Fax (202) 514-8802

September 25, 1998

HAND DELIVERED

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

The Honorable John Conyers, Jr.
Ranking Minority Member,
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Chairman Hyde and Representative Conyers:

In recent days various media and Members of Congress have publicly commented on the propriety of this Office's actions in contacting Monica S. Lewinsky on January 16, 1998 at the Ritz-Carlton Hotel. At the time we submitted our Referral we viewed these questions as incidental and tangential. Nonetheless, the issue has now been raised publicly and appears to bear on the substantiality and credibility of the information we provided to the House in our Referral.

The question of the propriety of our actions has already been litigated and resolved by Chief Judge Johnson. Because Congress may find this material germane to its inquiry, I am conveying to Congress the docketed filings in In Re Grand Jury Proceedings (D.D.C. Misc. No. 98-068) and the appeal of that ruling in In Re Sealed Case (D.C. Cir. Nos. 98-3052, 98-3053, 98-3059). The filings on the dockets are specified in the attachment to this letter. I call your particular attention to the pleadings and orders filed in the District Court between March 31, 1998, and April 28, 1998, which bear directly on the factual issue of the OIC's contact with Ms. Lewinsky on January 16.

Sincerely,

Kenneth W. Starr

Kenneth W. Starr
Independent Counsel

Attachment to Letter to
Chairman Hyde and Representative Conyers
of September 25, 1998

The following docket entries from In Re Grand Jury Proceedings (D.D.C. Misc. No. 98-068) are included with this submission:

Date	Party	Filing
2/17/98	Carter	1) Motion to Seal and Points and Authorities in Support Thereof 2) Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum 3) Memorandum of Points and Authorities in Support of Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum
2/18/98	NACDL	1) Unopposed Motion for Leave to File Amici Curiae Brief 2) Brief of Amici Curiae National Association of Criminal Defense Lawyers and District of Columbia Association of Criminal Defense Lawyers
2/19/98	COURT	Order (granting motion to seal)
2/20/98	COURT	Order (granting motion to file amici curiae brief)
2/24/98	OIC	1) Opposition of the United States to Motion to Quash Subpoenas 2) In Camera Submission of the United States in Support of Its Opposition to Motion to Quash
2/25/98	Lewinsky	Response of the Real Party in Interest Monica Lewinsky to Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum
2/2798	Carter	Reply to Opposition of United States to Motion to Quash
2/27/98	OIC	Opposition of the United States to "Response" of Monica Lewinsky to Motion to Quash Subpoenas
3/4/98	COURT	Transcript of Hearing
3/12/98	Carter	1) Supplement to Factual Record 2) Motion for Production of Ex Parte Submission
3/23/98	OIC	Opposition of the United States to Motion for Production of Ex Parte Submission

3/31/98	COURT	1) Order (denying motion for production and granting in part and denying in part motion to quash) 2) Memorandum Opinion
4/3/98	OIC	Motion of the United States to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion
4/9/98	Lewinsky	Notice of Appeal
4/9/98	Lewinsky	Opposition of Monica Lewinsky to Motion of the United States to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion
4/10/98	Carter	Notice of Appeal
4/14/98	Lewinsky	Application/Motion for Transcript Order Req. for Appeal
4/15/98	Carter	Opposition to Motion of the United States to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion and Points and Authorities in Support Thereof
4/22/98	OIC	Reply Memorandum of the United States in Support of Motion to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion
4/28/98	COURT	1) Order (granting motion to reconsider) 2) Amended Memorandum Opinion
4/28/98	Lewinsky	Motion for Stay of Enforcement of Order Pending Appeal
4/29/98	Carter	Motion to Join Motion for Stay Pending Appeal and Points and Authorities in Support Thereof
4/30/98	OIC	Response of the United States of America to Motion for Stay of Enforcement of Order Pending Appeal
4/30/98	COURT	Order (granting stay pending appeal)
4/30/98	OIC	Notice of Appeal
5/1/98	OIC	Section 3731 Certificate
5/7/98	OIC	Motion of the United States of America for Release of Hearing Transcript

5/7/98	Carter	Francis D. Carter's Motion for Release of Hearing Transcript
5/7/98	COURT	Order (granting motion for release of transcript to Carter)
5/8/98	COURT	Order (granting motion for release of transcript to all parties)

The following docket entries from In Re Sealed Case (D.C. Cir. Nos. 98-3052, 98-3053, 98-3059) are included with this submission:

Date	Party	Filing
4/23/98	COURT	Order (consolidating cases)
5/1/98	OIC	1) Motion of the United States of America to Expedite Consideration of the Appeal and for an Abbreviated Briefing Schedule 2) Motion of the United States of America for Summary Dismissal of Appeal of Francis D. Carter, Esq. for Want of Jurisdiction
5/2/98	Carter	Motion for Extension of Time to File Opposition to Motion for Summary Dismissal and Motion to Set Briefing Schedule
5/1/98	COURT	Order (consolidating cross-appeal)
5/5/98	COURT	Order (setting briefing schedule)
5/11/98	Carter	Brief for Appellant Francis D. Carter, Esquire
5/11/98	Lewinsky	1) Opening Brief of Appellant Monica Lewinsky 2) Appendix of Appeliant Monica Lewinsky 3) Request for Judicial Notice by Appellant Monica Lewinsky
5/11/98	OIC	1) Brief of Cross Appellant United States 2) Cross Appellant's Appendix
5/14/98	Carter	Brief for Cross-Appellee Francis D. Carter, Esquire
5/14/98	Lewinsky	Brief of Cross-Appellee Monica Lewinsky
5/14/98	OIC	Brief of Appellee United States

5/15/98	Carter	Reply Brief for Appellant Francis D. Carter, Esquire
5/15/98	Lewinsky	1) Reply Brief of Appellant Monica Lewinsky 2) Motion to Night File Reply Brief of Monica Lewinsky
5/15/98	OIC	Reply Brief of Cross Appellant United States
5/20/98	COURT	Order (granting admission pro hac vice)
5/26/98	COURT	Order (granting leave to file reply brief out of time)
5/26/98	COURT	1) Order (affirming in part and reversing in part) 2) Opinion
6/3/98	COURT	Mandate

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS	:	
DUCES TECUM #D902	:	Misc. No. FEB [illegible] 98-061
AD TESTIFICANDUM #D937	:	(Filed Under Seal)

MOTION TO SEAL AND POINTS AND
AUTHORITIES IN SUPPORT THEREOF

A witness, through undersigned counsel, respectfully moves this Court, pursuant to Rule 302 of the Rules of the United States District Court for the District of Columbia, to seal the attached Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum and Memorandum of Points and Authorities in Support thereof and all attachments. In support of this motion, counsel for the witness states as follows:

1. The attached Motion to Quash concerns a grand jury subpoena.

2. Rule 302 of the local rules of this Court requires that all motions filed in connection with grand jury subpoenas be filed under seal.

3. The Motion and Memorandum and attachments are currently sealed within the attached envelope.

Wherefore, for the reasons set forth above, and for any other reasons that may appear to the Court, counsel for the witness respectfully requests that the Motion to Seal be granted and that the attached Motion to Quash and attachments be filed with the Court under seal.

Respectfully submitted,

Charles J. Ogletree, Jr.
272658

Jamie S. Gardner
375811
Harvard Law School
320 Hauser Hall
Cambridge MA 02138
617-495-5097

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Seal and Points and Authorities has been served, by first class mail and by hand, upon Paul Rosenzweig, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and upon Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005 and William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles CA 90067, this 17 day of February, 1998.

Charles J. Ogletree, Jr.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS	:	FEB [illegible]
DUCES TECUM #D902	:	Misc. No. 98068
AD TESTIFICANDUM #D937	:	**(Filed Under Seal)**

ORDER

Upon consideration of the Motion to Seal and Points and Authorities in Support Thereof, it is this _____ day of _____, 1998,

ORDERED, that the Motion to Seal is **GRANTED**. The clerk is directed to file the attached Motion to Quash and Memorandum in Support and attachments under seal.

Norma Holloway Johnson
Chief Judge

cc: Charles J. Ogletree, Jr., Esquire
Jamie S. Gardner, Esquire
Harvard Law School
320 Hauser Hall
Cambridge MA 02138

Paul Rosenzweig, Esquire
Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 - North
Washington, D.C. 20004

Nathaniel Speights, Esquire
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

William Ginsburg, Esquire
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles CA 90067

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS	:	
DUCES TECUM #D902	:	Misc. No. 98-068
AD TESTIFICANDUM #D937	:	(Filed Under Seal)

MOTION TO QUASH SUBPOENA DUCES TECUM
AND SUBPOENA AD TESTIFICANDUM

Francis D. Carter, Esquire, through undersigned counsel, respectfully moves this Court, pursuant to Fed. R. Crim. P. 17(c), to quash the subpoena duces tecum issued to him by the Office of the Independent Counsel for the production of documents on Wednesday, March 4, 1998 and the subpoena ad testificandum issued for testimony the same day. The subpoenas must be quashed because they are overly broad and unreasonable in scope and were issued in contravention of the Department of Justice policies governing subpoenas to attorneys. Furthermore, the subpoenaed documents relate primarily to Mr. Carter's legal representation of a client, Monica Lewinsky, and production of those documents would violate Ms. Lewinsky's Fifth Amendment right against self-incrimination, as well as the attorney client and attorney work product privileges. Although the subpoena ad testificandum is unlimited in scope, it would also presumably be directed at obtaining information protected by the same privileges. A hearing is requested on this motion. In support of this motion, counsel for Mr. Carter states as follows:

1. Francis D. Carter, Esquire, is a member of the District of Columbia bar.

2. He was retained by Monica S. Lewinsky to represent her in connection with a legal action pending in the United States District Court for the Eastern District of Arkansas.

3. Ms. Lewinsky is now a target of a criminal investigation by the Office of the Independent Counsel. Ms. Lewinsky retained new counsel to represent her. The specific crimes for which Ms. Lewinsky is being investigated have not been revealed to her former counsel, Mr. Carter. However, it appears the investigation centers on a variety of allegations that include but are not necessarily limited to obstruction of justice, false statements, perjury and/or subornation of perjury.

4. On January 21, 1998, Mr. Carter was served with a subpoena duces tecum issued from the United States District Court for the Eastern District of Virginia, commanding production of various documents. On February 2, 1998, Associate Independent Counsel Darrell M. Joseph withdrew that subpoena, and issued an identical subpoena duces tecum for production of documents before the grand jury in the United States District Court for the District of Columbia. See attached Exhibit #1 . A week later, on February 9, 1998, a new subpoena for testimony was issued and served on Mr. Carter's counsel. See attached Exhibit #2. Both subpoenas originally required compliance on February 17, 1998, but that appearance date has been continued to March 4, 1998, by agreement with Associate Independent Counsel, Paul Rosenzweig. See letter to Court, February 13, 1998.

5. Ms. Lewinsky informed Mr. Carter, through her current counsel, and by means of a signed declaration, that she does not waive any rights or privileges she may assert with respect to documents, materials or information in Mr. Carter's possession. She has requested that Mr. Carter not disclose or reveal any document or other material or information in his possession concerning her case and has requested that Mr. Carter resist compliance with the subpoenas for

all documents and for any testimony concerning her by raising all available legal challenges. See Exhibit #4, attached.

6. Because Ms. Lewinsky's rights are at the center of this matter, she has exercised her right to intervene and raise any and all objections in addition to those raised by Mr. Carter by motion filed today.

7. In order to fully and adequately resolve the important constitutional and policy matters that are at stake in this case, counsel for Mr. Carter respectfully requests a hearing on this motion.

Wherefore, for the reasons set forth in the attached Memorandum of Points and Authorities in Support of this Motion to Quash and exhibits and affidavits, Mr. Carter respectfully requests this Court quash the subpoena for production of documents.

Respectfully submitted,

Charles J. Ogletree, Jr.
272658

Jamie S. Gardner
#375811
Counsel for Francis D. Carter, Esquire

Harvard Law School*
320 Hauser Hall
Cambridge MA 02138
617-495-5097

* The reference to Harvard Law School is solely for use as an official mailing address.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum and Memorandum in Support of the Motion to Quash as well as all attachments have been served, by first class mail and by hand, upon Paul Rosenzweig, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and upon Counsel for Monica Lewinsky, Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005 and William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles CA 90067, this 17 day of February, 1998.

Charles J. Ogletree, Jr.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS	:	FEB [illegible]
DUCES TECUM #D902	:	Misc. No. 98-065
AD TESTIFICANDUM #D937	:	(Filed Under Seal)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM AND SUBPOENA AD TESTIFICANDUM

I. Introduction

The Independent Counsel issued two extraordinarily broad subpoenas to Francis D. Carter, Esquire, a prominent and well-respected member of the bar of the District of Columbia, to testify and to produce documents relating to his representation of a client, Monica S. Lewinsky. The subpoenas were issued almost immediately after attorneys and agents in the Office of the Independent Counsel engaged in unauthorized communications with Ms. Lewinsky, an individual they knew to be represented by counsel, about the subject matter of the representation and in direct contravention of the D.C. Rules of Professional Conduct. See Rule 4.2. The entire investigation of Ms. Lewinsky by the Independent Counsel has been conducted without the appropriate regard for the attorney-client relationship and without any restraint or oversight.

The highly unusual decision to issue subpoenas to an attorney based on his legitimate representation of a client is not warranted merely because of the nature of the allegations involved in the Independent Counsel's investigation. The unauthorized communications by the Independent Counsel and his staff with Ms. Lewinsky in violation of the ethical rules were also

unjustified. Therefore, Mr. Carter respectfully requests that this Court quash both subpoenas and impose any other sanctions that are appropriate for the serious violations of the D.C. Rules of Professional Conduct and the Department of Justice Guidelines.

The subpoena duces tecum seeks an exceptionally wide range of documents and materials, demanding every single document, item or thing in Mr. Carter's case file and everything in his office files in any way related to the client, Ms. Lewinsky, and a number of other well-respected lawyers and prominent individuals. The demand for production of such files implicates the attorney work product doctrine and the attorney-client privilege as well as Ms. Lewinsky's Fifth Amendment privilege against self-incrimination. Each of these privileges has long been recognized in the federal courts. Upjohn v. United States, 449 U.S. 383 (1981); Fisher v. United States, 425 U.S. 391 (1976); Fed. R. Evid. 501. Furthermore, the subpoena is not narrowly focused or carefully drawn. Instead, it demands wholesale disclosure of an attorney's files, impinges on the long-honored respect of the adversarial system for the confidentiality of the attorney client relationship, and is unreasonable and oppressive. Finally, the violations of the ethical restrictions require this Court's exercise of its supervisory power to impose sanctions against the Independent Counsel.

Similarly, the recently issued subpoena commanding Mr. Carter's testimony is completely unlimited in scope and subject to the same objections as the subpoena for the production of documents. Obviously, the same information, whether preserved in the form of a document or in Mr. Carter's memory is protected by the same privileges. For the reasons explained below, this Court should quash the subpoenas and uphold all privileges asserted.

II. Factual Background

Ms. Lewinsky was served with a civil subpoena to testify at a deposition and to produce documents and things in the case of Jones v. Clinton, LR-C- 94-290, in the Eastern District of Arkansas on December 19, 1997. She sought legal advice and assistance and retained Mr. Carte to represent her. Mr. Carter conducted legal and factual investigation in the course of the representation and undertook certain legal actions on his client's behalf. It is the details and documentation of that legal and factual investigation as well as the strategy of the attorney that the grand jury subpoena primarily seeks.

While Mr. Carter represented Ms. Lewinsky, and without his or his client's knowledge or consent, the Office of the Independent Counsel deliberately caused Linda Tripp to record communications with Ms. Lewinsky about the subject matter of the representation. Specifically, the attorneys and agents for the Independent Counsel installed an eavesdropping device on Ms. Tripp and directed her to question Ms. Lewinsky about her proposed testimony in the Jones v. Clinton case.[1] There can be no dispute that the attorneys for the government knew she was represented by counsel and that the communications related directly to the subject matter of the representation. Not satisfied with the result of the surreptitiously recorded communications, several attorneys from the Independent Counsel's office as well as numerous law enforcement agents working with the attorneys confronted Ms. Lewinsky, detained her for many hours, questioned her and sought to negotiate a cooperation agreement with her. These events occurred

[1] These actions occurred before the Independent Counsel was granted increased jurisdiction to investigate the allegations involving Monica Lewinsky. See, e.g., New York Times, January 23, 1998, p. A17 (time line indicating authorization for increased jurisdiction granted on January 16, 1998).

on January 16, 1998, while Mr. Carter actively continued to represent Ms. Lewinsky. When she requested an opportunity to call her lawyer, Mr. Carter, she was told she could not contact him.[2]

Although Ms. Lewinsky has retained new counsel to represent her, she continues to assert all of her rights, privileges and objections to the disclosure of the materials in Mr. Carter's possession. She has not knowingly or intentionally waived any of those rights or privileges. Moreover, she has specifically directed Mr. Carter not to disclose any materials in his possession and has requested that he resist compliance with the subpoena and raise any and all legal objections to disclosure.

III. Monica Lewinsky, Through her Current Counsel, is the Real Party in Interest and Therefore has the Right to Intervene in These Proceedings

Ms. Lewinsky is clearly the individual with the primary interest in the motion before the Court. The vast majority of the subpoenaed documents in Mr. Carter's possession relate to his representation of her and presumably that is the subject of the testimony sought from Mr. Carter. It is clear from the representations made by the Office of the Independent Counsel, and from the facts in this case, that Mr. Carter is not a target of this investigation and has no personal stake in the outcome of the investigation.[3] However, he has an absolute obligation pursuant to the D.C. Rules of Professional Conduct not to knowingly "reveal a confidence or a secret" of his client.

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[2] The factual allegations are based in part on reports in the media attributed to sources close to the Independent Counsel investigation as well as information reported by Ms. Lewinsky's current lawyers. See, e.g., Time Magazine, at 49 (February 16, 1998).

[3] Should the Court order testimony or disclosure of any documents, Mr. Carter specifically reserves the right to raise his own Fifth Amendment privilege. See letter to Court, February 13, 1998.

Rule 1.6(a)(1).[4] As the comments to Rule 1.6 explicitly state, even if Mr. Carter were ordered to disclose confidences or secrets, he may not comply until he has "personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it." Comment 26.

Although undersigned counsel has spoken with her current counsel, neither Mr. Carter nor his counsel has spoken directly with Ms. Lewinsky since she retained new counsel. Her current lawyers are in the best position to assert her rights with full knowledge of her present legal situation and are indispensable parties in this action. Therefore, Ms. Lewinsky, through her current lawyers, has the right to intervene in this litigation and has done so by means of a motion filed on the same day as this motion. Perlman v. United States, 247 U.S. 7, 12-13 (1918). See also United States v. Hubbard, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980) ("Federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed").

IV. The Subpoenas are Unreasonable and Oppressive and Must be Quashed Pursuant to Rule 17(c).

One of the central principles of the adversarial system of justice is the duty of loyalty an attorney owes his or her client. "[T]he lawyer is the client's 'champion against a hostile world'--

[4] The obligation to preserve confidences and secrets is broader in scope than the attorney client privilege. The confidentiality requirement applies to "all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (ie., secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge." Rule 1.6, comment 6.

the client's zealous advocate against the government." Monroe H. Freedman, Understanding Lawyers' Ethics 16 (1990) (quoting ABA, Standards Relating to the Defense Function 145-146 (Approved Draft, 1971)). The ethical rules governing lawyers practicing in the District of Columbia require a lawyer to represent a client "zealously and diligently within the bounds of the law." D.C. Rules of Professional Conduct 1.3(a). The obligation to preserve the confidences and secrets of the client found in Rule 1.6 "reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client." Rule 1.6, comment 6.

The conduct of the Independent Counsel in this case indicates a complete disregard for these principles. The scope and timing of the subpoenas make clear that this investigation has been conducted without restraint or consideration of the important values at stake. The values at issue have been articulated by the Supreme Court:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88 (1935). The ethical obligations of public prosecutors are equally as compelling:

> The prosecutor is an administrator of justice, an advocate and an officer of the Court; the prosecutor must exercise sound discretion in the performance of his or her functions. The duty of the prosecutor is to seek justice, not merely to convict. . . . It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and the law in the prosecutor's jurisdiction.

ABA, Standards for Criminal Justice, Prosecution Function Standards, 3-1.2. The Independent Counsel must abide by the same exacting standards and demonstrate the same level of

commitment to fairness and consideration that guide all other prosecutors. Particularly in light of the broad investigatory powers of the grand jury, "[e]nforcement officials taking the initiative in grand-jury proceedings and courts charged with their superintendence should be sensitive to the considerations making for wise exercise of such investigatory power. . . ." Hoffman v. United States, 341 U.S. 479, 485 (1951).

Although a grand jury has broad authority to investigate suspected criminal conduct, that authority is not limitless. United States v. R. Enterprises, 498 U.S. 292, 299 (1991). "Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." Id. Rule 17(c) of the Federal Rules of Criminal Procedure authorizes this Court to quash a subpoena "if compliance would be unreasonable or oppressive." However, as the Court in R. Enterprises made clear, "[t]his standard is not self-explanatory. . . . 'what is reasonable depends on the context.'" R. Enterprises, 498 U.S. at 299 (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)).

A. The Highly Unusual Action of Subpoenaing an Attorney Should be a Last Resort and the Subpoenas in this Case Must be Quashed Because They Were Improvidently Issued and Violate the Department of Justice Guidelines.

In this case, the extraordinarily broad subpoena duces tecum, issued to an attorney before any effort to obtain the information from any other source is unreasonable and oppressive. For the same reasons, an apparently limitless subpoena ad testificandum for a "witness" whose only information was gained in the context of his completely appropriate and ethical representation of a client is also unreasonable and oppressive. This type of subpoena chills the legitimate activities of lawyers on behalf of clients and seriously jeopardizes the rights of clients to confidentiality and loyalty in the attorney client relationship. See Max D. Stern and David A.

Hoffman, Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform, 136 U. Pa. L. Rev. 1783, 1796 (1988) (unregulated policy of subpoenaing attorneys will have inhibiting effect on legal practice and will demoralize profession); William J. Genego, The New Adversary, 54 Brook. L. Rev. 781, 814-19 (1988) (detailing systemic harms caused by practices including grand jury subpoenas to attorneys).

Recognizing that preserving attorney client confidences and the protection of the attorney client relationship are critical to the adversary system, the United States Department of Justice has promulgated specific policies limiting the circumstances in which an attorney and/or an attorney's files may be subpoenaed. D.O.J. Manual 9-2.161(1). While the guidelines have been criticized for appearing to "institutionalize the practice of subpoenaing attorneys,"[5] they were promulgated to address the significant impact on the legal system of unregulated subpoenas to attorneys. Under the guidelines, not only are the circumstances in which subpoenas to attorneys are permitted extremely limited, but independent review and express advance approval by the Assistant Attorney General of the Criminal Division are required. The guidelines apply to all members of the Department of Justice in "any matter involving a grand jury or trial subpoena."

These guidelines should and do apply to the Independent Counsel. Section 594 of the independent counsel statute defines the authority and duties of an independent counsel. Compliance with the written policies of the Department of Justice is mandated "except to the extent that to do so would be inconsistent with the purposes of this chapter." Title 28 §594(f). Indeed, it was, in part, this section of the independent counsel statute that supported the Court's

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[5] Stern and Hoffman, Privileged Informers, 136 U. Pa. L. Rev. at 1817.

conclusion that the statute passed constitutional muster. Morrison v. Olson, 487 U.S. 654, 672 (1988).

Nothing about this investigation could possibly be hampered by adherence to the Department of Justice guidelines with respect to the decision to subpoena an attorney and his files. These guidelines assure that attorneys will not be harassed, that the attorney client relationship will not be compromised and that there is no chilling effect on the provision of zealous and effective advocacy. Indeed, the purposes of the independent counsel statute would be fully consistent with the exercise of restrained and measured judgment before the issuance of an exceptionally broad subpoena to a highly respected member of the bar of this Court. While the Independent Counsel has no source for independent review of the decision to issue a subpoena to an attorney, this Court can and should review the decision to determine whether the subpoena was properly issued and sufficiently narrowly drawn to satisfy both the guidelines and the reasonableness requirement of Rule 17.

The Department of Justice guidelines require, among other things, an effort "to strike the proper balance between the public's interest in the fair administration of justice and effective law enforcement and [the] individual's right to the effective assistance of counsel." D.O.J. Manual §9-2.161(a)(A). Before information is sought from an attorney, a reasonable attempt to obtain information from alternative sources must be made. And, significantly, an independent evaluation of whether the subpoena is "narrowly drawn and directed at material information regarding a limited subject matter" is required. D.O.J. Manual §9-2.161(a)(A), (B) and (E)(5). In addition, the policy requires an independent evaluation that the subpoena shall not seek information protected by a valid claim of privilege. §9-2-161(a)(E)(6) (emphasis added).

The guidelines, by their own terms, do not purport to vest rights in individuals aggrieved by a violation of the policies, but the proscriptions contained in the guidelines are instructive about the reasonableness or unreasonableness of the subpoena before the Court. They are also illustrative of the very minimum that must be demonstrated by the Independent Counsel when seeking to pierce the protection of the attorney client privilege and the work product doctrine. The subpoenas here were issued without following any of the minimal requirements of the D.O.J. guidelines. For example, had the Independent Counsel sought prior independent approval for the issuance of these subpoenas, he would have necessarily been required to demonstrate that no other reasonable alternative exists to obtain the requested information and that the subpoenaed materials are not privileged. He would have been required to narrowly tailor the subpoenas to request only necessary materials unavailable from any other source.

No such showings have been or could be made in this case. The subpoenas in this case were issued [6] by the Independent Counsel without consideration of alternative sources for the information. They were improvidently issued before all reasonable efforts to obtain the information directly from the witness, Ms. Lewinsky, or from any other source were pursued. They were drafted without appropriate consideration of the significant chilling effect of such subpoenas on the ability and willingness of lawyers to represent clients, particularly in serious cases involving prominent individuals. Accordingly, the subpoenas cannot be viewed as

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[6] The original subpoena duces tecum for production of documents in the Eastern District of Virginia (a jurisdiction with absolutely no connection to any of the alleged criminal activities or any other conduct in this case) was issued on January 21, 1998, literally the day this case was first reported in the Washington Post, and only a few days after the Independent Counsel apparently began his negotiations with Ms. Lewinsky.

reasonable and compliance with them would be oppressive. Pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, this Court must quash the subpoenas.

B. The Blatant Interference with the Attorney-Client Relationship Demonstrated by the Violations of the Rules Prohibiting Contact with Represented Persons Evidences the Unreasonableness of the Investigation and Warrants a Finding that Compliance with the Subpoenas Would be Unreasonable and Oppressive.

The investigation of Monica Lewinsky by the Office of the Independent Counsel was conducted, virtually from its inception, by invasion of and interference with the attorney client relationship. Knowing that she was represented by counsel, the Independent Counsel arranged for first Ms. Tripp and then attorneys in his office to interrogate Ms. Lewinsky about the subject matter of the representation in direct violation of the ethical rules applicable to members of the District of Columbia Bar. Moreover, the attorneys who detained and interrogated Ms. Lewinsky over many hours on January 16, 1998, specifically refused to permit her to speak with her attorney and sought to negotiate a cooperation agreement with her in direct contravention of the Department of Justice rules governing communications with represented parties.[7] This Court should sanction this conduct through the use of the Court's supervisory power over the grand jury to deny the Independent Counsel access to information from Ms. Lewinsky's attorney.

The Independent Counsel was fully aware that Ms. Lewinsky was represented by Mr. Carter in connection with her potential testimony in the Jones v. Clinton case at least as late as January 13, 1998, the date that Ms. Tripp first spoke to Ms. Lewinsky wearing the government's

[7] See Section IV, above; 28 U.S.C. §594(f) (Independent Counsel required to follow Department of Justice Guidelines).

eavesdropping device.[8] The actions of the attorneys in the Office of the Independent Counsel in listening to and recording the conversations between Ms. Tripp and Ms. Lewinsky were therefore specifically in violation of Rule 4.2 of the D.C. Rules of Professional Conduct.

Rule 4.2 provides:

> (a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Rules such as 4.2 barring contact with represented parties[9] have been enacted in every state. ABA Formal Op. 95-396, Communications with Represented Persons (1995). "The ethical prohibition against such contacts has enjoyed a long history and broad acceptance." Id.

> The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition. As a result, uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case, for our adversary system is premised upon functional lawyer-client relationships.

United States v. Lopez, 4 F.3d 1455, 1459 (9th Cir. 1993) (emphasis added). The conduct of the attorneys in the Office of the Independent Counsel, like the other conduct throughout this

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[8] Because the parties in Jones v. Clinton were ordered not to reveal any information about the discovery process to anyone, the only legitimate source of this information could have been Ms. Tripp. Circumstances would suggest, however, that the Independent Counsel also possessed specific information about the contents of the affidavit by January 16, 1998, before it was even formally filed but after it had been sent to the plaintiffs' attorneys.

[9] Although the rule speaks in terms of a "party," the comments make clear that the rule is intended to apply to any individual represented by counsel in the matter. "This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." Comment 4. See also ABA Formal Opinion 95-396, Communications with Represented Persons.

investigation, failed to pay even passing respect to the fundamental nature of the attorney client relationship in our system of justice or to the rules governing all attorneys, whether their practices are civil or criminal, public or private.

The Department of Justice has taken the position that local state ethics rules do not prevent Department of Justice attorneys from contacting individuals represented by counsel in certain circumstances. The Department's policy is codified at 28 C.F.R. part 77. Section 77.12 of the regulations provides:

> This part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorney for the government, and those acting at their direction or under their supervision, with represented parties or person in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts.

This position has been strongly criticized by judges, lawyers and academics. See Samuel Dash, An Alarming Assertion of Power, 78 Judicature 137 (1994) and authorities cited therein. And only a week before the communications by the government lawyers in this case, the regulation was struck down as invalid by the Eighth Circuit. United States v. McDonnell Douglas Corp., 1998 WL 1924 (8th Cir 1998) (decided January 6, 1998). This Court has also rejected the argument that federal prosecutors are not governed by the state ethics rules in the states in which they are licensed. United States v. Ferrara, 847 F. Supp. 964, 969-70 (D.D.C. 1993) ("Congress therefore clearly contemplated compliance with state bar ethical standards by attorneys practicing in the Department of Justice"). See also In the Matter of Doe, 801 F. Supp. 478, 479 (D.N.M. 1992) ("It falls to this Court to disabuse the Government of its novel self-conceived notion that Government lawyers, unlike any other lawyer, may act unethically").

The prohibition against communication with represented parties applies not only to lawyers, but to others acting at their direction. The rule specifically forbids a lawyer to "cause

residing in communicating" with the represented person. Therefore, the fact that Ms. Tripp is not an attorney does not vindicate the attorneys' conduct in this case. She was directed to communicate with Ms. Lewinsky by the attorneys, and indeed provided with the electronic recording device to allow the attorneys to listen to the communications.

United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974), is often cited by the government to authorize pretrial/current recording of or communication with targets represented by counsel. However, Lemonakis was based on two important findings that cannot be made in this case. First, the Court in Lemonakis concluded that the agent in that case could not be considered the "alter ego" of the prosecutors. Second, the Court noted that in that case, because the matter was preindictment, "the contours of the 'subject matter of the representation' by superfluous attorneys, concerning which the code bars 'communication,' were less certain . . ." Lemonakis, 485 F.2d at 958.

Here, Ms. Tripp's actions were conducted at the instigation and with the express direction of the Office of the Independent Counsel attorneys. In fact, at the time she communicated with Ms. Lewinsky, Ms. Tripp was acting pursuant to her own immunity agreement with the government for her own illegal conduct. Ms. Tripp was clearly acting as the alter ego of the government attorneys in this case. See United States v. Hayward, 858 F.2d 834, 840 (2d Cir. 1988), vacated, 498 U.S. 871 (1990) (upholding District Court's finding that informant was "alter ego" of prosecutor and finding violation of no-contact rule). Furthermore, the later conduct of the attorneys in communicating directly with Ms. Lewinsky indicates that they were not concerned about the ethical proscription and intended Ms. Tripp to act as their alter ego.

Unlike the situation suggested in Lemonakis, in which contours of the subject matter of the representation are not well focused, Ms. Tripp was directed to discuss the precise subject of

the representation with Ms. Lewinsky. From the government's perspective, Mr. Carter's representation was at least concerned with Ms. Lewinsky's potential testimony in Jones v. Clinton and the affidavit prepared in that connection. See D.C. Bar Ethics opinion #263 (Civil Protection Order modification proceeding and criminal contempt case arising out of violation of CPO constitute the same matter for the purposes of Rule 4.2; matters involve the same facts and have implications for each other). Therefore, the communications made during that interview were in blatant violation of Rule 4.2.

The subsequent conduct of the attorneys on January 16, 1998, was in complete and utter disregard of the ethical rules as well as the Department of Justice Regulations. Obviously the actions of the Office of the Independent Counsel would violate the express prohibition of Rule 4.2. But the conduct in this case also violated the Department of Justice regulations.

This interrogation reportedly included several attorneys working in the Office of the Independent Counsel as well as numerous law enforcement officers. The government was fully aware that Ms. Lewinsky was represented by counsel in precisely "the subject matter" about which they questioned her. More astonishingly, when she specifically asked to call her lawyer, the government lawyers and law enforcement personnel refused to allow her to call Mr. Carter. Nevertheless, they sought to persuade her to agree to a "one time only" offer of immunity that expired that same day.[10] This is exactly the conduct the rule is designed to prevent. An inexperienced, terrified young woman was at the mercy of the experienced attorneys and professional law enforcement officers who intentionally went behind her attorney's back to try to

[10] Time Magazine, p. 49 (February 16, 1998).

obtain waivers of important constitutional rights, complicated agreements and substantive information.

Even though the Department of Justice regulations permit some contact with represented individuals, this type of contact is specifically prohibited.

> 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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party. . . .

28 C.F.R. §77.8 (emphasis added). The only exception to this absolute prohibition is if the represented party initiates the communication with the government and other specific conditions are met. 28 C.F.R. 77.6(c). Obviously nothing approaching the exception in §77.6(c) happened in this case. Furthermore, the regulations admonish government attorneys not to "[o]therwise improperly seek to disrupt the relationship between the represented person or represented party and counsel." §77.9(a)(iii). In fact, the government conduct in this case was designed to and succeeded in terminating the attorney client relationship between Ms. Lewinsky and Mr. Carter.

These rules were designed to protect individuals from "[t]he harms that may flow from the disparity in sophistication and skill between a lay person and a lawyer" and to prevent a lawyer from "intentionally or otherwise, tak[ing] advantage of unsophisticated persons who are represented by counsel and thereby circumvent[ing] the client-lawyer relationship." ABA Formal Op. 95-396. Given the blatant violations of the ethical rules and the Department of Justice guidelines, this Court should exercise its supervisory power to quash the subpoena. The disregard for the attorney-client relationship demonstrates that the Independent Counsel unreasonably seeks information by improper invasion of this important relationship. See United States v. Williams, 504 U.S. 36, 47 (1992) ("[T]he court's supervisory power . . . may be used as

a means of establishing standards of prosecutorial conduct before the courts themselves"). Finally, to the extent the government seeks to demonstrate the existence of any waiver or exceptions to the attorney client privilege or the work product doctrine, this Court should not consider any information obtained in violation of this rule.[11]

C. The Subpoenas are Unreasonably Overbroad in Scope and Must be Quashed.

The subpoenas are extraordinarily broad in scope. Contrary to the careful procedures and protections established in the ethical rules and the D.O.J. Guidelines for circumstances in which government conduct will invade the attorney client relationship, the subpoenas here demand anything and everything remotely related in any way to the perfectly legitimate legal representation of a client. Rather than a focused narrow inquiry into specific information or materials in an attorney's files, this subpoena duces tecum demands "any and all documents and things referring or relating to Monica Lewinsky. . . ." and "any and all documents referring or relating to any communication since January 1, 1997" with seventeen different people, including Ms. Lewinsky, her mother and others. And the definition of "document" literally consists of a one and a half page of single-spaced description of items considered "documents."

[11] The media reports indicate that this investigation was initiated based on evidence that was illegally recorded in Maryland. See Washington Post, p. A1 (January 22, 1998). Md. Code §§10-402(a)(1), (a)(2) and (c)(3). Not only should the Court decline to consider evidence from these illegal tapes, but to the extent that the subpoenas are based on information illegally obtained, they may also be invalid. See 18 U.S.C. §3504 (illegal sources of evidence including illegally obtained wiretap evidence); 18 U.S.C. §2511 (interception or disclosure of wire, oral or electronic communications prohibited). Finally, it appears that the Independent Counsel conducted the investigation involving Ms. Tripp on January 13, 1998, three days before his jurisdiction was extended to cover any of these matters.

There has been no effort by the Independent Counsel to seek only unprivileged materials. Nor has there been any showing that the government has any reason to believe that any relevant evidence even exists in Mr. Carter's files. Instead, in the broadest language, the subpoena requests absolutely everything relating to Ms. Lewinsky and potentially relating to other clients. Rather than the Independent Counsel proffering justifications for a limited request to invade the privacy of the attorney-client relationship, the subpoena puts the responsibility on Mr. Carter to determine what information exists, and then whether and to what extent a privilege applies. He has required the assistance of counsel; responding to the vast requests and assisting his attorneys prepare a response to the demands of the subpoena have taken considerable time and energy.[12] Because of the important values the attorney-client privilege and work product doctrines protect, as explained more fully below, this procedure is unreasonable. In the absence of a specific, limited and reasonable request, compliance with the subpoenas in this case would be oppressive and this Court should quash the subpoenas as issued.

V. The Subpoenas Improperly Demand Information Protected from Disclosure by the Attorney-Client Privilege, the Work Product Doctrine and the Fifth Amendment Right against Self-Incrimination.

For the reasons explained above, this Court should quash both subpoenas issued by the Independent Counsel. Furthermore, Mr. Carter has been expressly directly by Ms. Lewinsky not to reveal any document in his possession relating to her or her case. See Declaration of Monica Lewinsky, Exhibit #4, ¶ 6. Accordingly, Mr. Carter is unable to provide a document index or any other list of materials in his possession without violating her explicit directive because to

[12] See Genego, The New Adversary, 54 Brook. L. Rev. at 816 (cost to attorney in terms of the time, effort and pressure).

produce an index would reveal the existence of documents and other items. If, however, the Court concludes that the subpoenas need not be quashed in their entirety, counsel for Mr. Carter can submit an index of documents that may not be disclosed without violating one of the following specific privileges: the attorney client privilege, the attorney work product privilege or Ms. Lewinsky's Fifth Amendment privilege.[13] Numerous documents in Mr. Carter's possession would qualify for protection under these well established privileges.

A. Documents, Materials and Information Protected by the Attorney Client Privilege May not be Disclosed.

"In many ways, the attorney-client relationship is at the heart of our adversarial system of justice." Whitehouse v. Unites States District Court for the District of Rhode Island, 53 F.3d 1349, 1360 (1st Cir. 1995). To protect that relationship, "[a] body of law and ethical rules has evolved over the years with the purpose of creating an atmosphere in which free and unfettered communication is, to the greatest extent, encouraged." Id. at 1361. Central to that goal is the operation of the long-standing evidentiary privilege protecting attorney-client communications.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upiohn Company v. United States, 449 U.S. 383, 389 (1981). See, e.g., 8 J. Wigmore, Evidence § 2290 at 542 (McNaughton rev. 1961). It reflects society's judgment that promotion of trust within the attorney-client relationship is "essential to the protection of a client's legal rights and to the proper functioning of the adversary

[13] Should the Court determine that despite the substantive arguments supporting an order to quash both subpoenas, a further evaluation of the specific privileges asserted with respect to individual documents is necessary, an index could be provided to the Court and counsel expeditiously.

process." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir.1980). "The proposition is that the detriment to justice from a power to shut off inquiry to pertinent facts in court, will be outweighed by the benefits to justice (not to the client) from a franker disclosure in the lawyer's office." McCormick on Evidence § 87 at 175 (2d ed. 1972). Like other evidentiary privileges, "the attorney-client privilege[] . . . is 'rooted in the imperative need for confidence and trust'" in the relationship. Jaffee v. Redmond, 518 U.S. 1 (1996) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

In order to protect these important interests, "[l]imitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused." Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982). "Absent such abuse, or a waiver of the privilege, our legal system jealously protects the confidential status of attorney-client communications." Id. at 32-33 (footnotes omitted) (emphasis added).

> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems.

Id. at 32 (footnote omitted).

The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services, as well as any other information, materials or documents that would reveal those same communications. See, e.g., Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 618 (D.C. Cir. 1997) (privilege extends to communications that "rest on confidential information obtained from the client"); In re Sealed Case, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (privilege cloaks communication from attorney to client based, in part at least, upon a confidential communications). The privilege protects other communications and materials "to ensure against inadvertent disclosure, either directly or by

implication, of information which the client has previously confided to the attorney's trust." Coastal States v. Dep't. of Energy, 617 F.2d at 862.

As the proponent of the attorney-client on behalf of his client, Mr. Carter has met his required burden of demonstrating the applicability of the privilege to information and documents that reveal, directly or indirectly, Ms. Lewinsky's communications with Mr. Carter. There is no dispute that Mr. Carter represented Ms. Lewinsky and that in the course of that representation, she revealed confidential communications to her lawyer for the purpose of obtaining legal advice and representation.

Mr. Carter's files include documents that contain attorney client communications both directly and by implication. For example, handwritten notes of interviews and meetings with Ms. Lewinsky constitute direct client communications. In addition, documents reflecting investigation undertaken or work accomplished reveal indirectly the substance of the communications. Similarly, communications between Mr. Carter and her current attorneys would reveal information not subject to disclosure. Finally, the existence of certain documents and materials in Mr. Carter's files would reveal both directly and indirectly representations made by Ms. Lewinsky.

Compliance with the subpoena duces tecum by producing documents and items that would reveal the communications between Ms. Lewinsky and Mr. Carter would therefore violate Ms. Lewinsky's attorney-client privilege. Similarly, testimony relating to the subject matter of any of the documents or the underlying communications related to Mr. Carter during his representation of Ms. Lewinsky would also violate the privilege. Accordingly, the Court must quash the subpoenas with respect such items.

B. Information Protected by the Attorney Work Product Doctrine May not be Disclosed.

The doctrine protecting attorney work product is also rooted in the need "to protect the adversary trial process itself." Coastal States v. Dep't of Energy, 617 F.2d at 864. The work product privilege "provides a working attorney with a 'zone of privacy' within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories" in contemplation of litigation. Id. To provide quality representation, lawyers must be free to work without fear of disclosure. This is the rationale that led to the Court's development of the doctrine.

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demand that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the frame work of our system of jurisprudence to promote justice and to protect their clients' interests.

Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

The integrity of our system of justice suffers when the province of an attorney's work product is invaded. "Certainly less work-product would be committed to paper, which might harm the quality of trial preparation." Coastal States v. Dep't of Energy, 617 F.2d at 864. See also, Jordan v. Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc) ("purpose of the privilege is to...remove[] counsel's fears that his thoughts and information will be invaded").

The work-product privilege is wider in scope than the attorney-client privilege. See Hickman v. Taylor, 329 U.S. at 508; United States v. Nobles, 422 U.S. 225, 238 n.11 (1975) (work product privilege distinct from and broader than attorney-client privilege); In re Sealed

Case, 107 F.3d 46, 51 (D.C. Cir. 1997) (work product privilege broader than attorney-client privilege); Moody v. Internal Revenue Service, 654 F.2d 795, 798 (D.C. Cir. 1981) (work product privilege broader than attorney-client privilege and "exempts from discovery documents prepared by an attorney in contemplation of litigation"). Cf. Fed.R.Civ.P. 26(b)(3). "Work product immunity covers not only confidential communications between the attorney and client. It also attaches to other materials prepared by attorneys (and their agents) in anticipation of litigation." In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). This work product privilege is more inclusive than the attorney-client privilege because it "protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share." In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982).

Documents (or portions of documents) revealing the opinions, judgments, and thought processes of counsel are given almost absolute protection, to be disclosed only on a showing of the most "extraordinary justification." See, e.g., In re Sealed case, 676 F.2d at 809-810("[T]o the extent that work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection and a party seeking discovery must show extraordinary justification"). Even if deemed relevant to the legitimate scope of the grand jury's inquiries, other "fact work product" may not be ordered disclosed without a sufficient showing that the standard of Rule 26(b)(3) of the Federal Rules of Civil Procedure is satisfied. See, e.g., In re Sealed case, 676 F.2d at 809. This rule requires a showing of "substantial need" and "the inability to obtain the substantial equivalent of the information . . . from other sources without 'undue hardship.'" Id. at 809 n.59.

As in the case of the attorney-client privilege, the work product doctrine not only protects documents prepared by the attorney, but any other documents or materials that may "tend to

indicate the focus of [the lawyer's] investigation, and hence her theories and opinions regarding this litigation." Better Government Bureau, Inc. v. McGraw, 106 F.3d 582, 607-08 (4th Cir. 1997), cert. denied, 118 S.Ct. 689 (1998); Upjohn, 449 U.S. at 399. Accordingly, even factual materials are afforded the greater protection reserved by Rule 26(b)(3) for "mental impressions," when they reflect the attorney's thought processes. Upjohn, 449 U.S. at 401. Forcing an attorney to disclose notes from contact with third-parties is especially disfavored, insomuch as it tends to reveal the attorney's mental processes. Id.

Commitment to these principles is required "in view of the strong public policies furthered by the privilege for attorney work-product. . . ." Mervin v. Federal Trade Commission, 591 F.2d 821, 827 (D.C. Cir. 1978). These public policies require protection of factual materials "even though it is not reasonably available to the requestor from another source." Id. See also United States v. Paxson, 861 F.2d 730, 735 (D.C. Cir. 1988) (documents which "reflected [the attorney's] judgment on how best to advise and protect the interests of his client" protected by the work-product doctrine, therefore not necessary to reach the question of whether the attorney-client privilege was also applicable). The impact to the quality of justice by the disclosure of the contents of an attorneys files mandates restraint. While disclosure might assist a party in the short run, "[i]n the long run, however, this would discourage trial preparation and vigorous advocacy. . . ." United States v. AT&T, 642 F.2d 1285, 1300 (D.C. Cir. 1980).

Most of the documents in Mr. Carter's possession are privileged pursuant to the work product doctrine because they reveal his opinions, strategies, thought processes and mental impressions. Mr. Carter's files include documents that fall into one of the following categories: 1) documents revealing attorney impressions or strategies by indicating factual or legal investigation or research; 2) documents explicitly revealing strategies or impressions; 3)

documents that contain factual information that would reveal attorney impressions or strategies by the selection and organization of the information.

The documents in the first category reflect the people Mr. Carter spoke to and information he received in the course of conducting factual and legal investigation. The documents also encompass legal research he conducted in preparation for a motion he wrote and ultimately filed on Ms. Lewinsky's behalf. All of the investigation conducted by Mr. Carter, as reflected in his files, is protected by the work product privilege. See Nobles, 422 U.S. at 239 n. 14 (notes, documents and other internal materials prepared to present client's case not discoverable unless privilege waived by specific testimonial use of the materials).

The second category consists of documents that reveal strategies or decisions by Mr. Carter in the course of his representation of Ms. Lewinsky and in preparation for the motion to be litigated on her behalf. In addition, some of the documents are communications between Mr. Carter and Nathaniel Speights, one of Ms. Lewinsky's current attorneys, including discussions of the strategies for the representation of Ms. Lewinsky. Accordingly, the documents are precisely the materials the privilege was designed to protect.

Finally, the last category of documents consists of otherwise factual material recorded in the file. As the cases discussed above make clear, even factual materials are protected by the attorney work product privilege. However, in this case, the materials must also be protected by the greater protection for "opinion" work product because the selection and organization of the materials demonstrates that thought processes of the attorney in "assemb[ling] information, sift[ing] what he considers to be the relevant from the irrelevant facts, prepar[ing] his legal theories and plan[ning] his strategy. . . . " Hickman v. Taylor, 329 U.S. at 510-11.

C. Certain Information in Mr. Carter's Files Remains Protected by Ms. Lewinsky's Fifth Amendment Privilege against Self-Incrimination.

Apart from the attorney-client and work-product privileges, a target of a grand jury investigation always remains protected by the Fifth Amendment privilege against compelled self-incrimination. Hoffman v. United States, 341 U.S. 479, 486 (1951). This privilege also protects core values in our system of justice. Murphy v. Waterfront Commission, 378 U.S. 52 (1964).[14] Therefore, it "must be accorded liberal construction in favor of the right it was intended to secure." Hoffman, 341 U.S. at 486; Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). Certain materials in Mr. Carter's possession may not be revealed without violating Ms. Lewinsky's Fifth Amendment rights.

The subpoena issued by the plaintiffs in Jones v. Clinton and served on Ms. Lewinsky demanded specific items allegedly in her possession. See Exhibit #3, attached.[15] In connection with her legal representation by Mr. Carter, she provided certain items to him. If production of

[14] The Fifth Amendment privileges "reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" Id. at 55 (citations omitted).

[15] All discovery matters in Jones v. Clinton have been ordered sealed by the Honorable Susan Webber Wright, with the agreement of the parties. See Confidentiality Order, Exhibit #6, attached. However, Judge Wright has authorized the disclosure of the matters covered by the confidentiality order to the Office of the Independent Counsel. Certain matters must also be disclosed to this Court in order to resolve the questions of disclosure pursuant to the subpoena. footnote continued . . . .

those items or documents were sought by subpoena directly from Ms. Lewinsky herself, she would have the absolute right to refuse to produce them and to assert her Fifth Amendment privilege. Therefore, they remain privileged in the custody of her attorney. Fisher v. United States, 425 U.S. 391, 405 (1976).

To be protected by the Fifth Amendment privilege, the information sought must be incriminating. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). Information is incriminating if disclosure might provide a link in the chain of evidence necessary to prosecute. Hoffman, 341 U.S. at 486. Furthermore, "[i]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." Id.

Among the charges apparently under investigation by the Independent Counsel are the offenses of obstruction of justice, perjury or false statements in connection with her proposed deposition testimony and affidavit filed in the Jones v. Clinton civil suit. The government, therefore, seeks evidence tending to prove both the facts underlying the subject matter of the affidavit (ie., whether an improper relationship existed) as well as evidence tending to show Ms. Lewinsky's intentions with respect to the affidavit and any proposed testimony at a deposition. The subpoena to Ms. Lewinsky in the civil case demanded specific items allegedly in her possession. Whether she, in fact, possessed the items demanded in the subpoena in the civil case, or possessed the items but did not intend to produce them, could provide a link in the chain of evidence necessary to prove the potential charges against her. Therefore, there is no question that production of the items or any documents reflecting their existence could be incriminatory.

Because this matter is also under seal, revealing this information will not disseminate it to the public in violation of the order.

Indeed, it is for that reason that her assertion of her Fifth Amendment privilege was apparently upheld and she was not compelled to testify at the deposition in the civil case.[16]

Further disclosure of the nature of the items or the context demonstrating their incriminating nature is not necessary. "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Hoffman, 341 U.S. at 486-87.

Disclosure is not protected by the Fifth Amendment, however, solely because production could be incriminating. There must also be a testimonial compulsion to production of the materials. In this case, that requirement is easily satisfied. As the Court made clear in United States v. Doe, 465 U.S. 605, 612 (1984), "[a] government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." For example, "[c]ompliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [target]. It also would indicate the [target's] belief that the papers are those described in the subpoena." Fisher v. United States, 425 U.S. 391, 410 (1976). Production of the items is the same as an affirmative communication that 1) the items exist, 2) they are in Ms. Lewinsky's possession, 3) Ms. Lewinsky believes they are items described in and requested by the subpoena, and 4) what is produced is, in fact, all that she has in

[16]See supra note 2. There was a telephonic hearing in the civil case during which Ms. Lewinsky's current attorneys apparently argued, among other things, that she was a target of a grand jury investigation and asserted her Fifth Amendment privilege. Ms. Lewinsky was not required to testify at the scheduled deposition on January 23, 1998.

her possession that would be responsive to the requests in the subpoena. Production of the materials would therefore be testimonial and incriminatory.

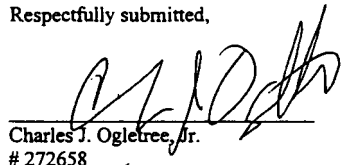
The question remains whether production of certain items provided to a lawyer for the purpose of seeking legal advice relinquishes the privilege. The Court in Fisher concluded that it did not. "'[W]hen the client himself would be privileged from production of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.'" Fisher, 425 U.S. at 404 (quoting 8 Wigmore §2307, p.592). This proposition derives from the attorney-client privilege. "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." Id. at 403. In order to effectuate the important values protected by the attorney client privilege, documents that are "not obtainable by subpoena duces tecum or summons while in the exclusive possession of the client" because of the Fifth Amendment privilege, may not be "appreciably easier to obtain from the attorney after transfer to him." Id. Therefore, because the materials could not be compelled to be disclosed from Ms. Lewinsky herself by means of a subpoena duces tecum, they may not be compelled to be produced by her attorney.

VI. Conclusion

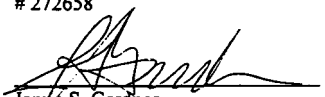
The subpoenas issued to Mr. Carter are extraordinary in their breadth and encompass materials protected by privileges specifically designed to protect the confidentiality of the attorney client relationship. Important values are at stake if the Independent Counsel, or any government attorney, can, in the first instance, request a virtually limitless opportunity to rummage through the files of an attorney for the target of a grand jury investigation. This Court has the authority to prevent an unwarranted and unnecessary fishing expedition into the

individual client files as well as the office files of a well-respected, prominent member of the District of Columbia Bar. Mr. Carter requests that this Court exercise that authority and quash the subpoenas.

Respectfully submitted,



Charles J. Ogletree, Jr.
272658



Jamé S. Gardner
#375811
Counsel for Francis D. Carter, Esquire

Harvard Law School
320 Hauser Hall
Cambridge MA 02138
617-495-5097

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum and Memorandum in Support of the Motion to Quash as well as all attachments have been served, by first class mail and by hand, upon Paul Rosenzweig, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and upon Counsel for Monica Lewinsky, Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005 and William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles CA 90067, this 17 day of February, 1998.

Charles J. Ogletree, Jr.

EXHIBIT # 1

SUBPOENA DUCES TECUM #D902

CO 293 (Rev. 3/91) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE DISTRICT OF COLUMBIA

TO:
Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Court for the District of Columbia Third & Constitution Avenue, N.W. Washington, D.C.	Grand Jury, Third Floor DATE AND TIME February 17, 1998/9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

See attached rider.

☐ Please see additional information on reverse.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
Nancy M. [illegible]-Whi[illegible], Clerk (BY) DEPUTY CLERK Margaret [illegible] Papier	February 2, 1998 (D902)

This subpoena is issued upon application of the United States [illegible]

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY
Darrell M. Joseph, Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-North
Washington, D.C. 20004
(202) 514-8688

*If not applicable, enter "none."

U.S. GPO: 1993-0-750-[illegible]

Dec-03-02 06:15M FAX

RETURN OF SERVICE (1)

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE

SERVED ON (PRINT NAME)

SERVED BY (PRINT NAME) | TITLE

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER (2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a summons and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 4(d)(5), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(b), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)".

Subpoena # D902

To: Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA RIDER

A. Produce any and all documents and things referring or relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, including but not limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings, and memoranda. Such documents should include, but are not limited to, any documents referring or relating to the financial terms and arrangements for payment in your representation of Monica Lewinsky.

B. Produce all telephone records for long distance and local calls made by you, your secretary, and anyone working on your behalf, from June 1, 1997 to the present, related or referring to the following persons:

Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asnes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

C. Produce any and all documents referring or relating to travel in a limousine or other chauffeur service by you or Vernon Jordan since June 1, 1997.

D. Produce any and all documents referring or relating to any communication since January 1, 1997 with any of the following persons or their representatives. These documents should include, but are not limited to, calendars, appointment books, telephone messages, telephone and toll records, correspondence, courier records/logs, and visitor records/logs:

Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asnes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

E. Produce any and all documents referring or relating to Monica Lewinsky and any communication with McAndrews & Forbes or Revlon, Inc. and their employees, agents, or representatives, including, but not limited to, Ron Perelman, Howard Gittes, and Barry Schwartz.

F. Produce any and all documents referring or relating to Monica Lewinsky and any communication with the United Nations, or the office of the United States Ambassador to the United Nations, including but not limited to any communications with William Richardson, from January 1, 1997 to the present.

Definitions and Instructions

1. Definitions

a. The term "document" or "documents" as used in this subpoena means all records of any nature whatsoever within your possession, custody or control or the possession, custody or control of any agent, employee, representative (including, without limitation, attorneys, investment advisors, investment bankers, bankers and accountants), or other person acting or purporting to act for or on your behalf or in concert with you, including, but not limited to, draft, pending or executed contracts and/or agreements, sample documents, insurance policies, financial guarantee bonds, letters of credit, communications, correspondence, calendars, DayTimers, date books, telegrams, facsimiles, telexes, telefaxes, electronic mail, memoranda, records, reports, books, files (computer or paper), summaries or records of personal conversations, meetings or

interviews, logs, summaries or records of telephone conversations and/or telefax communications, diaries, forecasts, statistical statements, financial statements (draft or finished), work papers, drafts, copies, bills, records of payments for bills, retainer records, attorney time sheets, telephone bills and records, telefax bills and records, tax returns and return information, employee time sheets, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultants' reports and/or records, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, maps, plats, trade letters, depositions, statements, interrogatories and answers thereto, pleadings, docket sheets, discovery materials, audit letters, audit reports, materials underlying audits, document productions, transcripts, exhibits, settlement materials, judgments, press releases, notes, marginal notations, invoices, documents regarding collateral or security pledged, settlement statements, checks disbursed or received at settlement, inspection reports, title policies, financial statements and/or federal tax returns submitted by any person in support of any loan application, items related the repayment, if any, of any interest or principal on the loan, items relating to any default on the loan, commission records, evidence of liens, documents relating to filings under the Uniform Commercial Code and/or its equivalent, foreclosure and mortgage documentation, cashiers checks, bank drafts, money orders, bank and brokerage account statements, debit and credit memoranda, wire transfer documentation, opening account cards, signature cards, loan applications, any employment and bank account deposit verification documents, loan histories, loan files, records of loan repayment or any and all efforts to secure repayment, including foreclosure or records of lawsuits, credit references, board resolutions, minutes of meetings of boards of directors, opinion letters, purchases and sales agreements, real estate contracts, brokerage agreements, escrow agreements, loan agreements, offer and acceptance contracts, or any other contracts or agreements, deeds or other evidence of title, escrow accounts and any other escrow documentation, savings account transcripts, savings account deposit slips, savings account withdrawal slips, checks deposited in savings accounts, checking account statements, canceled checks drawn on checking accounts, deposit slips and checks deposited into checking accounts, credit card accounts, debit and credit documentation, safe deposit records, currency transaction reports (IRS Forms 4789), photographs, brochures, lists, journals, advertising, computer tapes and cards, audio and video tapes, computerized records stored in the form of magnetic or electronic coding on computer media or on media capable of being read by computer or with the aid of computer related equipment, including but not limited to floppy disks or diskettes, disks, diskettes, disk packs, fixed hard drives, removable hard disk cartridges, mainframe computers, Bernoulli boxes, optical disks, WORM disks, magneto/optical

disks, floptical disks, magnetic tape, tapes, laser disks, video cassettes, CD-ROMs and any other media capable of storing magnetic coding, microfilm, microfiche and other storage devices, voicemail recordings and all other written, printed or recorded or photographic matter or sound reproductions, however produced or reproduced.

The term "document" or "documents" also includes any earlier, preliminary, preparatory or tentative version of all or part of a document, whether or not such draft was superseded by a later draft and whether or not the terms of the draft are the same as or different from the terms of the final document.

b. The term "communication" or "communications" is used herein in its broadest sense to encompass any transmission or exchange of information, ideas, facts, data, proposals, or any other matter, whether between individuals or between or among the members of a group, whether face-to-face, by telephone or by means of electronic or other medium.

c. "Possession, custody or control" means in your physical possession and/or if you have the right to secure or compile the production of the document or a copy from another person or entity having physical possession, including, but not limited to, your counsel.

d. The term "referring or relating" to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject including, but not limited to, documents concerning the preparation of other documents.

e. The term "you" means yourself and any of your companies, partnerships and business entities with which you have been affiliated and any employees, partners, associates or members of any firm with which you have been affiliated in the course of your work for any of the persons or entities named in this rider, and any such firms and the affiliates of those firms.

2. Instructions

a. The originals of all documents and communications must be produced, as well as copies within your possession, custody, or control.

b. If any original document cannot be produced in full, produce such document to the extent possible and indicate specifically the reason for your inability to produce the remainder.

c. Documents shall be produced as they are kept in the usual course of business, as organized in the files.

d. File folders, labels, and indices identifying documents called for shall be produced intact with such documents. Documents attached to each other should not be separated.

e. In reading this rider, the plural shall include the singular and the singular shall include the plural.

f. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The use of the word "including" shall be construed without limitation.

g. In the event that any document, or portion thereof, called for by this subpoena is withheld on the basis of any claim of privilege or similar claim, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c) addressee; (d) the position or title of the addressee; (e) any indicated or blind copies; (f) date; (g) a description of the subject matter of the document; (h) number of pages; (I) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, has been disclosed, distributed, shown, or explained; and (k) present custodian. Each basis you contend justifies the withholding of the document shall also be specified. With respect to those documents or records as to which you may claim privilege, or attorneys' work product, set forth as to each such document the basis for such claim, including the purpose and circumstances surrounding the creation of the document, the identity of each person who has been privy to such communication reflected in the document, the identity of any person or entity instructing the subpoena recipient or the attorney of the subpoena recipient to withhold production of the document, and whether you will submit the document to the Court for an in camera determination as to the validity of the claim. If the existence of a joint defense agreement or any agreement as to common interest is relevant to the assertion of any claim of privilege or similar claim, please provide a copy of that agreement; if any such agreement is not in writing, please set forth the date of the creation of the agreement, the identities of all parties to the agreement and the specific individuals who entered into the agreement on behalf of those parties, and the objects, purposes, and scope of the agreement.

h. In the event that any document called for by this subpoena has been lost, destroyed, deleted, altered, or otherwise disposed of, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c)

addressee; (d) the position or title of the addressee; (e) indicated or blind copies; (f) date; (g) a brief description of the subject matter of the document; (h) number of pages; (I) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, had been disclosed, distributed, shown or explained; (k) the date of the loss, destruction, deletion, alteration, or disposal and the circumstances thereof; and (l) the reasons, if any, for the loss destruction, deletion, alteration, or disposal and the person or persons responsible.

i. If any information or data is withheld because such information or data is stored electronically, it is to be identified by the subject matter of the information or data and the place or places where such information is maintained.

EXHIBIT # 2

SUBPOENA AD TESTIFICANDUM #2017

CC 253 (Rev. 8/91) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE DISTRICT OF COLUMBIA

TO:
Francis D. Carter, Esq.
1341 G St., NW
Washington, DC

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Court for the District of Columbia Third & Constitution Avenue, N.W. Washington, D.C.	Grand Jury, Third Floor
	DATE AND TIME February 17, 1998/9:15 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

☐ *Please see additional information on reverse.*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
Nancy M. Mayer-Whittington, Clerk	February 9, 1998
BY DEPUTY CLERK Margaret A. Poirier	(D937)

This subpoena is issued upon application of the United States of America.

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Paul Rosenzweig, Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490- North
Washington, D.C. 20004
(202) 514-8688

53-4

SO 293 (Rev. 8/01) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE (1)

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE

SERVED ON (PRINT NAME)

SERVED BY (PRINT NAME) | TITLE

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER(2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)"

EXHIBIT # 3

SUBPOENA DUCES TECUM AND FOR DEPOSITION

CASE # LR-C-94-295

AO 88 (Rev.1/94)Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PAULA JONES,
Plaintiff,
v.
WILLIAM JEFFERSON CLINTON
and
DANNY FERGUSON,
Defendants.

SUBPOENA IN A CIVIL CASE
CASE NUMBER:[1] LR-C-94-290

COPY

TO: MONICA LEWINSKY
700 New Hampshire NW
Washington, DC 20037

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
The Rutherford Institute 733 15th Street NW., Suite 410 Washington, DC 20005	Friday, January 23, 1998 9:30 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

Exhibit A, attached hereto.

PLACE	DATE AND TIME
The Rutherford Institute 733 15th Street NW., Suite 410 Washington, DC 20005	Friday, January 23, 1998 9:30 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify, Federal Rules of Civil Procedure, 30(b) (6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Donovan Campbell Jr. , ATTORNEY FOR PLAINTIFF	December 17, 1997

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Donovan Campbell, Jr., Rader, Campbell, Fisher & Pyke, Stemmons Place, Suite 1080,
2777 Stemmons Freeway, Dallas, Texas 75207, (214) 630-4700

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

[1] If action is pending in district other than district of issuance, state district under case number.

EXHIBIT A

DOCUMENTS AND THINGS TO BE PRODUCED

Pursuant to the Federal Rules of Civil Procedure, the Deponent is directed to produce, at the time and place of the Deponent's deposition, all of the documents and tangible things described in the enumerated requests below. In responding to the following requests for production, the Deponent is directed to comply with the following instructions and to apply the following definitions.

DEFINITIONS

For the purposes of these requests, the following definitions apply:

"Defendant Clinton" means William Jefferson Clinton.

"Defendant Ferguson" means Danny Ferguson.

"Document" means any tangible thing on which appears, or in which is stored or contained, any words, numbers, symbols, or images. The term "document" includes any and all writings, drawings, graphs, charts, photographs, tape recordings, video recordings, phono records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices, into reasonably usable form.

"Person" means any identifiable entity, including but not limited to individuals, corporations, partnerships, sole proprietorships, and unincorporated associations.

"You" means the Deponent.

INSTRUCTIONS

A request for any particular document or thing is a request for the original, for each and every photocopy or duplicate of that document or thing, and for each and every draft of the document or thing. If, however, you produce the original of the document or thing, you are not required to produce any photocopies or duplicates unless they are not identical (as, for example, when marginal notations are made on a copy).

The documents and things to be produced should, at the time of production, be organized and labeled to correspond to the enumerated requests below. In the alternative, they may be produced as they are kept in the ordinary course of business, if it is possible to do so.

You are to produce not only the documents and things in your immediate possession, but also those over which you have custody or control, including but not limited to documents and things in the possession, custody, or control of your agent(s), your accountant(s), your attorney(s), any investigator employed by you or by your attorney(s), or any consultant or expert witness employed by you or by your attorney(s).

If, in response to a particular request, an objection is interposed, and the objection applies to some but not all of the documents requested, please produce all responsive documents and things to which the objection does not apply.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: Every document relating to any private meetings between you and Defendant Clinton, including any agendas, letters, journals, diaries, notes, tape recordings or memoranda.

REQUEST FOR PRODUCTION NO. 2: Every document constituting or containing communications between you and Defendant Clinton, including letters, cards, notes memoranda, and all telephone records, notes or memoranda reflecting calls to or from any telephone in the White House, the Pentagon, any governmental office or property, or your home or office, any cellular or mobile telephone, or to or from any other telephone numbers of Bill Clinton or you or anyone acting for or on behalf of him or you.

REQUEST FOR PRODUCTION NO. 3: Every document concerning any communications with persons other than Defendant Clinton which reference any relationship or any private meetings between you and Defendant Clinton.

REQUEST FOR PRODUCTION NO. 4: Every document concerning any communications with persons other than Defendant Clinton which reference any relationship or any private meetings between you and Defendant Clinton.

REQUEST FOR PRODUCTION NO. 5: Every calendar or address book or other document reflecting any meetings between you and Defendant Clinton or reflecting the address or telephone number of Defendant Clinton at any location.

REQUEST FOR PRODUCTION NO. 6: Every document relating to any communications with anyone concerning any occurrence involving you and Defendant Clinton, including any agendas, letters, journals, diaries, notes, time records, employment records, tape recordings or memoranda.

REQUEST FOR PRODUCTION NO. 7: Please produce each and every gift including, but not limited to, any and all dresses, accessories, and jewelry, and/or hat pins given to you by, or on behalf of, Defendant Clinton.

REQUEST FOR PRODUCTION NO. 8: Please produce each and every document mentioning or describing any gift given to you by Defendant Clinton.

EDBRP++
BIOLABORATORY-PROTECTED LEARNING

DECLARATION OF MONICA LEWINSKY

I, Monica Lewinsky, declare under penalty of perjury that I am an adult over the age of eighteen years. If called upon to testify, I could and would competently testify to the following facts:

1. That I currently reside at the Watergate Apartments in Washington, D.C.
2. That I was served with a subpoena in the case of Paula Jones v. William Jefferson Clinton, LR-C-94-290, on December 19, 1997. I sought legal advice and assistance in connection with that subpoena. Shortly thereafter, I met with and formally retained attorney Francis D. Carter, Esquire to represent me.
3. I subsequently retained new counsel, William H. Ginsburg, Esquire and Nathaniel Speights, Esquire. Mr. Carter was informed through my new counsel that I would no longer need his assistance.
4. I understand that Mr. Carter has received two subpoenas requesting documents concerning the legal work he did for me.
5. I have not knowingly or intentionally waived any right, privilege or other legal protection available to me.
6. I have directed Mr. Carter, through my current counsel, not to disclose or reveal any document or other material or information in his possession concerning my case.
7. I have directed him, through my current counsel, to assert every right, privilege or objection available on my behalf, including, but not limited to the attorney client privilege, the attorney work product privilege, my fifth amendment right against self-incrimination and any other rights or objections legally available. I

have requested that he assert my rights and resist compliance with the subpoenas or any other request for information to the fullest extent of the law.

I declare that the foregoing is true and correct to the best of my knowledge and information available to me.

Signed this 9th day of February, 1998 at Los Angeles, California, under penalty of perjury.

Monica S. Lewinsky

MONICA S. LEWINSKY

Appendix 1

Declaration of Financial Capital Expenses

DECLARATION OF FRANCIS D. CARTER

I, Francis D. Carter, Esquire, do hereby declare:

1. I am an attorney licensed to practice law in the District of Columbia.

2. I am a partner in the law firm of Carter & Varrone, located at 1341 G Street, N.W., Suite 510, Washington, D.C. 20005.

3. I have practiced law in the District of Columbia since 1973.

4. I was retained by Monica S. Lewinsky to undertake legal representation of her in connection with a subpoena she received in the case of Jones v. Clinton, LR-C-94-290.

5. In the course of my representation of Ms. Lewinsky, I undertook factual and legal investigation and research, spoke with a number of individuals, reviewed documents and other written materials, researched and wrote legal pleadings and conducted other tasks consistent with my representation of her.

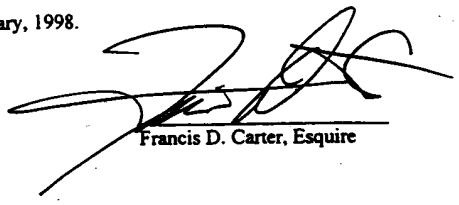
6. I did not knowingly or intentionally waive any right, privilege or other legal protection available to me or to Ms. Lewinsky.

7. I did not authorize or consent to any communications with Ms. Lewinsky by any other individual or attorney or agent of an attorney during my representation of her. No such authorization or consent was sought from me.

8. I was notified that Ms. Lewinsky had retained new counsel and that I had been discharged. At their request, I provided copies of documents and materials in my possession to her new lawyers.

9. Pursuant to Ms. Lewinsky's request, I have not revealed any documents or materials or information in my possession concerning to anyone other than my attorneys.

I hereby declare that the foregoing is true to the best of my knowledge. Signed under the penalties of perjury this 17th day of February, 1998.



Francis D. Carter, Esquire

EXHIBIT # 6

CONFIDENTIALITY ORDER
CASE # LR-C-94-290

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

OCT 30 1997

JAMES W. McCORMACK, CLERK
By: DEPUTY CLERK

PAULA CORBIN JONES,

Plaintiff,

v.

WILLIAM JEFFERSON CLINTON

and

DANNY FERGUSON,

Defendants.

CIVIL ACTION
LR-C-94-290

Judge Susan Webber Wright

CONFIDENTIALITY ORDER ON CONSENT OF ALL PARTIES

WHEREAS, the Court has determined and counsel for all of the parties agree that this action is a matter in which there has been and will continue to be intense media interest and coverage due to the identity of the parties and the subject matter of this action; and

WHEREAS, the Court has determined and counsel for all parties agree that the interests of all parties and the judicial system in obtaining a fair and impartial jury and a fair trial for all parties will be prejudiced if the existing pre-trial publicity concerning discovery in this matter were permitted to continue; and

WHEREAS, the Court has determined and counsel for all parties agree that the interest in an impartial jury and a fair trial greatly outweigh any public interest in access to pre-trial information and proceedings in this matter; and

WHEREAS, the Court has determined and counsel for all parties agree that no reasonable alternative exists to protect the above-referenced interests;

IT IS HEREBY ORDERED, AND COUNSEL FOR ALL PARTIES CONSENT to the entry of the following confidentiality order to apply to the parties, counsel for the parties, and agents (including spokespersons) for the parties, prohibiting disclosure directly or indirectly of:

1. The time, place, or date on which any deposition is to be taken or the identity of any witness to be deposed; and

2. The content of any deposition, including but not limited to the questions asked, the answers given, whether any objections were made, the substance of any objections, the length of the deposition, whether the deposition went well or poorly, and whether new information was disclosed or old information confirmed; and

3. The content of any written discovery (interrogatories, document requests and requests for admission) sought from any party or third party, the identity of persons or entities from which information is sought, and the content of any responses thereto, including but not limited to the information sought, the responses given, documents produced, whether any objections were made, the substance of any objections, whether the information was helpful or not, and whether any new information was disclosed or old information confirmed.

IT IS HEREBY FURTHER ORDERED, AND COUNSEL FOR ALL PARTIES CONSENT that all materials, including motions and briefs, filed with the Court concerning discovery matters shall be filed under seal and the parties, counsel for the parties, and agents (including spokespersons) for the parties will not disclose the fact that any such filing has been made or any information concerning the content of such filings, responses thereto or resolution thereof;

IT IS HEREBY FURTHER ORDERED, AND COUNSEL FOR ALL PARTIES CONSENT that counsel for the parties will advise all third parties subject to subpoena, or who otherwise provide information in this case (including documents), of this Confidentiality Order.

SEEN AND AGREED TO:

_____ Dated: _____
Donovan Campbell, Jr., Esq.
BARAS, CAMPBELL, FISHER & FIKE
Stemmons Place, Suite 108
2777 Stemmons Freeway
Dallas, Texas 75207
(214) 630-4700

COUNSEL TO PAULA JONES

_____ Dated: _____
Robert S. Bennett, Esq.
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

COUNSEL TO
PRESIDENT WILLIAM J. CLINTON

Bill W. Bristow Dated: October 31 1997
Bill W. Bristow, Esq.
216 East Washington
Jonesboro, Arkansas 72401
(870) 935-9000

COUNSEL TO DANNY FERGUSON

SO ORDERED this 30th day of October, 1997:

Susan Webber Wright
Honorable Susan Webber Wright
United States District Court

OCT.-30'97(THU) 16:44 RADER, CAMPBELL TEL:214 630 9996 P.002
OCT-30-97 08:12 FROM:SAENGS ID:2022717813 PAGE 5/8

SEEN AND AGREED TO:

~~Donovan Campbell, Jr., Esq.~~ James A. Fisher Dated: 10/30/97
RADER, CAMPBELL, FISHER & FYKE
Stemmons Place, Suite 1080
3777 Stemmons Freeway
Dallas, Texas 75207
(214) 630-4700

COUNSEL TO PAULA JONES

Robert S. Bennett, Esq. Dated: 10/30/97
SHADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

COUNSEL TO
PRESIDENT WILLIAM J. CLINTON

Bill W. Bristow, Esq. Dated: _____
216 East Washington
Jonesboro, Arkansas 72401
(870) 935-9000

COUNSEL TO DANNY FERGUSON

SO ORDERED this 30th day of October, 1997:

Honorable Susan Webber Wright
United States District Court

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 10/31/97 BY [illegible]

EXHIBIT 2 7

LETTER FROM CHAMBERS OF
THE HONORABLE SUSAN WEBBER WRIGHT

UNITED STATES DISTRICT COURT
EASTERN AND WESTERN DISTRICTS OF ARKANSAS
600 WEST CAPITOL AVENUE, SUITE 302
LITTLE ROCK, ARKANSAS 72201-3325

SUSAN WEBBER WRIGHT
JUDGE

February 9, 1998

Jamie S. Gardner, Esq.
320 Hauser Hall
Cambridge, MA 02138

Dear Ms. Gardner:

This letter will confirm our conversation this morning wherein I informed you that Judge Wright has indeed authorized you to release subpoenaed information from the civil case of *Jone* v. *Clinton*, No. LR-C-94-290 (E.D.Ark.), to the Independent Counsel.

Please let me know if I can be of any further assistance.

Sincerely,

Barry W. Ward
Law Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Sealed Case	)	**FILED UNDER SEAL**
	)	Misc. Docket No. 98-068
	)	(NHJ)

UNOPPOSED MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Local Rules 302 and 307.1, the National Association of Criminal Defense Lawyers ("NACDL") and its local affiliate the District of Columbia Association of Criminal Defense Lawyers ("DCACDL") request leave to file an *amici curiae* brief in this proceeding concerning the efforts of the Independent Counsel to subpoena information from an attorney, Francis D. Carter, directly arising from and relating to his representation of a client, Monica Lewinsky. The Office of the Independent Counsel has consented to the filing of the brief of *amici*, which is tendered herewith.

As grounds therefor, *amici* state that Charles J. Ogletree, Jr., counsel for Mr. Carter, approached NACDL for assistance when Mr. Carter was served with subpoenas relating to his representation of a client. *Amici* have a vital interest in the resolution of the issues raised by the subpoenaes issued to Mr. Carter because of their significant impact on the attorney-client relationship.

NACDL's mission, as defined in its bylaws, includes ensuring "justice and due process . . . and [p]romot[ing] the proper and fair administration of justice." NACDL has nearly 10,000 members nationwide, along with 80 state and local affiliate organizations numbering

28,000 members. NACDL's members include private criminal defense lawyers, public defenders, active duty United States military defense lawyers, and law professors. The Americ Bar Association recognizes NACDL as an affiliate organization and awards it full representatio in its House of Delegates. NACDL has appeared as *amicus* in dozens of proceedings in district courts, appellate courts, and in the Supreme Court, including a number of cases involving the government's effort to subpoena counsel.

This matter involves a broad-based attempt by the Office of the Independent Counsel to subpoena information from an attorney relating to his representation of a client. Without exhausting efforts to obtain the information first from alternative sources, and without making any effort to accommodate valid claims of privilege, the Independent Counsel seeks any and all information relating to Mr. Carter's representation of his client. The Independent Counsel's approach with respect to the subpoena is consistent with a troubling pattern of conduct that appears to demonstrate a blatant disregard for the relationship between attorneys and clients.

States, the Bar, and the Department of Justice properly have been concerned about the deleterious effects of subpoenaing attorneys to obtain confidential material relating to the representation of clients and have responded by imposing safeguards to prevent excessive, premature, and unnecessary use of this dangerous investigative tool. These safeguards provide valuable guidance for this Court's exercise of its authority under Rule 17(c) of the Federal Rules of Criminal Procedure to determine whether the challenged subpoenas are unreasonable or oppressive.

Here, such a review demonstrates that the Independent Counsel's pursuit of information concerning attorney Francis Carter's representation of a client -- documents and testimony

obtained or prepared under the aegis of attorney-client and work product privileges -- is unreasonable and oppressive. Although an office of the federal government, the Office of the Independent Counsel failed to follow applicable Department of Justice guidelines that require attorneys to be approached on presumably privileged matters only as a last resort, and even then only through narrowly drawn subpoenas. In contrast, the Office of the Independent Counsel's investigation has attempted to invade the attorney-client relationship broadly, and as a first resort. This is oppressive to the attorney and client directly involved and poses a significant threat to client confidence in attorneys generally, hampering the ability of attorneys to provide adequate counsel.

Moreover, it has been reported that the Independent Counsel may invoke the "crime-fraud" exception to the attorney-client privilege as justification for his effort to obtain confidential communications between Mr. Carter and his client. The crime-fraud exception reportedly will be invoked based on alleged inconsistencies between out-of-court statements by Ms. Lewinsky and an affidavit she filed as a non-party in a civil tort suit. Extending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship. If the government is permitted to rely on evidence of inconsistent statements by witnesses in private litigation as a basis to force attorneys to testify against their clients and to divulge client confidences, nothing will be left of the attorney-client privilege.

This Court has wide discretion to permit appearances by *amici* and routinely has

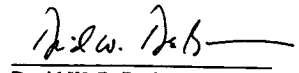
permitted *amici* to appear, *see, e.g., Ellsworth Assoc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996); *Dize v. Amalgamated Council of Greyhound Local Unions*, 684 F. Supp. 332, 340 (D.D.C. 1988) -- including in cases involving the Independent Counsel. *See, e.g., Deaver v. Seymour*, 656 F. Supp. 900, 901 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir. 1987). In addition, the NACDL and similar organizations have been permitted to appear as *amici curiae* on behalf of subpoenaed attorneys in numerous federal courts throughout the country, including in grand jury proceedings. *See, e.g., In re: Special Grand Jury 81-1*, 676 F.2d 1005, 1014 n.3 (4th Cir.), *vacated on other grounds*, 697 F.2d 112 (4th Cir. 1982); *In re: Grand Jury Subpoena*, 397 F. Supp. 520 (S.D.N.Y. 1975).

In light of its considerable experience in other cases involving government efforts to subpoena counsel, NACDL believes that its limited participation in this matter will assist the Court in resolving difficult and critically important issues surrounding the propriety of prosecutorial efforts to breach the attorney-client relationship. At the same time, permitting NACDL and DCACDL to file an *amici curiae* brief, tendered with this motion, will not in any way delay the proceedings concerning the subpoena served on Mr. Carter or otherwise prejudice the parties.

CONCLUSION

For the foregoing reasons, NACDL and its affiliate the DCACDL respectfully request leave to participate as *amici curiae* in this proceeding.

Respectfully Submitted,



David W. DeBruin
Bar No. 337626
Jerome L. Epstein
Nory Miller
JENNER & BLOCK
601 13th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 639-6000

Counsel for

National Association of
Criminal Defense Lawyers
1025 Connecticut Ave., N.W.
Suite 901
Washington, D.C. 20036

District of Columbia Association of
Criminal Defense Lawyers
2500 Q Street, N.W. #725
Washington, D.C. 20007-4373

February 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 1998, I caused a copy of the foregoing Unopposed Motion for Leave to File Amici Curiae Brief, and Brief of Amici Curiae National Association of Criminal Defense Lawyers and District of Columbia Association of Criminal Defense Lawyers, to be served by messenger on

Paul Rosenzweig
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, D.C. 20004

and by first-class mail and Federal Express on:

Professor Charles J. Ogletree, Jr.
Harvard Law School
320 Hauser Hall
Cambridge, Massachusetts 02138

Jerome L. Epstein

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Sealed Case	)	**FILED UNDER SEAL**
	)	Misc. Docket No. 98-068
	)	(NHJ)

ORDER

Upon consideration of the unopposed motion of the National Association of Criminal Defense Lawyers ("NACDL") and the District of Columbia Association of Criminal Defense Lawyers ("DCACDL") for leave to file an *amici curiae* brief, it is, this _____ day of _____, 1998,

ORDERED, that the motion is granted; and it is

FURTHER ORDERED, that the NACDL and DCACDL may participate in this proceeding as *amici curiae.*

_____
Norma Holloway Johnson
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Sealed Case	)	**FILED UNDER SEAL**
	)	
	)	Misc. Docket No. 98-068 (NHJ)

BRIEF OF AMICI CURIAE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND
DISTRICT OF COLUMBIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

INTEREST OF AMICI

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is one of the Nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused or convicted of crime. NACDL's mission, as defined in its bylaws, includes "[e]nsuring justice and due process" and "[p]romoting the proper and fair administration of justice." NACDL has nearly 10,000 members nationwide, along with 80 state and local affiliate organizations numbering 28,000 members. NACDL's members include private criminal defense lawyers, public defenders, active duty United States military defense lawyers, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared as *amicus* in dozens of proceedings in district courts, appellate courts, and in the United States Supreme Court, including in a number of cases involving the government's efforts to subpoena counsel. The District of Columbia Association of Criminal Defense Lawyers (DCACDL) is a local affiliate of the NACDL.

Charles J. Ogletree, Jr., counsel for attorney Francis D. Carter, approached NACDL for assistance when Mr. Carter was confronted with the subpoenas in this case that appear to seek all information in Mr. Carter's possession concerning his representation of a client. Because of the extreme importance of this proceeding on the attorney-client privilege, and on the attorney-client relationship that the privilege protects, *amici* have a vital interest in the resolution of the issues raised by these subpoenas.

BACKGROUND

This case involves a broad-based attempt by the Office of the Independent Counsel to subpoena information from an attorney directly arising from and relating to his representation of a client. Apparently without exhausting efforts to obtain the information from alternative sources, and without making any effort to accommodate valid claims of privilege, the Independent Counsel seeks any and all information whatsoever relating to attorney Francis D. Carter's representation of his client, Monica Lewinsky. The Independent Counsel's approach with respect to the subpoenas is consistent with a troubling pattern of conduct that appears to demonstrate a blatant disregard for the relationship between an attorney and his client.

It is the understanding of *amici* that on January 16, 1998, at a time when the Independent Counsel *knew* that Ms. Lewinsky was represented by Mr. Carter with respect to the precise matters under investigation, four or five attorneys from the Office of Independent Counsel and four or five FBI agents approached Ms. Lewinsky directly, not through counsel, and asked to question her. Indeed, Ms. Lewinsky's present counsel have reported that, when Ms. Lewinsky asked if she could call her lawyer, she was told, "You cannot call your lawyer. If you call your

lawyer, we cannot grant you immunity." William Ginsburg and Nathaniel Speights, *Monica Lewinsky: Her Lawyers' Version*, *Time Magazine*, Feb. 16, 1998 at 49.

Only five days later, on January 21, 1998, the Independent Counsel served a subpoena *duces tecum* on Mr. Carter, identical in scope to the subpoena *duces tecum* at issue here (the first subpoena was withdrawn, but an identical subpoena later was refiled). Among other things, that subpoena seeks "*any* and *all* documents and things referring or relating to Monica Lewinsky . . . including but not limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings, and memoranda." *Subpoena Rider*, at 1 (emphasis added). Independent Counsel now has added a second subpoena for testimony by Mr. Carter.

This case thus involves a process that appears to be indifferent to the significance of the attorney-client relationship in our adversary system and the protections surrounding it. Beginning with an effort by the Independent Counsel to interrogate Ms. Lewinsky despite the fact that she was represented by counsel, and then continuing with an attempt to rifle through every aspect of her attorney's files, the Independent Counsel exhibits complete disregard for the sanctity of the attorney-client relationship. It is this threat to the attorney-client relationship that triggers the concern of the *amici* in this proceeding.

SUMMARY OF ARGUMENT

The dramatic increases in subpoenas to attorneys in recent decades "erode one of the basic components of our legal system" -- the confidential attorney-client relationship.[1] States,

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[1]Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. Pa. L. Rev. 1783, 1825 (1988) [Stern]; *see also id.* at 1787-89 (discussing "explosion of subpoenas to lawyers" since early 1980s and citing surveys).

the Bar, and the Department of Justice have been rightly concerned about the deleterious effects of subpoenaing attorneys to obtain confidential material about their clients and have responded by imposing safeguards to prevent excessive, premature, and unnecessary use of this dangerous investigative tool. These safeguards provide valuable guidance for this Court's exercise of its authority under Rule 17(c) of the Federal Rules of Criminal Procedure in reviewing whether the challenged subpoenas are unreasonable or oppressive.

Here, such a review demonstrates that the Independent Counsel's pursuit of information concerning attorney Francis Carter's representation of a client -- documents and testimony obtained or prepared under the aegis of attorney-client and work product privileges -- is unreasonable and oppressive. Although an office of the federal government, the Office of the Independent Counsel failed to follow applicable Department of Justice guidelines that require that attorneys may be subpoenaed on presumably privileged matters only as a last resort, and even then only through subpoenas that are narrowly drawn. In contrast, the Office of the Independent Counsel's investigation has attempted to barge into the attorney-client relationship as a first resort. This is a move not only oppressive to the particular client involved here, but one that poses a significant threat to client confidence in attorneys generally and to the ability of attorneys to provide effective counsel. Furthermore, the subpoenas are far broader than could possibly be justified by the investigation in progress, potentially intruding into unrelated aspects of Mr. Carter's private life and representation of other clients.

Because the subpoenas at issue are premature, and unconscionably broad, this Court should quash them in their entirety, allow the Office of the Independent Counsel to exhaust other

[illegible] if necessary -- to parse a properly focused subpoena in light of privilege concerns.

Finally, it has been reported that the Independent Counsel may invoke the "crime-fraud" exception to the attorney-client privilege as the supposed justification for his effort to obtain confidential communications between Mr. Carter and his client. The crime-fraud exception reportedly will be invoked based on alleged inconsistencies between out-of-court statements by Ms. Lewinsky and an affidavit she filed as a non-party in a civil tort suit. Extending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship. If the government is permitted to rely on evidence of alleged inconsistent statements by a witness in a civil tort suit as a basis to force attorneys to testify against their clients and to divulge client confidences, nothing will be left of the attorney-client privilege.

ARGUMENT

I. The Court Should Quash the Subpoena Under Rule 17(c) as Unreasonable and Oppressive Because it is Premature, Not Narrowly Tailored, and Wholly Destructive of the Attorney-Client Relationship.

A. This Court Has Power Under Rule 17(c) to Quash a Subpoena That Is Unreasonable or Oppressive.

Rule 17(c) of the Federal Rules of Criminal Procedure provides that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." Rule 17(c) applies in the context of grand jury subpoenas. *In re Sealed Case*,

827 F.2d 777-78 (D.C. Cir. 1987) (challenge to authority of Independent Counsel may be raised as basis to quash grand jury subpoenas under Rule 17(c)); *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299-300 (1991) (recognizing that "[t]he investigatory powers of the grand jury are . . . not unlimited" and discussing limits on grand jury subpoenas imposed by Fed. R. Crim. P. 17(c)). In particular, the Court of Appeals has recognized that "'the longstanding principle that the public has a right to every man's evidence' is limited by valid claims of privilege in grand jury proceedings as elsewhere." *In re Sealed Case*, 121 F.3d 729, 756 (D.C. Cir. 1997) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)); *see also United States v. Calandra*, 414 U.S. 338, 343-44, 346 (1974) (while grand jury is "accorded wide latitude," "the grand jury's subpoena power is not unlimited" and "[j]udicial supervision is properly exercised" to protect claims of privilege).

For reasons set forth in the following sections of this memorandum, the Independent Counsel's conduct in this case is antithetical to Department of Justice guidelines, which he legally is obligated to follow, governing the issuance of grand jury subpoenas on attorneys for information relating to the representation of clients. Because the Independent Counsel is subject to no other review or restraint, this Court should look to those guidelines in evaluating whether the extremely broad subpoenas served on Mr. Carter, at the very outset of the grand jury's investigation, are "unreasonable" or "oppressive" within the meaning of Rule 17(c), and whether enforcement of those subpoenas adequately would protect the attorney-client privilege.

B. The Attorney-Client Privilege, and the Attorney-Client Relationship It Protects, Is a Cornerstone of Our Legal System.

The recognition that confidentiality between attorneys and clients is essential for attorneys to perform their functions as advisors and to represent clients in an adversarial system of justice predates this country. The attorney-client privilege is the oldest evidentiary privilege concerning confidential communications in the common law and was unquestioned at least as early as the sixteenth century. *See* 8 J. Wigmore, *Evidence* § 2290 & n.1 (1961). In protecting such confidences from discovery, England and later the United States recognized that: "Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much." *Pearse v. Pearse*, 63 Eng. Rep. 950, 957 (1846) (Vice-Chancellor Knight Bruce).

The Supreme Court recognized long ago that preserving such confidences serves "the interest and administration of justice." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). "[S]ound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant," *id.* at 390-91, the lawyer needs "to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* at 389 (citation and quotation omitted).

The Supreme Court has long recognized that clients will provide the factual background their lawyers need to advise and represent them only "when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. at 470. If clients know that their lawyers can be forced to disclose client confidences, they "would be reluctant to confide" and it

would be difficult for them to obtain proper legal advice. *Fisher v. United States*, 425 U.S. 391, 403 (1976). Empirical evidence supports the Court's conclusions. *See, e.g.*, Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 Yale L.J. 1226, 1262 (1962); Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 Am. Soc. Rev. 144, 150-51 (1978).

In addition, a lessened ability to protect client confidences can be expected to lead lawyers to be less aggressive in eliciting information from their clients, in order to protect them from possible disclosure later. *See Development in the Law: Privileged Communications*, 98 Harvard L. Rev. 1450, 1476-77 (1985). Lawyers will insulate themselves from all but the bare minimum of information that appears from a distance to be necessary, which increases the risk that they will provide incorrect advice or ineffective representation. *See Stern, supra* n.1, at 1794-95.

Undermining lawyers' abilities to be effective guides through the increasingly complex legal system and strong advocates in an adversarial system disserves not only their clients but the "broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. For example, in addition to unbalancing the adversarial process, it also hampers lawyers' role in encouraging lawful behavior. By pointing out the consequences and alternatives, attorneys often are able to persuade their clients to follow a legal rather than an illegal course of action. This is not possible, however, if clients are not willing to disclose their plans and attorneys are hesitant actively to interrogate them. *See, e.g., United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950). Even worse, the decisions about

whether and what to confide must be made by clients with little understanding of the law, and the decisions about what to ask must be made by lawyers with little knowledge of the facts.[2]

That prosecutors may, on limited and carefully scrutinized occasions, subpoena attorneys for evidence about their clients places a strain on the attorney-client relationship. Permitting them to do so without restraint is antithetical to that relationship and the legal system based upon it. As the Supreme Court has recognized, "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The effect on the general public is of particular concern here because of the extraordinary coverage that each aspect of this particular grand jury proceeding is receiving from both broadcasting and print media, day after day, detail after detail. If this subpoena is permitted to be enforced, there will be few households and businesses in this country that escape the lesson that they should be wary of confiding in lawyers because lawyers' allegedly confidential files and knowledge are, and are permitted to be, the government's investigatory weapon of choice.

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[2]Related interests underlie the protection ordinarily provided attorneys' own materials under the work product doctrine. Just as the attorney-client privilege encourages the client to communicate candidly with counsel so as not to compromise the quality of legal services, the work product doctrine encourages thorough preparation by the lawyer. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Thus, the government must not be permitted to subpoena an attorney in order to "embark on a general fishing expedition into the files of [counsel] mainly to satisfy itself that nothing has been overlooked." *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 936 (6th Cir. 1980).

C. In Order to Safeguard the Attorney-Client Privilege and the Attorney-Client Relationship, Prosecutors Are Subject to Rigid Guidelines Before They May Subpoena an Attorney for Information Relating to Client Representations.

It is widely recognized that it is necessary to tread cautiously before compelling an attorney to divulge client confidences. What may be reasonable with respect to an ordinary fact witness is not reasonable when attorneys are subpoenaed to provide evidence about their clients. Thus, the Department of Justice, recognizing that federal prosecutors had sharply increased efforts to subpoena attorneys and that the issuance of such subpoenas had a deleterious effect on attorney-client relationships, concluded more than a decade ago that it must "exercise close control" over the choice to use such methods. Department of Justice, United States Attorneys' Manual § 9-2.161(a). The Department adopted internal guidelines on the issuance of grand jury or trial subpoenas to attorneys for information relating to their representation of clients, and it provided that these guidelines "shall be adhered to by all members of the Department in any matter involving a grand jury or trial subpoena." *Id.*

A key requirement is that no subpoena may be issued to an attorney for information about a client unless "[a]ll reasonable attempts [have been] made to obtain information from alternative sources." *Id.* at § 9-2.161(a)(B). In addition, no subpoena may be issued without the "express authorization" of the Assistant Attorney General of the Criminal Division. *Id.* at § 9-2.161(a)(D). The Assistant Attorney General, intended to act as a restraint on over-zealous prosecutors in the Department, is directed to prevent such subpoenas in connection with a criminal investigation or prosecution unless there are "reasonable grounds to believe that a crime has been or is being committed," the information sought is "reasonably needed for the successful completion of the investigation or prosecution," and "[a]ll reasonable attempts to obtain the

information from alternative sources *shall have proved* to be unsuccessful. *Id.* at § 9-2.161(a)(E)(1)-(4) (emphasis added). The Department, therefore, plainly intends its prosecutors to have exhausted alternative methods of obtaining needed information *before* issuing a subpoena to an attorney about a client's representation.

Further, the Department specifies not only that the "subpoena must not be used to obtain peripheral or speculative information," *id.* at § 9-2.161(a)(E)(1), but also that it must be "narrowly drawn and directed at material information regarding a limited subject matter" and cover "a reasonably limited period of time." *Id.* at § 9-2.161(a)(E)(5).

The Department's guidelines are directly relevant to the prosecutorial standards exercised by the Office of the Independent Counsel because Congress has provided that independent counsels must comply with established policies of the Department of Justice, except where doing so is inconsistent with their independent role. *See* 28 U.S.C. § 594(f)(1).[3] Thus, the Office of the Independent Counsel need not obtain clearance from the Assistant Attorney General before issuing subpoenas, because its choices must remain independent. However, Congress did intend the Independent Counsel to adhere to the substantive provisions, including the proscription against subpoenaing lawyers before other avenues have been exhausted and the requirement that subpoenas be narrowly drawn.

The Department of Justice's view that the unrestrained issuance of subpoenas to attorneys is unreasonable and unwise is by no means unique. Commentators, courts and the Bar have

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[3]The statute provides: "An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws."

expressed grave concerns for the potential for prosecutorial abuse presented by a prosecutor's ability to subpoena attorneys about clients. A committee of the American Bar Association concluded that the "unregulated power to subpoena attorneys also carries with it the potential for mischief inherent in any situation where one adversary can pummel his opponent without violating the rules," and it recommended judicial supervision of the decision to issue such a subpoena. ABA, Report to the House of Delegates 6 (Feb. 1986). Commentators also have observed that "prosecutors may use attorney subpoenas simply to fish for information or to gain a tactical advantage,"[4] and courts have undertaken supervisory measures, noting the "potential for abuse" engendered by the "natural tendencies promoted by adversarial postures."[5]

Concerns about abuse have led a number of states to require prosecutors to obtain prior judicial approval before subpoenaing an attorney to provide evidence about a client. *See, e.g.*, Massachusetts Supreme Court Rule 3:08 (Prosecution Function 15); Rhode Island Rules of Professional Conduct 3.8(f); Pennsylvania Rules of Professional Conduct 3.10; Tennessee Supreme Court Rule 8; New Hampshire Rules of Professional Conduct Rule 4.5; and Rules of Supreme Court of Virginia 3A:12(a). Similar concerns led the American Bar Association to pass resolutions calling for review of proposed grand jury subpoenas of attorneys under standards that would preclude such subpoenas unless the information sought was essential, not privileged, and unavailable through any feasible alternative methods -- a conclusion the prosecutor was

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[4]Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 Minn. L. Rev. 917, 924 (April 1992).

[5]*United States v. Klubock*, 832 F.2d 649, 654 (1st Cir.), *vacated*, 832 F.2d 664 (1st Cir. 1987) (*en banc*) (affirming panel decision by equally divided court).

permitted to make only after unsuccessfully making all reasonable attempts to obtain the information elsewhere. Stern, *supra n.1*, App. D at 1835. More recently, the ABA has addressed these concerns through its Model Rules of Professional Conduct, adding a new rule "intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship." ABA Model Rules of Professional Conduct Commentary to Rule § 3.8(f) as reprinted in Geoffrey C. Hazard, Jr. & W. William Hodes, the 2d ed. Law of Lawyering at App. 1 at 1063 (1996 Supp.). The ABA Model Rule provides that a prosecutor should not subpoena an attorney to provide evidence about a client unless the prosecutor reasonably believes the information sought (1) is essential, (2) is not privileged, and (3) cannot be obtained elsewhere.

Underlying the Department of Justice Guidelines, state rules, and ABA efforts, is the shared understanding that unlimited use of the subpoena power to compel attorneys to give evidence about their clients will materially discourage communications between lawyers and clients -- and that driving that wedge between lawyer and client will have profound effects on the reliability of outcomes under our adversarial justice system, on the quality of legal advice available, and on the ability of the public to navigate, absent that advice, through the increasingly complex legal environment.

D. This Court Should Consider the Department's Guidelines in Evaluating Whether the Subpoenas Here Are Unreasonable or Oppressive, and Should Conclude That They Are.

In evaluating whether the broad subpoenas served on Mr. Carter, at the very outset of the grand jury's investigation, are unreasonable or oppressive within the meaning of Rule 17(c), this Court should look to the Department of Justice guidelines. The Department of Justice

guidelines, and Congress' intention that independent counsels should abide by them, provide this Court with carefully considered and relevant substantive standards to weigh in exercising its independent duty under Rule 17(c). Moreover, this Court's review under Rule 17(c) provides the only review or restraint on subpoenas issued by the Independent Counsel because his office is exempt from the normal, mandatory review ordinarily required of the Assistant Attorney General of the Criminal Division.

The subpoenas at issue here are plainly unreasonable and oppressive. In issuing its broad, all-inclusive subpoenas at the outset of this investigation, the Office of the Independent Counsel has demonstrated complete indifference to the effect of its actions on the attorney-client privilege and the integrity of the attorney-client relationship. Its attempt here to breach attorney-client confidentiality before other sources of information have been explored fully is unreasonable and oppressive for that reason alone. It appears that the original subpoena *duces tecum* was served on Mr. Carter before a single witness was heard by the grand jury, and long before other avenues of investigation were exhausted. This intrusion on attorney-client confidentiality is not necessary. The grand jury may well obtain whatever information actually is germane to its investigation from other sources, without this Court needing to address whether clearly applicable privileges can be pierced, and -- even more importantly -- without this Court sending a message to every client and potential client that embarrassing or even incriminating information confided to their attorneys might, without warning, be disclosed to federal prosecutors. It is clear that the Department of Justice finds such conduct unreasonable and oppressive, as demonstrated by its requirement that subpoenas should not be issued to attorneys demanding evidence relating to the representation of clients unless all reasonable attempts have been made to obtain information

from alternative sources and those attempts have proved unsuccessful. Department of Justice, United States Attorneys' Manual § 9-2.161(a)(B) &(E)(3).[6]

Further, the subpoenas are unreasonably over broad. The subpoena *duces tecum* asks for every document related in any way to Mr. Carter's representation of Ms. Lewinsky, for documents referring to travel in limousines whether related to Ms. Lewinsky or not, and for every document referring to sixteen other people whether related to Ms. Lewinsky or not. The subpoena *ad testificandum* includes no identification of subject matter and therefore no limitations whatsoever. Again, the Department's guidelines provide this Court with an additional tool to measure what is reasonable here in light of the high risks involved. The Department has determined that subpoenas to attorneys demanding information relating to the representation of clients should be narrowly drawn and directed at material information concerning a limited subject matter. *Id.* at § 9-2.161(a)(E)(5).

It may be that the Office of the Independent Counsel finds it more convenient to subpoena confidential attorney-client communications as an initial rather than a last resort, and to rummage freely through confidential attorney files, but "such considerations of convenience do not overcome the policies served by the attorney-client privilege." *Upjohn*, 449 U.S. at 396.

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[6]In the Department's view, it would be reasonable to depart from this criterion only if obtaining information from alternative sources would compromise a criminal investigation or impair the ability to obtain the information from the attorney later. *Id.*, § 9-2.161(a)(B). Neither situation obtains here. The Office of the Independent Counsel plainly believes that attempting to gather this information from alternative sources will not compromise its investigation because, at least according to reports in the press, that office *already is doing so*. Second, there is certainly no basis to assert that any information that now exists will not still be available after the Independent Counsel has pursued other sources and is in a position to determine what -- if anything -- remains to be learned.

Reasonableness is the standard this Court must apply, not prosecutorial convenience. *Amici* urge this Court to apply that reasonableness standard and to quash these subpoenas.

II. The Crime-Fraud "Exception" to the Attorney-Client Privilege Must Not Be Allowed to Eviscerate the Rule, and Does Not Appear to Apply in This Case.

It has been reported that the Independent Counsel may invoke the "crime-fraud" exception as its justification to invade the attorney-client relationship. In the event that issue is raised in these proceedings, *amici* urge the Court to guard carefully against evisceration of the attorney-client relationship based on an improper expansion of that exception.

The basic contours of the crime-fraud exception are well established. Communications otherwise protected by the attorney-client privilege are not protected if they are made in furtherance of a crime or fraud. *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) [hereinafter cited as *Sealed Case II*]. The government bears the burden of proof, and must make a prima facie showing, akin to probable cause,[7] of a violation "sufficiently serious" to defeat the privilege. *Id.* at 399 & n.3. The government further must establish a relationship between the communications and the prima facie violation. *Id.* at 399.

The most important principle this Court must apply if the crime-fraud exception is raised in this proceeding is that the alleged crime or fraud *"must be of sufficient weight to warrant abridgement of the privilege."* *In re Sealed Case*, 676 F.2d 793, 814 n.84 (D.C. Cir. 1982) (emphasis added) [hereinafter *Sealed Case I*]. This means that "*'[n]o court should order*

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[7] The government must offer evidence that "if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." *Sealed Case II*, 754 F.2d at 399 (citation omitted).

disclosure . . . if the disclosure would traumatize the adversary process more than the underlying legal misbehavior.'" *Id.* (emphasis added and citation omitted).

This appears to be precisely such a case. *Amici* understand that Ms. Lewinsky retained Mr. Carter to assist in filing an affidavit in a civil proceeding to which Ms. Lewinsky was not a party. It has been reported that there are allegations that this third-party affidavit is inconsistent with prior out-of-court statements made by Ms. Lewinsky. Application of the crime-fraud exception in these circumstances would be unprecedented and unwarranted. The Court should be deeply concerned about fashioning a rule that would permit the government to force an attorney to appear as a witness against his or her client, and to breach otherwise privileged communications and work product, where the alleged crime is based on prior inconsistent statements by an affiant in a civil proceeding.

To apply the crime-fraud exception under these reported circumstances would gut the attorney-client privilege and the work product doctrine in an overwhelming number of garden-variety civil and criminal cases. What lawyer has not challenged a witness with inconsistencies between deposition testimony and trial testimony, or inconsistencies between grand jury testimony and trial testimony? How many cases involve inconsistencies between statements a witness made to an investigator or a third party and statements the witness made in an affidavit or deposition, or inconsistencies between documents produced in discovery and the facts presented in a witness's sworn testimony? In each instance a crime potentially has been committed (perjury or false statements). But if inconsistent testimony is sufficient to invoke the crime-fraud exception, then forcing an attorney to testify against his or her client will become the

rule, rather than an exception that previously has existed only for cases of widespread criminal activity.

Sealed Case II illustrates the type of serious, widespread criminal activity -- and the quantum of evidence -- that properly justifies application of the crime-fraud exception. In that case, the court applied the crime-fraud exception based on prior findings of fact by two district courts. Two courts had found overwhelming evidence of "a pervasive and systematic scheme to destroy or alter subpoenaed evidence" -- a scheme in which attorneys "assisted [the defendant] in carrying out its illegal and fraudulent scheme." 754 F.2d at 400, 402. Indeed, the attorneys had acted as "front men" in the widespread scheme to destroy evidence and subvert the entire judicial process. *Id.* at 402. The evidence of significant and continuing criminal activity in *Sealed Case II* included:

- a sworn declaration by a party to the crime admitting destruction of subpoenaed evidence;
- a sworn declaration by a second party to the crime admitting destruction and alteration of evidence;
- prior findings of a district court, after hearing substantial testimony and reviewing evidence, that the organization had engaged in a "willful, deliberate and purposeful scheme to . . . destroy extensive amounts of evidence . . . [and] cover up and conceal this destruction of evidence and discoverable materials by giving false testimony in deposition and before [the] Court"; and
- prior findings of a second judge that the organization had engaged in "willful, systematic, and extensive destruction and alteration of documents" amounting to "egregious misconduct."

Id. at 398-400. The second judge emphasized that the criminal conduct was *"[m]ore than mere fraud between the parties, or an isolated instance of perjury,"* and was instead a widespread and continuing plan carried out through multiple judicial proceedings. *Id.* at 400 (emphasis added).[8]

The question is not whether perjury or obstruction of justice can ever be used to satisfy the crime-fraud exception -- courts already have so held -- but whether the attorney-client privilege should be eviscerated, and attorneys turned into witnesses against their clients, based on probable cause that testimony by a witness in a civil proceeding may be false. Unlike in *Sealed Case II* and other cases in which the crime-fraud exception has been applied, Ms. Lewinsky's involvement as a third party in a civil tort suit does not involve "more than mere fraud between the parties, or an isolated instance of perjury," even assuming the truth of the allegations. *Amici* are not aware of any court applying the crime-fraud exception to a similar factual scenario. If the crime-fraud exception can be invoked under these reported facts, it will become commonplace for attorneys to be called to testify against their clients. The long-standing practice of using prior inconsistent statements to impeach a witness will become a tool for destroying the attorney-client relationship and for forcing attorneys to testify against their clients.

The ramifications of extending the crime-fraud exception to this type of case are clear. Instead of advising prospective and existing clients that attorney-client communications will be kept in the strictest confidence, attorneys will have to warn their clients that if evidence

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[8] Similarly, *Sealed Case I* involved widespread bribery of foreign officials, illegal campaign contributions, and a conspiracy to defraud the government by submitting false information to both the IRS and the SEC. 676 F.2d at 813.

contradicting any of the client's testimony is developed, as often occurs, the attorney can be called to testify against the client and disclose the confidence.

The crime-fraud exception simply was never intended to be applied in this type of case. This Court should conclude that application of the crime-fraud exception in this case clearly would "traumatize the adversary process more than the underlying legal misbehavior." *Sealed Case I*, 676 F.2d at 814 n.84. At a minimum, the Court should determine that adequate protection *against* that potential trauma was not provided by the Independent Counsel's decision here to proceed in the first instance with a subpoena directed to counsel, without exhausting other alternatives.

CONCLUSION

For the reasons discussed above, this Court should quash the subpoenas in their entirety and leave to another day -- if necessary -- the task of reviewing a narrowly drawn subpoena, limited to evidence not privileged and not available from others.

Respectfully submitted,

David W. DeBruin
Bar No. 337626
Jerome L. Epstein
Nory Miller
JENNER & BLOCK
601 13th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 639-6000

Counsel for

National Association of
Criminal Defense Lawyers
1025 Connecticut Ave., N.W.
Suite 901
Washington, D.C. 20036

District of Columbia Association of
Criminal Defense Lawyers
2500 Q Street, N.W. # 725
Washington, D.C. 20007-4373

February 18, 1998

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS :
:
DUCES TECUM #D902 : Misc. No. 97-068
:
AD TESTIFICANDUM #D937 : **(Filed Under Seal)**
:
:

FILED

FEB 19 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the Motion to Seal and Points and Authorities in Support Thereof, it is this 19th day of February, 1998,

ORDERED, that the Motion to Seal is **GRANTED**. The clerk is directed to file the attached Motion to Quash and Memorandum in Support and attachments under seal.

Norma Holloway Johnson
Chief Judge

cc: Charles J. Ogletree, Jr., Esquire
Jamie S. Gardner, Esquire
Harvard Law School
320 Hauser Hall
Cambridge MA 02138

Paul Rosenzweig, Esquire
Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 - North
Washington, D.C. 20004

Nathaniel Speights, Esquire
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

William Ginsburg, Esquire
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles CA 90067

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY INVESTIGATION

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
FEB 20 1998
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the unopposed motion of the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers for leave to file an amici curiae brief, it is this 20th day of February 1998,

ORDERED that the motion for leave to file an amici curiae brief be, and hereby is, granted.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68
	)	
	)	(Under Seal)

OPPOSITION OF THE UNITED STATES
TO MOTION TO QUASH SUBPOENAS

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this opposition to Francis D. Carter's motion to quash two subpoenas that District of Columbia Grand Jury 97-2 issued to him. Mr. Carter contends that the Court must quash the subpoenas because they violate the attorney-client privilege, the work product privilege, the privilege against compelled self-incrimination, the U.S. Attorneys' Manual, and other privileges and policies.

The Court should deny Mr. Carter's motion and compel him to comply with the subpoenas. Evidence we are submitting in camera demonstrates plainly that the crime-fraud exception applies. That well-established exception extinguishes the attorney-client and work product privileges. In addition, Ms. Lewinsky waived the privileges by disclosing her confidential communications with Mr. Carter to a third party. Further, the subpoenas do not invade Ms. Lewinsky's Fifth Amendment rights; they are not overbroad or unreasonable; and they fully comply with Justice Department policies.

I. Background

In late 1997, Monica Lewinsky received a subpoena to produce items and to testify in Paula Jones v. William Jefferson Clinton, a civil matter pending in the Eastern District of Arkansas. Vernon Jordan, who was helping Ms. Lewinsky find a new job, recommended that she retain Francis Carter to represent her regarding the subpoena and deposition.[1]

Mr. Carter helped her prepare an affidavit, which she signed under penalty of perjury on January 7, 1998. On January 16, Ms. Lewinsky filed the affidavit in the Jones case as an exhibit to a motion to quash the subpoena seeking her deposition. (Exhibit A.) The affidavit states in relevant part:

> I have never had a sexual relationship with the President, [and] he did not propose that we have a sexual relationship. . . . The occasions that I saw the President after I left my employment at the White House in April, 1996, were official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time. There were other people present on those occasions.

On motion of the Attorney General, the Special Division of the United States Court of Appeals for the District of Columbia Circuit expanded the jurisdiction of the Office of the Independent Counsel ("OIC") on January 16 to include "authority to investigate . . . whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses or otherwise

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[1] By late January 1998, Mr. Carter no longer represented Ms. Lewinsky.

violated federal law . . . in the civil case Jones v. Clinton." Order (D.C. Cir., Spec. Div., Jan. 16, 1998).

On February 2 and February 9, 1998, as a part of that investigation, the grand jury issued two subpoenas to Mr. Carter. Subpoena duces tecum #D902 demands items relating to Mr. Carter's representation of Monica Lewinsky. Subpoena ad testificandum #D937 demands his testimony. Mr. Carter responded with the present motion.

II. Argument

Grand jury subpoenas enjoy a presumption of validity. "Nowhere is the public's claim to each person's evidence stronger than in the context of a valid grand jury subpoena." In re Sealed Case, 676 F.2d 793, 806 (D.C. Cir. 1982) (footnote omitted).

Mr. Carter contends that the subpoenas must be quashed because they violate attorney-client privilege, work product protection, the Fifth Amendment, and Justice Department policy, and because they are fatally overbroad. Each of these contentions lacks merit. The crime-fraud exception voids both attorney-client privilege and work product protection; in addition, Ms. Lewinsky's disclosures to third parties waive these protections. The objects sought by the subpoena duces tecum do not implicate the Fifth Amendment. The subpoenas comply with Justice Department policy, which in any event confers no enforceable rights on subpoenaed parties. The subpoenas are

reasonable in scope. Accordingly, the motion to quash should be denied.

A. Movant Cannot Withhold Non-Privileged Material.

We begin by noting the broad-brush approach that characterizes the motion. Movant implies that every document sought by the subpoena duces tecum implicates a privilege. He makes no effort to distinguish privileged matters from nonprivileged ones.

The courts have resoundingly rejected such categorical invocations of privilege. "[B]lanket assertions of privilege . . . are extremely disfavored." Salas v. United States, 695 F.2d 359, 362 (9th Cir. 1982). In litigation over taped White House conversations, for example, the D.C. Circuit rejected President Nixon's conclusory privilege claims: "[I]t is preposterous to contend that all of the conversations are equally privileged under all of the alleged privileges." Dellums v. Powell, 642 F.2d 1351, 1361 (D.C. Cir. 1980). The court stated that the case law makes it "abundantly clear" that any privilege claim "must be made with particularity." Id. at 1363.[2]

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[2] Other cases in the Circuit reach the same conclusion. See Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973) (agency seeking to withhold material in FOIA case must specify objections document by document, lest "lack of knowledge by the party seeking disclosure seriously distort[] the traditional adversary nature" of legal system); Resolution Trust Corp. v. Lopez, 794 F. Supp. 1, 2 (D.D.C. 1992) ("blanket assertions of the [Fifth Amendment] privilege are disfavored"); United Mine Workers v. Arch Mineral Corp., 145 F.R.D. 3, 7 (D.D.C. 1992) (blanket assertion of attorney-client privilege is "unacceptable"); Securities & Exch. Comm'n v. Gulf & Western Inds., 518 F. Supp. 675, 682 (D.D.C. 1981) (same).

In place of the sort of broad claims that Movant advances, the courts require an objecting witness to submit a privilege log that specifies, document by document, the privilege invoked and the justification for asserting it. Compiling such a log may be "time-consuming" but "it must be done" if a court is to evaluate the privilege invocations. Dellums v. Powell, 642 F.2d at 1360. In circumstances such as these, "the proper procedure is for [Movant] to compile a privilege log." Potomac Elec. Power Co. v. California Union Ins. Co., 136 F.R.D. 1, 3 (D.D.C. 1990). See also Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1516 (D.C. Cir. 1993); Director of the Office of Thrift Supervision v. Ernst & Young, 795 F. Supp. 7, 12 (D.D.C. 1992).

One case parallels the facts here. In Byers v. Burleson, 100 F.R.D. 436 (D.D.C. 1983), an attorney claiming attorney-client and work product privileges refused to attend a deposition or to produce subpoenaed records. The court agreed with the attorney that the privileges could well apply to "much" of the subpoenaed information, but said that they would not cover all of it. Id. at 438. Accordingly, "this assertion of a blanket claim of privilege is unwarranted. A party who asserts a privilege in response to a notice of deposition should attend the deposition and submit to the court for resolution any matters which allegedly violate the privilege." Id. at 439. See also In re Klein, 776 F.2d 628, 634 (7th Cir. 1985) (subpoenaed lawyer must assert any privileges "one document at a time").

The subpoena here plainly seeks material outside the attorney-client and work product privileges. Information relating to an attorney's fees is unprivileged. See In re Grand Jury Subpoena Served Upon John Doe, Esq., 781 F.2d 238, 247 (2d Cir. 1986) (en banc); In re Grand Jury Proceedings (John Doe, Esq.), 602 F. Supp. 603, 606 (D.R.I. 1985). So are telephone records or diaries reflecting the fact that attorney-client meetings occurred. See United States v. Weger, 709 F.2d 1151, 1153 (7th Cir. 1983) (information regarding form of communications with attorney are not privileged, only substance). Thus even in the absence of crime-fraud and waiver, Mr. Carter would be obliged to convey some documents and answer some questions.

Movant submits that "an index could be provided to the Court and counsel expeditiously" (Mem. at 19 n.13), but asserts that he has not done so yet because he has been "expressly direct[ed] by Ms. Lewinsky not to reveal any document in his possession relating to her or her case" (id. at 18). A client's instructions, however heartfelt, cannot overcome the law. Accordingly, Movant should produce all unprivileged documents and items; for each that he wishes to withhold, he should disclose the nature of the document or item, the particular privilege asserted, and the grounds for the privilege. He should also testify before the grand jury, invoking privileges -- and, if necessary, litigating them -- only where applicable.

B. Attorney-Client Privilege Does Not Bar Testimony or Production.

Movant maintains that the attorney-client privilege flatly bars him from testifying or producing documents. (Mem. at 19-21.) Movant fails to take into account the crime-fraud exception and waiver.

Because privileges obstruct the judicial truth-finding process, they are narrowly construed. In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979). Here, the privilege claim is defeated by two independent doctrines: crime-fraud and waiver.

1. Crime Fraud

Attorney-client privilege promotes full disclosure between client and attorney under ordinary circumstances, but "[t]he relationship between client and counsel may . . . be abused." In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997). The crime fraud exception limits the privilege when the "privileged relationship is used to further a crime, fraud or other fundamental misconduct." In re Sealed Case, 676 F.2d 793, 807 (D.C. Cir. 1982). The doctrine applies where the client made or received an otherwise-privileged communication with the intent to further an unlawful act, and proceeded to carry out the intended act. Sealed Case, 107 F.3d at 49. In such circumstances, the privilege "vanish[es]." Sealed Case, 676 F.2d at 807.

It bears emphasis that the courts ordinarily look to the client, not to the lawyer, for the requisite scienter and

actions. The attorney need not know or even suspect the client's planned wrongdoing. Id. As the D.C. Circuit has explained:

> [A] guilty client may not use the innocence or ignorance of its attorney to claim the court's protection against a grand jury subpoena. Unless the blameless attorney is before the court with an independent claim of privilege, the client's use of an attorney's efforts in furtherance of crime or fraud negates the privilege.

Sealed Case, 676 F.2d at 812 (footnote omitted); see also Grand Jury Proceedings, 102 F.3d at 751; In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996); In re Grand Jury Proceedings, 680 F.2d 1026, 1028 (5th Cir. 1982).

To establish the applicability of the crime-fraud exception, the United States must make out a prima facie case. Sealed Case, 107 F.3d at 49. "The government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." Id. at 50 (citation omitted).

An amicus in this proceeding, the National Association of Criminal Defense Lawyers, advances the argument that perjury is too trivial to give rise to the crime-fraud exception. (Amicus at 17.) This remarkable contention finds no support in case law. See, e.g., In re Grand Jury Proceedings, 835 F.2d 237, 237-38 (10th Cir. 1987) (applying crime-fraud to perjury in civil litigation); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (applying crime-fraud to perjury in criminal investigation). As the Supreme Court has emphasized: "[P]erjury is as much a crime as tampering with witnesses or jurors by way

of promises and threats, and undermines the administration of justice." Nix v. Whiteside, 475 U.S. 157, 169 (1986).

The false affidavit here, moreover, was not a mere incidental aspect of the attorney's representation of the client. It was a principal task for which Ms. Lewinsky hired Mr. Carter.

Consistent with general practice,[3] the OIC is submitting evidence relating to the crime-fraud exception (as well as waiver), some of which is covered by Rule 6(e), in camera.

The submission demonstrates that Ms. Lewinsky used Mr. Carter's advice to commit a crime. The evidence shows that Ms. Lewinsky repeatedly stated her intention to lie in the affidavit she planned to submit in the civil proceeding. She spoke of working with Mr. Carter to compose this affidavit. When it was completed, she signed the affidavit under penalty of perjury. The evidence discloses that the affidavit is materially false and that it was used to obstruct justice. Because the evidence demonstrates the elements of a crime or fraud, the crime-fraud exception applies. In re Sealed Case, 754 F.2d at 399.[4]

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[3] See, e.g., In re Grand Jury Subpoena, 884 F.2d 124, 126 (4th Cir. 1989) (citing In re Antitrust Grand Jury, 805 F.2d 155, 168-69 (6th Cir. 1986); In re Grand Jury Proceedings, 708 F.2d 1571, 1576 (11th Cir. 1983); In re Sealed Case, 676 F.2d 793, 814 (D.C. cir. 1982); In re Berkley & Co., Inc., 629 F.2d 548, 553 (8th Cir. 1980); In re Grand Jury Proceedings, 604 F.2d 798, 800 (3d Cir. 1979); In re September 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1978)).

[4] In determining whether the crime-fraud exception applies, the Court can examine Mr. Carter's documents in camera if necessary. United States v. Zolin, 491 U.S. 554, 556-57 (1989).

2. Waiver

Even if Ms. Lewinsky's criminal activity did not dissolve her attorney-client privilege, the grand jury would still be entitled to learn about the representation because Ms. Lewinsky waived her privilege.

Unless attorney-client confidences are conscientiously protected, the privilege is held to be waived. As Judge Silberman has warned:

> [T]he confidentiality of communications covered by the [attorney-client] privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. ... In other words, if a client wishes to preserve the privilege, it must treat the confidentiality of the attorney-client communications like jewels -- if not crown jewels.

In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989).

A waiver's scope extends to "to all other communications relating to the same subject matter." Sealed Case, 676 F.2d at 818; see also In re Sealed Case, 29 F.3d 715, 719-20 (D.C. Cir. 1994). Determining what constitutes a waived subject matter "depend[s] heavily on the factual context in which the privilege is asserted." Sealed Case, 877 F.2d at 982.

Given Ms. Lewinsky's disclosures to third parties here, the most reasonable definition of the waived subject matter appears to be Movant's entire representation. This is so because Ms. Lewinsky freely disclosed her communications with Movant concerning her response to the subpoena in the civil case -- and

that was a principal purpose for which she had retained Mr. Carter.

C. Ms. Lewinsky Has No Attorney Work-Product Privilege.

Mr. Carter bases his second objection to the subpoenas on the attorney work-product privilege. Again, both the crime-fraud exception and waiver defeat Mr. Carter's claim.

The attorney work-product privilege, which is broader though less absolute than attorney-client privilege, see Sealed Case, 107 F.3d at 51, can be pierced. "Every circuit which has considered the question has held or assumed that the crime-fraud exception applies to the work product privilege." Sealed Case, 676 F.2d at 811 n.67. "The privilege derived from work-product is not absolute. Like other qualified privileges, it may be waived." United States v. Nobles, 422 U.S. 225, 239 (1975). See also Sealed Case, 676 F.2d at 811 n.67; In re United Mine Workers of America Employee Benefits Plants Litig., 159 F.R.D. 307 (D.D.C. 1994). Again, the client's disclosure of information about a given topic waives the entire subject matter, including, for example, underlying internal documentation. See Nobles, 422 U.S. at 239-40.

Mr. Carter's failure to provide a privilege log makes any concrete discussion of work-product privilege difficult. However, Mr. Carter has identified three categories of information that the work-product doctrine protects: first, "people Mr. Carter spoke to and information he received in the course of conducting factual and legal investigation"; second,

"documents that reveal strategies or decisions by Mr. Carter in the course of his representation," including "communications between Mr. Carter and Nathaniel Speights, one of Ms. Lewinsky's current attorneys"; and third, other factual material in the file. (Mem. at 25.)

Each of these categories is linked to the underlying criminal or fraudulent acts -- namely, the false affidavit and the efforts to obstruct justice. Mr. Carter does not suggest that any of the information relates to any other purpose. Accordingly, the crime-fraud exception applies.

Moreover, just as Ms. Lewinsky waived her attorney-client privilege, she waived her work-product privilege by discussing the representation -- including the affidavit that Mr. Carter drafted -- with third parties. The waiver should be construed as covering the pertinent "subject matter" -- the single subject for which Ms. Lewinsky retained Mr. Carter, her response to the subpoena in the civil case. Accordingly, work product protection is inapplicable.[5]

D. The Fifth Amendment Is Not A Bar.

Mr. Carter claims that enforcing the subpoena duces tecum would violate the Fifth Amendment. He represents that Ms. Lewinsky turned over to him particular objects in connection with the subpoena to her in the civil case. Movant maintains that the

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[5] If Mr. Carter wishes to argue that he created work-product unrelated to Ms. Lewinsky's crimes or frauds, the court ought to require him to provide all work-product documents to the Court so it may assess whether there is a basis for withholding this evidence from the grand jury.

items (or documents reflecting their existence) could incriminate his former client. (Mem. at 26-27.) This contention lacks merit.

The Supreme Court has established that an attorney cannot directly invoke a client's privilege against compelled self-incrimination, but -- to much the same end -- can raise the client's privilege indirectly through assertion of attorney-client privilege. Two prerequisites must be shown. First, the client must have provided the materials "for the purpose of obtaining legal advice." Fisher v. United States, 425 U.S. 391, 405 (1976). Second, the client must be in a position that, if the materials remained in his possession, he could raise a valid Fifth Amendment claim. In such circumstances, "the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney." Id.

The question, then, is whether the OIC could have subpoenaed the items from Ms. Lewinsky before she turned them over to Mr. Carter. Movant indicates that the answer is no, because "[w]hether she, in fact, possessed the items demanded in the subpoena in the civil case, or possessed the items but did not intend to produce them, could provide a link in the chain of evidence necessary to prove the potential charges against her." (Mem. at 27.)

That contention, however, misstates the applicable law. Grand juries routinely subpoena "link[s] in the chain of evidence necessary to prove . . . potential charges." Id. Indeed,

virtually every subpoena is drafted in hopes of unearthing such a link. The coverage of the Fifth Amendment cannot be so broad.

In truth, the Fifth Amendment bars compelled, self-incriminatory testimony. Had Ms. Lewinsky retained possession of the items, she could have been compelled to turn them over pursuant to subpoena. Under Fisher, it follows that her former attorney can likewise be compelled. Contrary to Movant's contention, his surrender of the items would convey only the information that he possessed them and that they are covered by the subpoena. There will be no statement, implicit or explicit, about why Ms. Lewinsky handed the items over to him, or what she was thinking when she did so. Furthermore, there will be no statement regarding the origin or authenticity of the items.[6]

E. The Subpoenas Are Not Overbroad, Unreasonable or Oppressive.

Mr. Carter also claims the subpoenas are overbroad, unreasonable, and oppressive. These contentions are groundless.

"A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." Branzburg v. Hayes, 408 U.S. 665, 701 (1972). As it sets out on this inquiry, "a grand jury has no catalog of what books and papers exist and are involved . . . nor will it ordinarily have

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[6] At most, production immunity might be appropriate. Such immunity covers the act of producing the items, but not the items themselves. The Supreme Court has held that in some circumstances, the act of production itself may qualify as testimonial. See United States v. Doe, 465 U.S. 605, 612-17 (1984).

any basis for knowing what their character or contents immediately are." Schwimmer v. United States, 232 F.2d 855, 862 (8th Cir. 1956). Consequently, a motion to quash must be denied unless the Court determines that there is "no reasonable possibility" that the materials sought will prove relevant to the grand jury's inquiry. United States v. R. Enterprises, 498 U.S. 292, 301 (1991). Doing so requires a "strong showing." Id. at 300.

Movant has failed to make any showing. The subpoena demands documents relating to Monica Lewinsky, whenever they may have been created, and documents relating to seventeen other individuals which have been created since January 1, 1997. In grand jury practice, these are far from "extraordinarily broad" demands, and they can hardly be considered an attempt to procure "a virtually limitless opportunity to rummage through the files" (Mem. at 17, 29.) The grand jury has reason to believe that documents relating the eighteen named individuals may be relevant. The period of time covered for seventeen of them -- just over a year -- is hardly burdensome. Cf. In re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575, 579 (S.D.N.Y. 1961) (enforcing subpoena seeking documents created over eighteen years).

Movant complains that the government has failed to make any showing that the materials sought will prove relevant. The implication is that some such showing is required -- a notion that the Supreme Court has resoundingly rejected. "[T]he

Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists." R. Enterprises, 498 U.S. at 297. Consequently, Movant's reasonableness and overbreadth arguments fail.

F. There Has Been No "Prosecutorial Misconduct."

In a final effort to avoid compliance with the subpoena, Movant charges this Office with prosecutorial misconduct in two respects: first, by issuing a subpoena to him without following Justice Department guidelines; and, second, by contacting a "represented party," Ms. Lewinsky. Both contentions are without merit.

1. The OIC Did Not Violate DOJ Policy.

Mr. Carter claims that the subpoenas violate DOJ policy. In particular, he maintains that the OIC did not undertake the requisite balancing test before issuing the subpoenas.

Movant is wrong both procedurally and substantively. Procedurally, Justice Department guidelines by their own terms confer no enforceable rights on the recipients of subpoenas or anyone else. See U.S. Attys. Man. § 9-2.161. Accordingly, the courts routinely reject arguments based on alleged violations of the United States Attorneys' Manual. See, e.g., Nichols v. Reno, 124 F.3d 1376 (10th Cir. 1997); United States v. Meyers, 123 F.3d 350 (6th Cir. 1997); In re Grand Jury Subpoena (American Broadcasting Cos.), 947 F. Supp. 1314, 1321-22 (E.D. Ark. 1996).

Substantively, the U.S. Attorneys' Manual stipulates that the Assistant Attorney General of the Criminal Division must authorize subpoenas to attorneys, and that the Assistant Attorney General must take into account particular factors. U.S. Attys. Man. § 9-2.161(a). An Office of the Independent Counsel, of course, is not obliged to seek authorization for subpoenas from the Assistant Attorney General; such a requirement would be inconsistent with the notion of an Independent Counsel, acting in cases where the Justice Department faces a conflict.[7]

Here, Deputy Independent Counsel Robert J. Bittman authorized the subpoenas at issue. When making this decision, Mr. Bittman fully considered each factor set forth in the U.S. Attorneys' Manual. Consequently, Movant's argument fails.

2. The OIC Properly Interviewed Ms. Lewinsky.

Movant also alleges that the OIC improperly contacted Ms. Lewinsky. Representatives of the OIC met with Ms. Lewinsky on January 16, at a time when Mr. Carter represented her in connection with the civil deposition. This contact, Movant contends, violates D.C. Rule 4.2, which restricts contacts with represented persons. For two reasons, this arguments fails.

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[7] See 28 U.S.C. § 594(f) (requiring OIC to comply with DOJ policies "except to the extent that to do so would be inconsistent with the purposes of this chapter"); S. Rep. No. 101, 103d Cong. 1st Sess. 32 (1993) ("[T]he Committee does not intend that independent counsels comply with Department policies which would undermine their independence or hinder their mission. For example, where a Department policy requires the Attorney General's approval of a particular prosecution strategy, an independent counsel may waive compliance as inconsistent with the statute's goal of creating an 'independent' office.").

First, in terms of whether Ms. Lewinsky was a represented party, "[a] 'party' is necessarily a 'party' to something." United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996). Mr. Carter represented Ms. Lewinsky in connection with the civil case in which she had been subpoenaed. The OIC's contact with her concerned criminal matters under investigation -- matters related to but plainly distinct from the Jones deposition. Mr. Carter did not and does not represent her concerning the OIC investigation.

The Comment to D.C. Rule 4.2 covers this situation exactly. It directs:

> This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

Rule 4.2, comment (emphasis added).

Second, even if Mr. Carter had represented Ms. Lewinsky in connection with the criminal investigation, Rule 4.2 and the DOJ guidelines would have justified contact with her. The reason is simple: At the time of the contact, Ms. Lewinsky was not under indictment. As the commentary to the Model version of Rule 4.2 states, "[C]ommunications with represented criminal suspects prior to initiation of formal judicial proceedings as part of a noncustodial investigation by government agents . . . are not considered subject to the anticontact rule." Annotated Model

Rules of Professional Conduct Rule 4.2 comment (1992). The courts, too, have made it clear that Rule 4.2 (or its counterpart) does not apply to noncustodial interviews that occur pre-indictment. United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986); see also Balter, 91 F.3d at 436; United States v. Powe, 9 F.3d 68 (9th Cir. 1993); United States v. Ryans, 903 F.2d 731 (10th Cir. 1990); United States v. Dobbs, 711 F.2d 84 (8th Cir. 1983); United States v. Weiss, 599 F.2d 730 (5th Cir. 1979).[8] By contrast, the case Mr. Carter relies on, United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993), addresses a post-indictment contact.

Mr. Carter makes one other accusation that warrants response. He contends that during the January 16 interview, prosecutors and investigators refused to allow Ms. Lewinsky to telephone him. (Mem. at 15.) As his source, Movant cites a magazine article written by Ms. Lewinsky's criminal defense counsel. (Mem. at 4 & n.2, 15 n.10.) Noticeably absent from Ms. Lewinsky's affidavit, this allegation is completely false. No one prevented Ms. Lewinsky from calling anyone. In fact, Ms. Lewinsky left the hotel room without supervision, made unsupervised telephone calls at will, and returned voluntarily.

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[8] Even the exception to the rule, United States v. Hammad, 858 F.2d 834 (2d. Cir. 1988), holds that pre-indictment contact is authorized unless there is independent misconduct by prosecutors. Mr. Carter has not alleged any such misconduct here, and there was none.

See Declaration of Special Agent Patrick F. Fallon, Jr., Appendix B.

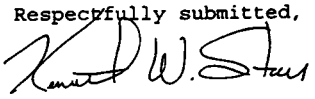
For the reasons above, the court should reject this argument.[9]

III. Conclusion

For the foregoing reason's the Court should deny Mr. Carter's Motion to Quash, and compel him to testify and produce the items called for.

Dated: February 24, 1998

Respectfully submitted,



KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

Sol Wisenberg
Paul S. Rosenzweig
Stephen Bates
Associate Independent Counsels
1001 Pennsylvania Ave, NW
Washington, D.C. 20004

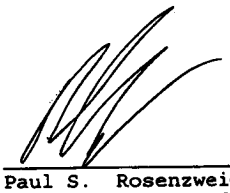
[9] Because the OIC has not violated DOJ policy or ethics rules, there is no basis for the imposition of sanctions that Movant seeks. (Mem. at 2.)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Opposition of the United States to Motion to Quash, was served via facsimile and was mailed, via United States mail, first class postage prepaid, on this the 24th day of February, 1998 to:

Charles J. Ogletree, Jr.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

David W. DeBruin
Jerome L. Epstein
Nory Miller
Jenner & Block
601 13th St., NW
Washington, D.C. 20005



Paul S. Rosenzweig
Associate Independent Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68
	)	
	)	(Under Seal)

ORDER

This Matter having come before the Court on the Motion of Francis D. Carter to quash Grand Jury subpoenas #D902 and #D937. Upon consideration of the motion, the premise there in, and the opposition of the United States, it is hereby,

ORDERED, that Mr. Carter's motion to quash the subpoenas is denied.

Norma Holloway Johnson
United States District Judge

A

AFFIDAVIT OF JANE DOE # 6

1. My name is Jane Doe #6 . I am 24 years old and I currently reside at 700 New Hampshire Avenue, N.W., Washington, D.C. 20037.

2. On December 19, 1997, I was served with a subpoena from the plaintiff to give a deposition and to produce documents in the lawsuit filed by Paula Corbin Jones against President William Jefferson Clinton and Danny Ferguson.

3. I can not fathom any reason that the plaintiff would seek information from me for her case.

4. I have never met Ms. Jones, nor do I have any information regarding the events she alleges occurred at the Excelsior Hotel on May 8, 1991 or any other information concerning any of the allegations in her case.

5. I worked at the White House in the summer of 1995 as a White House intern. Beginning in December, 1995, I worked in the Office of Legislative Affairs as a staff assistant for correspondence. In April, 1996, I accepted a job as assistant to the Assistant Secretary for Public Affairs at the U.S. Department of Defense. I maintained that job until December 26, 1997. I am currently unemployed but seeking a new job.

6. In the course of my employment at the White House I met President Clinton several times. I also saw the President at a number of social functions held at the White House. When I worked as an intern, he appeared at occasional functions attended by me and several other interns. The correspondence I drafted while I worked at the Office of Legislative Affairs was seen and edited by supervisors who either had the President's signature affixed by mechanism or, I believe, had the President sign the correspondence itself.

7. I have the utmost respect for the President who has always behaved appropriately in my presence.

8. I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship. I do not know of any

other person who had a sexual relationship with the President, was offered employment or other benefits in exchange for a sexual relationship, or was denied employment or other benefits for rejecting a sexual relationship. The occasions that I saw the President after I left my employment at the White House in April, 1996, were official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time. There were other people present on those occasions.

9. Since I do not possess any information that could possibly be relevant to the allegations made by Paula Jones or lead to admissible evidence in this case, I asked my attorney to provide this affidavit to plaintiff's counsel. Requiring my deposition in this matter would cause disruption to my life, especially since I am looking for employment, unwarranted attorney's fees and costs, and constitute an invasion of my right to privacy.

I declare under the penalty of perjury that the foregoing is true and correct.

Monica S. Lewinsky

MONICA S. LEWINSKY

DISTRICT OF COLUMBIA, ss:

MONICA S. LEWINSKY, being first duly sworn on oath according to law, deposes and says that she has read the foregoing AFFIDAVIT OF JANE DOE # 6 by her subscribed, that the matters stated herein are true to the best of her information, knowledge and belief.

Monica S Lewinsky
MONICA S. LEWINSKY

SUBSCRIBED AND SWORN to before me this 7th day of January, 1998.

Kathleen M. Grimes
NOTARY PUBLIC, D.C.
My Commission expires: My Commission Expires August 31, 1998

849-DC-00000316

B

DECLARATION

I, Patrick F. Fallon, Jr., make the following Declaration:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and I have been so for six years. I am detailed to the Office of the Independent Counsel ("OIC"). This declaration contains information I have collected myself and information I have learned from other investigators and attorneys on the OIC staff.

2. I was present on January 16, 1998 when Monica Lewinsky was interviewed by agents and attorneys from OIC in a hotel room at the Ritz Carlton Hotel in Pentagon City, Virginia. Ms. Lewinsky was repeatedly advised that she was free to leave at any time and did so on numerous occasions. During the evening Ms. Lewinsky left the hotel room unaccompanied and placed unmonitored phone calls. Ms. Lewinsky was accompanied by Agents and investigators to the Pentagon City Mall where she went shopping and ate dinner.

3. At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter. Ms. Lewinsky advised OIC staff that she placed an unmonitored call to a friend. She also made unmonitored calls to her mother, her father and her attorney William Ginsburg.

Pursuant to 28 U.S.C. §1746, under penalty of perjury, I declare the forgoing to be true and correct.

Dated: February 23, 1998.

Patrick F. Fallon, Jr.
Special Agent

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	MISC. NO. 98-068

RECEIVED
FEB 24 1998
CHAMBERS OF
CHIEF JUDGE
JOHNSON

IN CAMERA SUBMISSION OF THE UNITED STATES IN SUPPORT OF ITS OPPOSITION TO MOTION TO QUASH

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully makes this in camera submission in support of its opposition to the motion of Francis D. Carter, seeking to quash the subpoenas issued to him.

As set forth in the attached Declaration of Special Agent Patrick F. Fallon, Jr., the United States has prima facie evidence that Ms. Lewinsky has used Mr. Carter's professional services to commit the crime of perjury and as a tool in the commission of the crimes of subornation of perjury and obstruction of justice. There is also prima facie evidence that Ms. Lewinsky has waived any privilege that might attach to Mr. Carter's work on her behalf and that Ms. Lewinsky authorized Mr. Carter to have non-privileged third party discussions relating to his representation of Ms. Lewinsky.[1] Accordingly, the motion to quash should be denied.

[1] The Court is aware that Ms. Lewinsky provided OIC with a handwritten statement during plea negotiations. We do not rely on that statement to establish our prima facie case.

I. Crime Fraud

To establish the applicability of the crime-fraud exception, the United States must establish that a prima facie case exists that "the client . . . made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act [and]. . . . the client must have carried out the crime or fraud." In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997). We will establish this factual predicate by presenting prima facie evidence of perjury, subornation of perjury and obstruction of justice.

A) Perjury

Mr. Carter acknowledges being retained by Ms. Lewinsky to assist in the preparation of an affidavit which she signed on January 7, 1998. It was filed with the Court in the Jones case as an exhibit to a motion to quash her deposition on January 16. In relevant, part Ms. Lewinsky's affidavit states:

> I have never had a sexual relationship with the President, [and] he did not propose that we have a sexual relationship. . . . The occasions that I saw the President after I left my employment at the White House in April, 1996, were official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time. There were other people present on those occasions.

To prove a prima facie case of perjury the United States will set forth evidence that: 1) Ms. Lewinsky's affidavit was false, in that she had a sexual relationship with President Clinton; and 2) Ms. Lewinsky knowingly and deliberately made the false statement

in her affidavit.[2]

1) The Sexual Relationship

Let us say this at the outset of this portion of our submission: We deeply regret what follows. It is both graphic and vulgar. We have, however, been unable to discern any means of establishing the requisite factual predicate without explicit references. Our assurance to the Court is that we do not make this submission lightly. It is an integral aspect of establishing the crime-fraud exception.

Ample evidence exists to establish that Ms. Lewinsky had a sexual relationship with President Clinton. That evidence includes statements by Ms. Lewinsky, her admissions to close friends, and documentary evidence.

a) Ms. Lewinsky -- In tape-recorded conversations with Ms. Tripp, Ms. Lewinsky acknowledged a sexual relationship with President Clinton. During one discussion, she recounted a conversation she had with President Clinton:

> [T]hen he said, "I promise you," you know something like, "if I win in November, I'll have you back like that. You can do anything you want. You can be anything you want. You can do anything you want." And them I made a joke and I said, "Well, can I be assistant to the president for blow jobs?" He said, "I'd like that."

Fallon Decl. Exh. K, LRT-008 at 35. On another occasion, Ms. Lewinsky and Ms. Tripp had the following exchange:

Ms. Tripp: Well, the you-know-what of the you-know-

---

[2] In general 18 U.S.C. §§ 1621, 1623 require the willful making of a false statement to establish the elements of a perjury charge.

what found you awfully attractive.

Ms. Lewinsky: Big fucking deal.

Ms Tripp: I mean --

Ms. Lewinsky: He finds anybody attractive.

Ms. Tripp: Oh that's not true.

Ms. Lewinsky: It is true. I guarantee you that given the opportunity with anybody, he'd let anybody suck his dick.

Fallon Decl. Exh. K, LRT-008 at 16-17.

b) Ashley Raines -- Ms. Lewinsky acknowledged the existence of a sexual relationship with President Clinton to her friend Ashley Raines, who is Director of Office and Policy Development Operations and Special Liaison to Management and Administration in the White House. Ms. Raines was asked about Ms. Lewinsky's physical relationship with the President. Raines responded: "She told me that they would kiss and that they would have oral sex." Fallon Decl. Exh. A, Raines GJ, at 30; id. at 43 (describing relationship as "reciprocal oral sex"). Ms. Raines has also testified that Ms. Lewinsky and the President had "phone sex." Id. at 51.

c) Neysa DeMann Erbland -- Ms. Lewinsky also acknowledged the sexual relationship to her high school friend Neysa DeMann Erbland. According to Ms. Erbland: "She told me that she had given him a blow job and that she had had all of her clothes off, but that he only had his shirt off and that she had given him oral sex and they kissed and fondled each other and that they didn't have sex." Fallon Decl. Exh. B, Erbland GJ, at

26; id. at 29 ("He put his face in her chest. And you know just oral sex on her part, you know to him.").

d) Documentary Evidence -- Substantial documentary evidence corroborates the existence of a sexual relationship between Ms. Lewinsky and President Clinton. This documentary evidence includes the following:

i) Sept. 30, 1997 Memorandum -- On September 30, 1997, Ms. Lewinsky wrote a "Memorandum for Handsome."[3] Fallon Decl. Exh. H. It begins "A proposition for you: You show me that you will let me visit you sans a crisis, and I will be on my best behavior and not stressed out when I come (to see you that is)." The note closes with another sexual reference: "Oh, and Handsome, remember FDR would never have turned down a visit with Lucy Mercer!" Mercer is believed by many historians to have had an affair with President Roosevelt.

ii) Undated Letters -- In an undated letter seized from Ms. Lewinsky's apartment, she wrote:

> How else can I rationalize why it is ok for Marsha [Scott] and Debi [Schiff] and scores of others to be in golden positions -- people can say what they want to about them, even be nasty to them but everyone knows that they will never be touched because they have your approval. . . . Marsha can remark to someone . . . that "she spent the night with you". I just loved you -- wanted to spend time with you, kiss you, listen to you laugh -- and I wanted you to love me back.

The letter continues, making reference to President Clinton's

---

[3] "Handsome" is Ms. Lewinsky's nickname for President Clinton. Fallon Decl. Exh. A, Raines GJ, at 53. She also sometimes calls him "the Big Creep." Id. at 95-96.

apparent promise to have Ms. Lewinsky return to work at the White House following the 1996 election: "I was so sure that the weekend after the election you would call me to come visit and you would kiss me passionately and tell me you couldn't wait to have me back." Fallon Decl. Exh. J.

In another undated letter from the computer, she writes, simply: "i loved you with all of my heart, bill." It continues: "when you gave me 'leaves of grass', i realized that the reason i felt connected to you, or so i thought, was because you were in my soul. to quote your famous cliche, i felt your pain." Fallon Decl. Exh. D (lower case in original); see also id. Exh. E ("I will never do anything to hurt you. I am simply not that kind of person. Moreover, I love you.").

In short, Ms. Lewinsky's own words, her discussions with her close friends, and her writings make a prima facie showing that Ms. Lewinsky and President Clinton had a sexual relationship. Thus, on its face, her affidavit denying a sexual relationship and denying being alone with President Clinton is false.

2) Willfulness

Ms. Lewinsky's own words, as recorded in conversations with Ms. Tripp and documents she authored, demonstrate that her filing of a false affidavit was deliberate and knowing. They also corroborate the willfulness of her actions by demonstrating that she consciously concealed the truth about her relationship with President Clinton from Mr. Carter.

a) Direct Evidence of Willfulness -- On several

occasions over the course of three months, Ms. Lewinsky told Ms. Tripp that she intended to lie during the Jones litigation. Ms. Tripp said that she herself did not intend to lie, creating a potential conflict. Typical is the following exchange:

> Ms. Tripp: Hey, look, Monica, we already know that you're gonna lie under oath . . . If I have to testify -- if I am forced to answer questions and I answer truthfully, it's going to be the opposite of what you say, so therefore, it's a conflict right there.
>
> Ms. Lewinsky: But it doesn't have to be a conflict.
>
> . . . .
>
> Ms. Lewinsky: I believe you, but obviously, I don't have the same feelings about the situation that you do, so I can't --
>
> Ms. Tripp: What do you mean?
>
> Ms. Lewinsky: Because if I had the same feelings, that it was so wrong to do -- to -- to deny -- to deny something, then -- then, I would not be doing it. Do you see what I mean?
>
> Ms. Tripp: I think down deep, you don't like having to lie.
>
> Ms. Lewinsky: Of course not. I don't think anybody likes to.

Fallon Decl. Exh. K, LRT-006, at 6-7. See also id. Exh. L, BW-002, at 50-51 (Ms. Lewinsky says that truth is "what doesn't hurt people").

In one conversation, Ms. Lewinsky directly admitted that the affidavit she had filed was false, and said she did not intend to contradict herself by telling the truth in her deposition:

> Ms. Tripp: [Y]ou are putting everything on the line and lying under oath.
>
> Ms. Lewinsky: I already did.

Ms. Tripp: He [Vernon Jordan] knows you did that.

Ms. Lewinsky: I already did. I signed it.

Ms. Tripp: I --

Ms. Lewinsky: So what is it -- so what is it he's going to protect me from? Perjuring myself so I go to jail? Coming out and saying, "Gee, I'm going to tell the truth now, but I signed something under oath." So I'm going to go to jail just to tell the truth?

Fallon Decl. Exh. K, LRT-022, at 10. As Ms. Lewinsky summarized in one conversation, she did not think lying about her relationship with the President would be wrong:

Ms. Lewinsky: I will tell you one thing.

Ms. Tripp: I'm scared to death.

Ms. Lewinsky: Okay? This might -- I don't know -- change your thinking a little or whatever. If he asked me to lie under oath if he hurt -- physically hurt someone, I would not lie under oath. To me there's -- there are things --

Ms. Tripp: Well, you're looking at a gray area.

Ms. Lewinsky: Exactly. And that's how I see this. . .

Fallon Decl. Exh. L, BW-007, at 10-11.

b) Concealment as Evidence of Willfulness -- Besides manifesting an intent to lie, Ms. Lewinsky regularly and repeatedly indicated that she had not disclosed the true nature of her relationship with President Clinton to Mr. Carter, thereby confirming that her filing of a false affidavit was willful and deliberate. For example, Ms. Lewinsky told Ms. Tripp that she had not given Mr. Carter accurate information. She described how Mr. Carter had interviewed her:

Ms. Lewinsky: It is scary. You know, it was scary to

me when my lawyer said to me, "Okay. Well before I sit down and draft up this affidavit, I need to ask you some tough questions." I said, "Okay."

Ms. Tripp: Who's asking you this now?

Ms. Lewinsky: The lawyer. My lawyer.

Ms. Tripp: Oh, your -- your lawyer.

Ms. Lewinsky: My lawyer. He said: "Did you ever have sexual relations, dah, dah, dah?

And I said, "No."

"Did you ever dah, dah, dah?" [inaudible]

"No"

"Did you ever offer?"

"No."

"Was your job, dah, dah, dah, ever connected with?"

"No."

"Nah, nah, nah?"

"No."

Fallon Decl. Exh. L, BW-005, at 50-51.

In another conversation, which occurred after Ms. Lewinsky had already consulted with Mr. Carter, this exchange occurred:

Ms. Tripp: Listen. You're in a position where you -- you have not even told your own attorney the truth. . . .

Ms. Lewinsky: What if -- okay. Wait a minute. What if I told -- what if I told my lawyer the truth?

Fallon Decl. Exh. K, LRT-006, at 37.

In another conversation, Ms. Lewinsky explained why she had chosen not to tell Mr. Carter the truth:

Ms. Lewinsky: If you tell your lawyer the truth -- let's just say whatever, let's just say you stole a handout [sic -- "handbag"].

Ms. Tripp: Mm-hmm.

Ms. Lewinsky: And you do not tell your lawyer that you stole the handout because the lawyer then can't represent you.

Ms. Tripp: What?

Ms. Lewinsky: A lawyer can't represent you -- if you think -- they can represent you, but they can't represent you that you didn't steal the handout.

Ms. Tripp: What? You're serious?

Ms. Lewinsky: I think so. That's my understanding.

Ms. Tripp: So every convict that goes in for everything -- or every --

Ms. Lewinsky: Look at O.J. You think O.J. Simpson said to them "I did it. Get me off"?

Fallon Decl. Exh. L, BW-001, at 38-39.[4]

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[4] Apparently Ms. Lewinsky did tell Mr. Jordan the truth. The following exchange, which is direct evidence of Ms. Lewinsky's intent to perjure herself is illuminating:

Mrs. Tripp: Did he [Vernon Jordan] say anything about . . . did he address the perjury issue at all, because that is perjury?

Ms. Lewinsky: O.K. Yeah. He said, he said, "You're not going to jail. You're not going to go to jail."

. . . .

Ms. Lewinsky: . . . What I'm trying to show you is that what he's assured me is there is no way to get caught in perjury in a situation like this.

Mrs. Tripp: Really, he's sure?

Ms. Lewinsky: In a situation like this, no way.

Mrs. Tripp: He's sure?

Ms. Lewinsky: That's what he told me.

Fallon Decl. Exh. L, BW-005, at 46-47; see also id. at 43-44.

Apparently, Ms. Lewinsky's decision to hire Mr. Carter was a product of an agreement to conceal the true nature of her relationship with President Clinton. As Ms. Lewinsky recounts, Mr. Jordan recommended that she hire Mr. Carter: "[Y]ou think he took me because he wanted to be nice to me? No. I think he took me to make sure I went and make sure that I said what I was supposed to say." Id. BW-002, at 46-47 (emphasis added); see also id. BW-005, at 15-16 (Jordan took Lewinsky to his "personal attorney").

On this basis, there is a prima facie case that Ms. Lewinsky's false affidavit statement was willful.

B) Subornation of Perjury and Obstruction of Justice

Beyond simply lying, a prima facie case exists that Ms. Lewinsky used her false affidavit, secured with Mr. Carter's unknowing assistance, as part of a broader scheme to obstruct justice. Ms. Lewinsky sought to use her own perjurious conduct, and the anticipated conduct of President Clinton, as an inducement to Linda Tripp to provide false testimony in the Jones matter. Ms. Lewinsky also used the prospect of her false affidavit as an inducement to her others to reward her with a job in New York City.[5]

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[5] Obstruction of justice involves, generally, the willful use of corrupt means to influence, obstruct or impede the due administration of justice. 18 U.S.C. § 1503. Witness tampering involves, generally, the willful use of corrupt means to influence an official proceeding or induce a person to withhold testimony. 18 U.S.C. § 1512. Subornation of perjury involves procuring another to commit any perjury. 18 U.S.C. § 1622.

1) Subornation of Perjury

Ms. Lewinsky made numerous efforts to convince Ms. Tripp to testify falsely at Ms. Tripp's own Jones deposition, even coaching her on how to answer questions. Fallon Decl. Exh. K, LRT-022, at 19-20 (suggesting the answer: "I've been in politics for a long time. It's possible I've heard something, but nothing specific that I can remember"); id. at 21-22 (suggesting the answers: "I don't think so," "I think that's something I'd remember," and "I don't recall,"); id. Exh. L, BW-002, at 13-16 (advising Ms. Tripp to answer "Not that I recall . . . I don't really remember").

Ms. Lewinsky repeatedly assured Ms. Tripp that she would not be alone in her perjury, citing her own false affidavit and intent to lie, and President Clinton's anticipated action. Id. Exh. K, LRT-022, at 50-52 (assuring Tripp that Lewinsky and President Clinton would testify first); id. at 12-13 (assuring Tripp that President Clinton would not "slip up").

Indeed, Ms. Lewinsky was so concerned with the possibility that Ms. Tripp might testify truthfully that she offered Ms. Tripp the "entire portion [of a condominium] that [she] owned in Australia" if Ms. Tripp would lie. Fallon Decl. Exh. L, BW-003, at 8-9. As Ms. Lewinsky said: "The only way that I am going to get in trouble is if -- truthfully, is if you say something." Id. BW-002, at 2.

2) Jones Litigation

Ms. Lewinsky's efforts were not limited to her own relationship with the President. She made efforts as well to have Ms. Tripp testify falsely concerning President Clinton's relationship with Kathleen Willey, another potential witness in the Jones matter. E.g., Fallon Decl. Exh. L, BW-003 19-20; Fallon Decl. Exh. K, LRT-022, at 5-6.

The most compelling evidence that Ms. Lewinsky's efforts extended beyond her own personal situation is found in the "Talking Points" she provided to Ms. Tripp. Fallon Decl. Exh. M.[6] Those notes are direct Ms. Tripp to craft her testimony relating to Ms. Willey so that it will be less damaging to President Clinton. They also outline a strategy for Ms. Tripp to approach President Clinton's lawyers and assure them that she was a "team player." The language in the talking points appears to be the product of a sophisticated understanding of the law and it provides, we submit, a prima facie bases for inquiry into Ms. Lewinsky's communication with Mr. Carter.

3) New York City Job

There is also prima facie evidence that Ms. Lewinsky conditioned her willingness to file a false affidavit on receiving assistance in finding a job in New York City. She admitted as much in a conversation with Ms. Tripp on January 13:

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[6] A partially deleted copy of these Talking Points was recovered from the computer in Ms. Lewinsky's apartment. Fallon Decl. ¶4.

Ms. Tripp: What did Betty say when you said that, that "I'm not signing it"?

Ms. Lewinsky: She said, "Well" -- she said, "Well, [inaudible], I think he's been out of town," or some weird shit like that. I don't know, whatever it was. You know, I'm like -- but --

Ms. Tripp: Did you say again, "I'm not signing it?"

Ms. Lewinsky: I said, "Look. You guys want me to sign something, I'm not signing it until I have something." So -- and that was the people Friday -- Friday or Monday?

Ms. Tripp: This past Friday?

Ms. Lewinsky: No it must have been Monday [i.e. January 12].

Ms. Tripp: Okay. But, anyway, recently? Today's Tuesday. Tuesday.

Ms. Lewinsky: Yeah, yesterday morning.

Fallon Decl. Exh. L, BW-001, at 30; cf. id. at 27-28 (describing Revlon job). Ms. Lewinsky also acknowledged that Mr. Carter was waiting to hear from her before he filed her affidavit and that she intended to call him only after she heard from the "job people." Id. BW-005, at 28-29.

This is consistent with the documentary record, which reflects (i) that the White House and Mr. Jordan were deeply involved in efforts to find Ms. Lewinsky a job during this critical period, and (ii) that Ms. Lewinsky withheld the filing of the affidavit by Mr. Carter until after she received an employment offer. The time-line of Ms. Lewinsky's securing a job at Revlon, Fallon Decl. ¶¶ 10, 11, 13, is as follows:

January 7: Lewinsky meets Jordan for breakfast; Lewinsky signs affidavit

January 8: Jordan calls White House, Revlon CEO Perelman, and Lewinsky in succession

January 9: Jordan calls White House and Revlon; Lewinsky interviewed by Revlon

January 12: Jordan calls White House and Lewinsky; Carter sends affidavit to Jones' lawyers; Lewinsky tells White House she won't file affidavit until she is offered a job

January 13: Lewinsky offered job

January 16: Lewinsky affidavit filed in court

During this period, Mr. Jordan participated in series of phone calls between the White House, Ms. Lewinsky, and officials for Revlon, Inc. The following calls were placed from Jordan's phone lines at his law firm:

Date	Time	Duration	To
1/8/98	15:44	1:30	Erskine Bowles
	16:47	3:24	Erskine Bowles
	16:51	1:24	Ron Perelman
	16:56	0:54	Monica Lewinsky
	18:18	0:36	Monica Lewinsky
1/9/98	9:22	2:00	Erskine Bowles
	10:19	0:54	Ron Perelman
	10:44	0:48	Erskine Bowles
	16:27	4:00	Howard Gittes
	17:18	2:48	Monica Lewinsky
1/12/98	16:17	2:00	Monica Lewinsky
	16:35	0:24	Erskine Bowles
	16:35	5:06	White House
	19:11	4:06	Erskine Bowles

Fallon Decl. ¶10.

These facts establish a prima facie case that as part of a larger agreement to commit perjury and obstruct justice in the Jones matter, Ms. Lewinsky conditioned her submission of the Carter-produced affidavit on assistance in finding a job.

II. Waiver

"[I]f a client wishes to preserve the [attorney-client] privilege, [she] must treat the confidentiality of the attorney-client communications like jewels -- if not crown jewels." In re Sealed Case, 877 F.2d 976, 981 (D.C. Cir. 1989). Ms. Lewinsky waived her privilege by having discussions with Ms. Tripp, by consenting to an OIC search of her apartment that disclosed privileged material, and by authorizing Mr. Carter to discuss his representation of Ms. Lewinsky with third parties.

A) Conversations with Ms. Tripp

As is evident from the earlier discussion, Ms. Lewinsky routinely and regularly discussed with Ms. Tripp the subject matter of her representation by Mr. Carter and the services he was providing to her -- namely, her pending civil deposition in the Jones matter. Indeed, several of the tapes reflect hours of discussions of the Jones case and the subpoenas to Ms. Lewinsky and Ms. Tripp. Through these numerous discussions, Ms. Lewinsky waived any privilege she had in her conversations with Mr. Carter.

Beyond this discussion of the subject matter of Mr. Carter's representation, Ms. Lewinsky frequently disclosed to Ms. Tripp

the precise details of the advice Mr. Carter was providing to her and the actions he was taking on her behalf -- in effect revealing Mr. Carter's work-product to a third party. These included the following disclosures by Ms. Lewinsky:

- Mr. Carter met with President Clinton's attorney, Bob Bennett. Fallon Decl., Exh. K, LRT-022, at 37-38, 48-49; id. Exh. L, BW-003, at 24-25.
- Mr. Carter recommended that Ms. Lewinsky sign the affidavit to avoid a deposition. Fallon Decl. Exh. L, BW-001, at 43.
- Mr. Carter recommended that Ms. Lewinsky answer questions with the phrase "I might have, but I don't remember." Id. BW-003, at 12-13.
- Ms. Lewinsky paid Mr. Carter $2,500. Id. BW-003, at 24-25.
- Ms. Lewinsky discussed the possibility of a settlement in the Jones case with Mr. Carter. Id. BW-005, at 4.
- Ms. Lewinsky discussed with Mr. Carter the hypothetical possibility that someone might have tapped her phone and given information on her relationship with the President to other people. Mr. Carter replied: "Well, as long as you say it didn't happen, it didn't happen." Id. BW-005, at 42-43.
- Ms. Lewinsky described to Ms. Tripp the precise written contents of the affidavit drafted by Mr. Carter that she intended to file in the Jones matter. Id. BW-005, at 30-33.

These conversations waived the attorney-client and work-product privileges.

B) Consent Search

Moreover, Ms. Lewinsky waived her privilege by consenting to a search of her apartment that produced attorney-client and work-product material. At no time during the search did Ms. Lewinsky seek to limit her consent to non-privileged matters.

Among the items secured during the search was a confidential letter from Mr. Carter to the attorneys for Paula Jones, seeking

through Ms. Lewinsky's affidavit to have the subpoena for her deposition vacated. In that letter Mr. Carter writes that Ms. Lewinsky has "no relevant evidence whatsoever." Fallon Decl. Exh. F. Also seized in the search was a draft of her affidavit with what appear to be Ms. Lewinsky's own handwritten corrections on it. Fallon Decl. Exh. G.

These two items, which were removed from her apartment during a consent search, and her many conversations with Ms. Tripp, go to the heart of Ms. Lewinsky's representation by Mr. Carter. Their disclosure is a complete subject matter waiver of her attorney-client privilege.

C) Mr. Carter's Third-Party Conversations

Beyond all this, evidence indicates that Mr. Carter was authorized by Ms. Lewinsky to be in contact with Vernon Jordan concerning the subject matter of his representation of Ms. Lewinsky and the Jones case. The nature and timing of the phone calls raise an inference that the subject matter of their conversations was Mr. Carter's representation of Ms. Lewinsky. Given the general infrequency of calls between Mr. Carter and Mr. Jordan and the particular timing of these calls on two days critical to Mr. Carter's representation of Ms. Lewinsky, Mr. Carter appears to have discussed otherwise privileged matters with Mr. Jordan, with Ms. Lewinsky's authorization.

On January 6, 1998, the day before Ms. Lewinsky signed her affidavit, and January 7, 1998, the day Ms. Lewinsky signed her affidavit, the following calls were placed from Mr. Jordan's

telephones at his law firm:

Date	Time	Duration	To
1/6/98	14:08	1:48	Monica Lewinsky
	15:26	6:42	Frank Carter
	15:38	2:12	Nancy Hernreich
	15:48	0.24	Monica Lewinsky
	15:49	5:54	Monica Lewinsky
	16:32	1:06	Frank Carter
	16:34	2:30	Frank Carter
	17:15	4:06	White House
1/7/98	9:26	3:30	Frank Carter
	11:58	11:30	White House
	17:35	0:12	Erskine Bowles
	17:35	2:06	Erskine Bowles
	17:46	10:48	Nancy Hernreich

Fallon Decl. ¶10.

This record, placed in the context of Ms. Lewinsky's refusal to file her affidavit without having secured a job, indicates that a third-party, Mr. Jordan, played a role in discussions about Ms. Lewinsky's affidavit, acting as a conduit for information between the White House, Mr. Carter and Ms. Lewinsky. The first of the calls, to Ms. Lewinsky, reflects her apparent authorization of this course of conduct. Of significance, these numerous calls to Mr. Carter stand in sharp contrast to the single call Mr. Jordan made to Mr. Carter during November-December 1997. Fallon Decl. ¶10. To the extent that these third-party conversations occurred, they cannot be privileged.

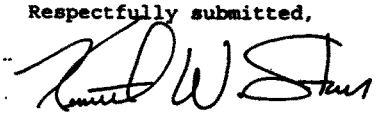
We need not rely on the phone records alone to establish that Mr. Jordan played a role in crafting Ms. Lewinsky's affidavit. Mr. Jordan met for breakfast with Ms. Lewinsky on the morning of January 7. Fallon Decl. ¶11. Ms. Currie, President Clinton's Personal Secretary, says that she first learned that Ms. Lewinsky had signed her Jones affidavit from Mr. Jordan. Fallon Decl. ¶12. The inference, sufficient to establish a prima facie waiver, is clear. Either Ms. Lewinsky discussed the matter with Mr. Jordan at breakfast or Mr. Carter discussed it with Mr. Jordan during the course of these conversations. In either event, the privilege has been waived.

III. Conclusion

Based upon this in camera submission, the United States respectfully submits that Mr. Carter's motion should be denied and he should be compelled to testify.

Dated: February 24, 1998

Respectfully submitted,



KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

Sol Wisenberg
Paul S. Rosenzweig
Stephen Bates
Associate Independent Counsels
1001 Pennsylvania Ave, NW
Washington, D.C. 20004

DECLARATION

I, Patrick F. Fallon, Jr. make the following Declaration:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and I have been so for six years. I am detailed to the Office of the Independent Counsel ("OIC"). This declaration contains information that has been collected by myself and others and information I have learned from other investigators and attorneys on the OIC staff. Since this declaration has been prepared solely for the purpose of making the requisite showing necessary to establish that the attorney-client privilege between Francis Carter, Esq. and Monica Lewinsky does not form a basis for quashing the subpoena to Mr. Carter, I have not included everything I know about this matter.

2. True and correct excerpts of the grand jury testimony of Ashley Raines are appended to this Declaration as Exhibit A.

3. True and correct excerpts of the grand jury testimony of Neysa DeMann Erbland are appended to this Declaration as Exhibit B.

4. On January 22, 1998, Ms. Lewinsky consented to a search of her apartment. Pursuant to that consent search the OIC seized a personal computer from Monica Lewinsky's apartment. Agents have recovered from the personal computer in Ms. Lewinsky's apartment a partial, unprintable copy of the "Talking Points" referred to infra ¶9.

5. Agents have since conducted an analysis of the hard

drive of the computer identified supra ¶4 and recovered files that have been "deleted" to the "Trash" by the user of the computer. Three undated documents have been recovered:

a. an undated document, beginning "As your friend" including a "Gameplan;"

b. an undated document beginning "it was so sad seeing you last night;" and

c. an undated document in italic print beginning "This is going to be a long letterbut [sic]"

True and correct copies of these documents are appended to this Declaration as Exhibits C through E.

6. At no time during the search referred to in ¶4 did Ms. Lewinsky seek to limit her consent to non-privileged matters. Among the items secured during the search were:

a) a confidential letter from Mr. Carter to the attorney's for Paula Jones, dated January 12, 1998, enclosing Ms. Lewinsky's affidavit and seeking to have the subpoena for her deposition vacated;

b) a draft of an affidavit with what appear to be Ms. Lewinsky's own handwritten corrections on it;

c) a letter dated September 30, 1997 entitled "Memorandum for Handsome";[1]

d) a letter dated June 29, 1997 addressed to Handsome; and

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[1] According to the testimony of Ashley Raines, supra ¶2, Ms. Lewinsky referred to President Clinton by the nickname "Handsome"and by the nickname "the Big Creep."

e) an undated letter, identified as Item 3 removed from Room O of Ms. Lewinsky's apartment.

True and correct copies of these documents are appended to this Declaration as Exhibits F through J.

7. Pursuant to grand jury subpoena, Linda Tripp produced to this Office 22 tape recordings of conversations between Ms. Tripp and Ms. Lewinsky. For clarity sake the OIC has identified the tapes as LRT-001 through LRT-022. True and correct excerpts of the transcription made of the tapes produced by Ms. Tripp are appended to this Declaration as Exhibit K.

8. On January 13, 1998, Ms. Tripp, at the request of agents of the Federal Bureau of Investigation and the OIC, recorded a conversation between Ms. Tripp and Ms. Lewinsky. The tapes were transcribed in 7 consecutive segments, identified as BW-001 through BW-007. A true and correct excerpt of the transcription made of the tape recording of the January 13th conversation between Ms. Tripp and Ms. Lewinsky is appended to this Declaration as Exhibit L.

9. Following a meeting with Ms. Lewinsky on January 14, 1998 Linda Tripp provided agents of the OIC with three pages of "Talking Points" that were given to Ms. Tripp at the meeting by Ms. Lewinsky. A true and correct copy of this document is appended to this Declaration as Exhibit M.

10. Pursuant to grand jury subpoena the law firm of Akin, Gump, Heuer, Strauss & Feld, LLP produced to OIC records of telephone calls made from phone lines assigned to Mr. Vernon

Jordan. The records identify the date, time and duration of the call and also identify the telephone number to which the call was made. Subsequently, Akin, Gump, Heuer, Strauss & Feld, LLP produced to OIC a log identifying the individuals to whom calls were made, by telephone number. Based on that log and the OIC's investigation, the following is a true and correct excerpt of the records of phone calls made from Mr. Jordan's phone lines, annotated to reflect the identity of the individual to whom the phone call was placed:

Date	Time	Duration	To
1/6/98	14:08	1:48	Monica Lewinsky
	15:26	6:42	Frank Carter
	15:38	2:12	Nancy Hernreich[2]
	15:48	0.24	Monica Lewinsky
	15:49	5:54	Monica Lewinsky
	16:32	1:06	Frank Carter
	16:34	2:30	Frank Carter
	17:15	4:06	White House[3]
1/7/98	9:26	3:30	Frank Carter
	11:58	11:30	White House
	17:35	0:12	Erskine Bowles[4]
	17:35	2:06	Erskine Bowles

[2] Ms. Hernreich is Deputy Assistant to the President and Director of Oval Office Operations.

[3] The Main White House Line, 456-1414, is listed to President Clinton. Calls to this number reach the main switchboard.

[4] Mr. Bowles is Chief of Staff to the President.

Date	Time	Duration	To
	17:46	10:48	Nancy Hernreich
1/8/98	9:21	0:48	White House
	9:21	0:42	White House Counsel's Office
	9:22	0:48	White House
	15:44	1:30	Erskine Bowles
	16:47	3:24	Erskine Bowles
	16:54	1:24	Ron Perelman[5]
	16:56	0:54	Monica Lewinsky
	18:18	0:36	Monica Lewinsky
1/9/98	9:22	2:00	Erskine Bowles
	10:19	0:54	Ron Perelman
	10:44	0:48	Erskine Bowles
	16:27	4:00	Howard Gittes[6]
	17:18	2:48	Monica Lewinsky
1/12/98	16:17	2:00	Monica Lewinsky
	16:35	0:24	Erskine Bowles
	16:35	5:06	White House
	19:11	4:06	Erskine Bowles

The telephone records from Akin, Gump, Heuer, Strauss & Feld, for the time period November 1, 1997 through January 5, 1998 reflect only one telephone call from Mr. Jordan to Mr. Carter: December

[5] Mr. Perelman is the Chairman of the Board of MacAndrews & Forbes, Holding, Inc., which owns a controlling interest in Revlon, Inc.

[6] Mr. Gittes is a Vice Chairman and Chief Administrative Officer of MacAndrews & Forbes Holding, Inc., and Mr. Perelman's immediate subordinate.

19, 1997 at 17:06 for 1:54.

11. Agents of the FBI have interviewed three separate individuals, one of whom identified Ms. Lewinsky and two of whom identified a woman fitting the description of Ms. Lewinsky having breakfast with Vernon Jordan at the Park Hyatt Hotel on the morning of January 7, 1998.

12. Agents of the FBI and the OIC have interviewed Ms. Betty Currie. Ms. Currie has said that she first learned that Ms. Lewinsky had signed an affidavit in the Jones v. Clinton case from Mr. Vernon Jordan.

13. Agents of the FBI and OIC have interviewed personnel at Revlon, Inc. They have learned that Ms. Lewinsky interviewed for a position with Revlon, Inc. on January 9, 1998. She was offered a position on January 13, 1998.

Pursuant to 28 U.S.C. §1746, under penalty of perjury, I declare the forgoing to be true and correct.

Dated: February 24, 1998

Patrick F. Fallon, Jr.
Special Agent

A

EXHIBIT A Ashley Raines Grand Jury Testimony 1/29/98

Page 29

Q Now, did there come a time when Monica discussed with you the nature of her relationship with the President?

A Yes.

Q And can you tell us when that occurred?

A I remember that it was in the summer of '96. I don't remember the exact month.

Q And do you remember where you were when that conversation took place? Was it on the telephone? In person?

A It was in person.

Q Do you remember where you were?

A When she was telling me about it, we were in my car.

Q And what did she tell you?

A She told me that he would call her, that she would go see him in his -- in the office in his study area, and you know, that they would talk. She was kind of relaying incidents over the period of their relationship as it had occurred to that point.

page 30

Q Was she talking about things that occurred when she was working at The White House?

A Yes.

Q And did she tell you anything about the nature of any physical relationship between her and the President during that conversation?

A Yes, she did.

Q What did she tell you?

A She told me that they would kiss and that they would have oral sex.

Q When she told you this, were you surprised to hear that?

A Yes.

Page 32

22 A Yes.

23 Q Did Monica indicate to you at what time of day her

24 relationship with the President took place?

25 A When she worked there, I think she told me it was

Page 33

1 on weekends, and afternoon or evening I don't really know.

2 Q Do you remember her saying weekend?

3 A Uh-huh. Yes.

4 Q Do you remember her saying evening as well?

5 A No. No.

6 Q Okay. Did she give you any indication of how often

7 she had had physical relations with the President up to that

8 point?

9 A I don't remember the frequency because, again, she

10 was telling me -- kind of recalling events of previous

11 history, so I don't really have a concept of how frequent it

12 was.

13 Q When she told you this, did you believe her?

A It was a lot of information at one time. I had no reason not to believe her, so I just of listened.

Page 43

Q And do you recall telling FBI agents who interviewed you when you described what Monica told you about her physical relationship with the President during the time she was working at The White House as reciprocal oral sex? Do you remember saying that?

A Yes, I do.

Q And that's -- that was in fact what she told you?

A Yes, I'm pretty sure that was true.

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Q Do you recall whether any of their telephone conversations took on a sexual nature that she ever told you?

A She did tell me.

Q Can you tell us about that?

A She didn't go into detail, and I really didn't want

detail, but she did mention to me on several occasions that they would have phone sex.

Page 53 (Bold)

Q Did she have any nicknames for the President that she used when she spoke to him directly?

A Yes, she did.

Q What did she call him?

A She told me that she'd call him handsome.

Page 90

Q Okay. You told the Grand Jury that Monica told you she was or at least conveyed to you that she was concerned about the subpoena from the people involved in the Paula Jones litigation, correct?

A Yes.

Q Did she ever tell you what she intended to do at

the deposition or what she intended to say?

A No, because in her mind I think she was still trying to deal with the fact that she had a deposition and was trying to work through the whole situation.

Q And when you say the whole situation, do you mean the situation of going to a deposition in general or that she understood that they were going to be asking her about her relationship with the President and she didn't want to say? What do you mean the whole situation?

A Well, as I said previously, she mentioned to me she was concerned that if in a deposition if she denied that she had a relationship with the President if that would be considered perjury. That was her concern that she relayed to

me.

Page 95

23 Q Do you know who she was talking about when she said
24 the Big Creep?
25 A Yes.

96

1 Q Who would that be?
2 A I referenced that she nicknamed the President the
3 Big Creep.

B

EXHIBIT B Neysa Erbland Grand Jury Testimony 2/12/98

Page 26

Q When she first brought the subject of her relationship with the President up with you during that conversation, was it during that conversation that she described to you how it began?
A I believe so.
Q And did she tell you anything else about the nature of her relationship with him during that conversation?
A Just whatever other sexual things that they had done together.
Q Okay. What did she tell you?
A She -- in her words or --
Q The best you can remember of her words, if you can.
A She told me that she had given him a blow job and that she had had all of her clothes off, but that he only had his shirt off and that she had given him oral sex and they kissed and fondled each other and that they didn't have sex. That was kind of a little bit of a letdown for her.

Page 28

Q Okay. And during subsequent conversations that you had with her, and we'll confine our discussion now to the period when she's working in the White House, did she tell you anything further about the nature of her physical

Page 29

relationship with him that's any different from what you've already told us?
A Just that -- like details of what he -- how he touched her or something?

Q Well, the best you can, just describe the nature of the contact as best you can.
A I mean, what I've told you is pretty much. I mean, fondling, you know. He put his face in her chest. And, you know, just oral sex on her part, you know, to him.

C

As your friend and as someone who wants nothing but the best for you, I want to tell you that the best thing you can do right now is settle your legal case that Bennett is handling. Your approval ratings are at sieme of the highest levels of your presidency and if it's done right, it will be a story that has a short life.

Everyone wants this ridiculous case to be over. Whether you go to court or not a majority aof the people will continue to say what they say now. whether you are proven innocent or not. The only thing goiung to court does is waste your precious time and cheat the American people of the wonderful president we elected and we deserve – the wonderful president that you are.

The Gameplan:

1) Someone n the first lady's staff makes it be known to a print reporter or possibly someone like Larry King that she might be willing to take a questioin about this case. When asked, she responds emotionally,(something we don't see from her) and says something akin to:

The country is being robbed of its time that the president speads on other issues. I wish it would simply be settled. This has been difficult on our family. i would like nothing more than for this to be anon-issue in our lives and the lives of the american people.

2) On a day during the work week, some lower level staff person lets the reporters know you'll be coming out soon to make a short statement. McCurry is with you, and no one else (honestly) knows what's going on. You come out and make a brief statement saying that this has taken up too much of the time you want to be focusing on the job the amerivcan people elected you to do. You have three years left and you don't want to wast another minute on something that does not benefit the american people. This situation The rquorement to make this go away is that i apologize and make a cash settlement thereforeew, I make the followiong statement. i apologize for any real or perceived damahege t I mauy have caused

i ahave been advised by my attorney

D

it was so sad seeing you last night because i was so angry with you that, once again, you rejected me by not wanting to see me today, and yet, all i wanted was for everyone else in the room to disappear and for you to hold me.

i loved you with all of my heart, bill. i wanted to be with you all of the time. most recently in london, i walked the streets thinking how content i would be to walk the streets at your side while you spoke of things past -- filled the air and my soul with your knowledge of history.

when you gave me "leaves of grass", i realized that the reason i felt connected to you, or so i thought, was because you were in my soul. to quote your famous cliché, i felt your pain. i seemed, somehow to feel in my heart some of your experiences. you will see in this collection of things for you, a card i was so shocked to find for obvious reasons. it rang so true to me.

i realized yesterday when betty told me you "couldn't" see me what was really going on -- you want me out of your life. i guess the signs have been clear for awhile -- not wanting to see me and rarely calling. i used to think it was you putting up walls and that the real you was the person whom i was with on the fourth of july. i'm humiliated at how wrong i was. for the life of me, i can't understand how you could be so kind and so cruel to me. when i think of all the times you filled my heart and soul with sunshine and then think of the times you made me cry for hours and want to die, i feel nauseous.

i will never forget what you said that night we fought on the phone -- if you had known what i was really like you never would have gotten involved with me. i'm sure you're not the first person to have felt that way about me. i am sorry that this has been such a bad experience.

well, anyway, these are all of the little gifts and one big christmas gift (the black box) that i've had for you. i wanted to give them to you in person, but that is obviously not going to happen. you may not want to keep them, but please don't send them back. i'm very particular about presents and could never give them to anyone else -- they were all bought with you in mind. your christmas present is an antique fron, i believe, the 30's. i was very attracted to it.

i knew it would hurt to say goodbye to you; i just never thought it would have to be on paper. take care.

E

This is going to be a long letter but I would like ot ask you to please honor what I dove been through and read all of it, you will never dove to read another rone of these agate.

When I saw RENT I was saddened during the number 24 not song, "Goodbye Love". Not for the reasons the composer wanted me to be, but because it was thinking about you and how I didn't want us to get to a point where I would have to say "goodbye handsome". But I am tired of crying and trying to analyze why you don't call me, why everything is the way it is. You know three weeks ago how we y spent I was. you know I wanted to see you and not only did you not see me,but you couldn't even call me to see if I was ok or allow me the sanity of talking to you. so much of this has been a frustration. It takes too much.

I have always been one of those people who has never wanted to be the one to end a relationship because it learned early on that I regret

So I sat down to write you this note. As I contemplated whether it should be a light note so that you wouldn't be afraid to see me or an honest note, the anxiety began to wash over me. I guess you can tell this is going to be of the latter. I want to state plain and clearly that despite what you might think from reading this letter the worst thing you could do to me is cause all contact and banish me from your life.

I sit here stressed out because I know that if you don't see me tonight, by the time I do see you it will have been at least two months. What kind of message does that send to me? Have you at had any desire to talk to me? Do you ... wonder what's going on in my life? Do you not miss me at all. had you not brought me back such a wonderfully extravagant gift, I would be measuring the loss of you in my life. Instead, I am confused.

Handsome, I would much rather hover this conversation with you in person, but I don't know if that will ever happen or when so I am just going to have my soul to you -- here and now.

I feel very connected to you and I have no idea why. I have often told you in person and on paper the various things you mean to me and my feelings for you. I have detailed the ways in which I think you are an incredible man -- despite what you may have done in ish past pr do now that hurt people you care about. I honor you and what you dove them through.

What is wrong with the way things are between us is not that I care about you so deeply, think about you a lot or cherish what we share in person whether it is a conversation, a laugh, a cry or a kiss-- what is wrong is that there is no consistency here. It has been about two years and I have no clue sas to how you really dfeel about me. Sure there were the times we were together like on the 4th of July where I felt very secure in how your feelings for me. Not that I was the woman of your dreams or the woman about whom you carved the mast -- just that you cared about me. I don't know that now. you have not talked to me in six weeks if you asked me to describe exactly what I wanted this is what I would tell you: I want you in my life. I want to be able to enjoy my life, my work, lovers, friends and family. I want you tyo be a part of that. Nobody knows what will happen in ish future. I cannot be free when I constantly stressing about why you haven't called me, returned my calls, wanted to see me etc.

Any normal person would have walked away fro this and said "He doesn't call me, he doesn't want to see me -- screw it. It doesn't matter." I can't let go of you

I want to be a source of pleasure and laughter and energy to you. I want to make you smile.

I have had another very unpleasant situation arises. A friend of mine who does not work at the White House has a friend who does and both of these people know I was looking to come back (reason I missed it) and that there were some "friends" with some influence helping me. The woman who does work at the WH recently moved offices and called my friend Sunday night. While she didn't want me to know that she had said it, because she felt it improper to pass along such information, she wanted her friend (who is also my friend) to let me know that I will never work at the WH or if I do it will be some -- kind of job with an orange pass. She had heard that I was "after the President" and would never be allowed to work on the complex, and wanted me to be aware of it. My friend became flabbyaster of me and said that's ridiculous. Her friends are just waiting till they find the right job. her friend's response was that there are jobs created all of the time there -- every week. In fact, there was just a position in Public Liaison created for Stephen Cooker's girlfriend. This coupled with me feeling out they did hired an intern in Payoff begins office recently has lead me to the conclusion that all you have promised me is an empty promise -- just like Marsha said. I am once again, totally humiliated. It is very clear to me that there is no way I am going to be brought back.

What is the most upsetting to me is that I could hgave been ok with

I will never do anything to hurt you. I am simply not that kind of person. Moreover, I love you.

F

CARTER & VARRONE
Attorneys-at-Law
Suite 510, The Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005

(202) 393-4330
Facsimile (202) 393-5657

Francis D. Carter
Edward G. Varrone*
*also admitted in Maryland

Stephanie Y. Bradley*
of counsel
*also admitted in MD and N

January 12, 1998

David Pyke, Esq.
Rader, Campbell, Fisher & Pyke
Stemmons Place, Suite 1080
2777 Stemmons Freeway
Dallas, Texas 75207

BY FEDERAL EXPRESS

Re: Ms. Monica Lewinsky
Jones v. Clinton & Ferguson
case No. LR-C-94-290

Dear Mr. Pyke:

This follows our phone conversation today about my Client, Ms. Lewinsky. I reminded you that she was served with a subpoena for a deposition now set for Friday, January 23, 1998. I asked you to reconsider your decision and cancel her deposition.

I further said that she has no relevant evidence whatsoever in relation to your case. I reminded you that Ms. Lewinsky was a intern at the White House during the summer of 1995, and subsequently worked in the White House Office of Legislative Affairs drafting correspondence. She left her job in the White House in April, 1996. The mere fact that she worked in the White House, the only relevant information related with your case, is insufficient for you to invade her privacy and subject her to the burden and embarrassment of a deposition. Ms. Lewinsky is 24 years old with the vast majority of her employment career ahead of her. Merely being associated with this case, in any fashion, will leave an indelible mark upon her. In order to verify these points, I have enclosed an Affidavit executed by my Client.

Again, please review your decision to depose her. In view of the information in Ms. Lewinsky's Affidavit, there is no valid reason to subject her to the deposition process. I would request the courtesy of a reply to this request rather expeditiously.

If necessary, I will seek judicial intervention for my efforts to remove my Client from the deposition process. Therefore, if I do not hear from you by Thursday, January 15, 1998, I will assume that you will not relent and I will proceed with efforts on behalf of my Client.

I hope you reconsider but, in any event, let me hear from you.

Very truly yours,

Francis D. Carter, Esq.
Carter & Varrone

Enclosure

G

(Item #13 Room M

DRAFT

AFFIDAVIT OF JANE DOE #

1. My name is Jane Doe # . I am 24 year old and currently reside at 700 New Hampshire Avenue, N.W., Washington D.C. 20037.

2. On December 19, 1997, I was served with a subpoen from the plaintiff to give a deposition and to produce documents i the lawsuit filed by Paula Corbin Jones against President Willia Jefferson Clinton and Danny Ferguson.

3. I can not fathom any reason that the plaintiff woul seek information from me for her case.

4. I have never met Ms. Jones, nor do I have an information regarding the events she alleges occurred at the Excelsior Hotel on May 8, 1991 or any other information concerning any of the allegations in her case.

having just graduated from college in * Lewis & Clark College in Portland OR.

5. I worked at the White House in the summer of 1995 as a White House intern. Beginning in December, 1995, I worked in the Office of Legislative Affairs as a staff assistant for correspondence. In April, 1996, I accepted a job as assistant to the Assistant Secretary for Public Affairs at the U.S. Department of Defense. I maintained that job until December 2[illegible], 1997. I am currently unemployed but seeking a new job.

6. In the course of my employment at the White House, I met President Clinton on several occasions. I do not recall ever being alone with the President, although it is possible that while working in the White House Office of Legislative Affairs I may have presented him with a letter for his signature while no one else was present. This would have lasted only a matter of minutes and would ~~not have been a private meeting, that is not behind closed doors.~~

7. I have the utmost respect for the President who has always behaved appropriately in my presence.

8. I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship. I do not know of any other person who had a sexual relationship with the President, was offered employment or other benefits in exchange for a sexual

DRAFT

relationship, or was denied employment or other benefits fc rejecting a sexual relationship. The occasions that I saw th President, with crowds of other people, after I left my employmen at the White House in April, 1996 related to official receptions formal functions or events related to the U.S. Department o Defense, where I was working at the time. There were other people pres on @ all of these occasions.

9. Since I do not possess any information that coul possibly be relevant to the allegations made by Paula Jones or lea to admissible evidence in this case, I asked my attorney to provid this affidavit to plaintiff's counsel. Requiring my deposition i this matter would cause unwarranted attorney's fees and costs disruption to my life, especially since I am looking fo employment, and constitute an invasion of my right to privacy.

I declare under the penalty of perjury that the foregoin is true and correct.

MONICA S. LEWINSKY

DRAFT

DISTRICT OF COLUMBIA, ss:

MONICA S. LEWINSKY, being first duly sworn on oath according to law, deposes and says that she has read the foregoing AFFIDAVIT OF JANE DOE # by her subscribed, that the matters stated herein are true to the best of her information, knowledge and belief.

_____
MONICA S. LEWINSKY

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1998.

_____
NOTARY PUBLIC, D.C.
My Commission expires:_____

(OFFICIAL LETTERHEAD)

30 September 1997

MEMORANDUM FOR HANDSOME

SUBJECT The New Deal

A proposition for you: You show me that you will let me visit you sans a crisis, and I will be on my best behavior and not stressed out when I come (to see you, that is).

I'd like to come for a visit this evening. According to *my* calendar, we haven't spent any time together on the phone or in person in six weeks. You'll be gone the next few weekends so if we don't get together tonight, by the time I do see you it will have been over two months.

What do you think of maybe planning ahead with Betty that you would leave at seven so everyone else goes home, and then you could come back around 7:30 or later. I'll be tied up until about 7:30. Any time after that is good for me.

Oh, and Handsome, remember FDR would never have turned down a visit with Lucy Mercer!

*** JUST A REMINDER TO THROW THIS AWAY AND NOT SEND IT BACK TO THE STAFF SECRETARY!

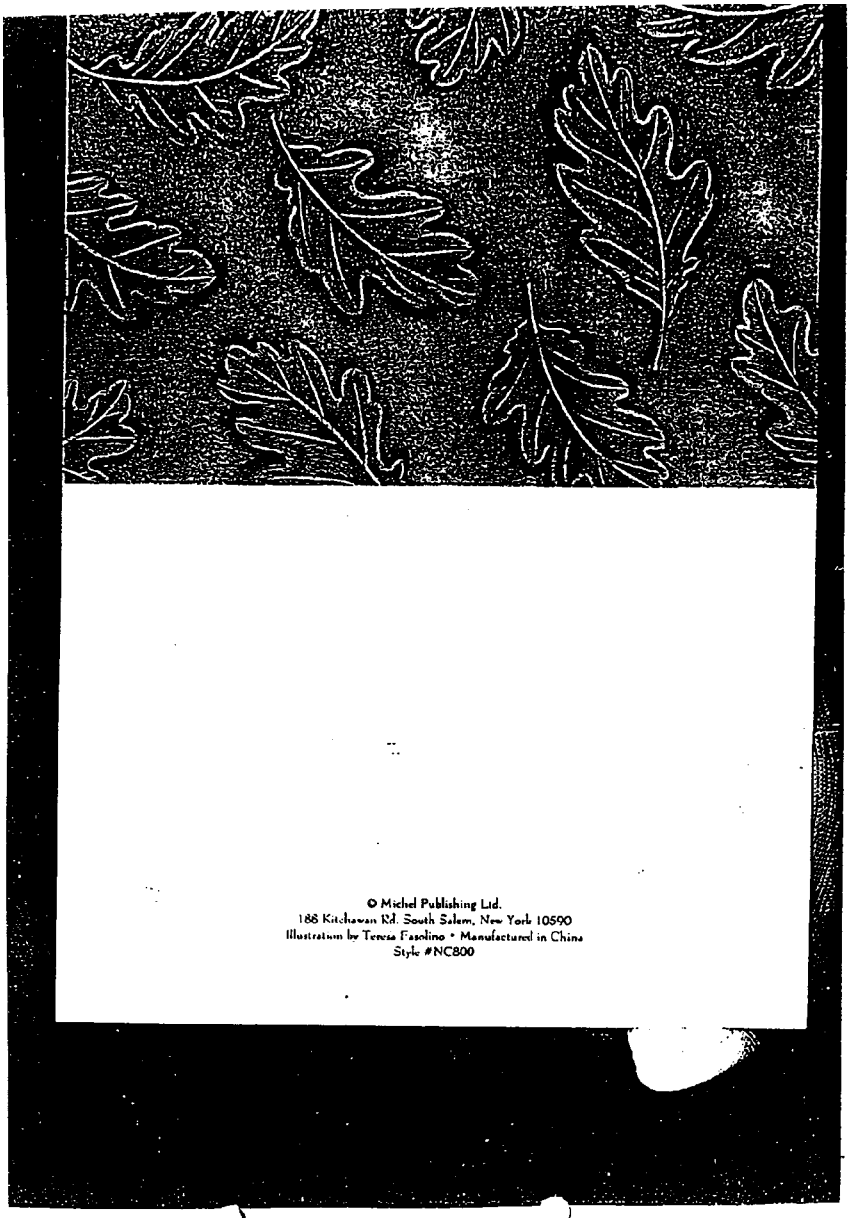

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Illustration by Teresa Fasolino • Manufactured in China
Style #NC800

29 June 1994

Dear Handsome,

I really need to discuss my situation with you. We have not had any contact for over five weeks. You leave on Sat. and I leave for Madrid w/ the SecDef on Monday returning the 14th of July. I am then heading out to Los Angeles for a few days. If I do not speak to you before you leave, when I return from LA it will have been two months since we last spoke. Please do not do this to me. I feel disposable, used and insignificant. I understand your hands are tied, but I ~~just~~ want to talk to you and look at some options. I am begging you ~~from the bottom of my heart~~ to please let me ~~come~~ see you Tuesday evening. I will call Betty Tues. afternoon to see if it is o.k.

Bright

-M

I believe the time has finally come for me to throw in the towel. my conversation with Marsha left me disappointed, frustrated, sad and angry. I can't help but wonder if you knew she wouldn't be able to detail me over there when I last saw you. maybe that would explain your coldness. the only explanation I can reason for your not bringing me back is that you just plain didn't want to enough or care about me enough. how else can I rationalize why it is ok for Marsha and Debi and scores of others to be in golden positions -- people can say what they want to about them, even be nasty to them but everyone knows that they will never be touched because they have your approval. Debi can prance around in your shoes or stand in front of 50 people gathered for dinner bragging about just how she obtained your shirt for Walter to have bespoke shirts made for you. Marsha can remark to someone which subsequently ends up in the papers and magazines that "she spent the night with you". I just loved you -- wanted to spend time with you, kiss you, listen to you laugh -- and I wanted you to love me back.

I never told you this because I didn't want to seem like a martyr but in April of '95 I wanted nothing more than to beg you to do something so I didn't have to leave. I wanted to scream and bawl. you have no idea how desperate, upset, humiliated I was. But I didn't. you said you would see what you could do and I left it at that because I didn't want to put you in a bad situation. It was an election year and I knew what was important. You promised you would bring me back after the election with a snap of you fingers.

I left the WH at age 22 from my first job out of college, the beginning of my career, to come to work at an agency in which I have no interest at a job where I'm bored. I kept a calendar with a countdown until election day. I was so sure that the weekend after the election you would call me to come visit and you would kiss me passionately and tell me you couldn't wait to have me back. You'd ask me where I wanted to work and say something akin to "Consider it done" and it would be. Instead I didn't hear from you for weeks and subsequently your phone calls became less frequent. We talked about my returning and you kept replying, "I'll talk to Bob Nash", "I've talked to Bob Nash", "Bob Nash is working it". Then it moved to "Marsha is working on it". Then you dumped me and it was still "Marsha' is working it. I promise it will be done" Now, Marsha is saying just be patient. Why do you want to come back anyway? You've already had the experience of working here.

I can't take it any more. A person can only handle so might anxiety and stress. Maybe it would be easier to wait if you had called more and it hadn't been such trouble to try to see you. As I said in my last letter to you I've waited long enough. You and Marsha win. I give up. you let me down, but I shouldn't have trusted you in the first place.

K

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MS. LEWINSKY: Well, the day before, it was that --

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I understood when -- when -- I didn't think I was involved with this. I -- I -- I sort of -- you know, this may sound retarded, but I understood -- you know, I understood you didn't want to get up there, and you didn't want them to have some kind of evidence and be caught with your pants down. I understand that. But does it change -- does it -- it --

MS. TRIPP: I'm not convinced and I don't think you should be convinced that there's nothing there.

MS. LEWINSKY: But I -- there's -- they can't have anything, even if they bring someone -- they could bring somebody up, and all I'd have to say is, "Look, it didn't happen, this person is politically motivated."

MS. TRIPP: But -- but assume -- look --

MS. LEWINSKY: There is no one -- there is no one -- there is no one, nobody saw anything so nobody could know.

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MS. LEWINSKY: Maybe I should just tell the creep, maybe I should just say, "Look, don't ever talk to me again. And they fucked you over, and so now you have this information, and that, "Do whatever you want with it."

MS. TRIPP: Well, I think if -- if you want to do that, that's -- that's what I would do, but I -- I just can't -- I don't know that you're comfortable with that. I think he should know. I don't --

MS. LEWINSKY: He won't settle. He's in denial.

MS. TRIPP: (Sigh.)

MS. LEWINSKY: Nothing is going to (inaudible).

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MS. TRIPP: I think if he fucking knew, he would settle.

MS. LEWINSKY: I don't think so, because he knows what it'll end up just being is me against you.

MS. TRIPP: I don't think --

MS. LEWINSKY: I don't want to paint you as a bad person.

MS. TRIPP: Hey, look, Monica, we already know that

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you're gonna lie under oath. We also know that I want out of this big time. I mean, how else is this going to go? If I have to testify -- if I am forced to answer questions and I answer truthfully, it's going to be the opposite of what you say, so therefore, it's a conflict right there.

MS. LEWINSKY: But it doesn't have to be a conflict.

MS. TRIPP: What do you mean? How? Tell me how. Tell me how. I'm supposed to say -- if they say, "Has Monica Lewinsky ever said to you that she is in love with the President or is having a physical relationship with the President?" -- if I say no, that is fucking perjury. That's the bottom line. I will do everything I can not to be in that position. That's what I'm trying to do, but I don't know how else to do this. I'm coming up with foot surgery in California. I will do anything.

MS. LEWINSKY: I know.

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MS. TRIPP: But, no, you really don't know, 'cause you don't believe me. I think you really believe --

MS. LEWINSKY: I believe you.

MS. TRIPP: -- that this is very easy and I should just say, "Fuck it, they can't prove it."

MS. LEWINSKY: I believe you, but obviously, I don't have the same feelings about the situation that you do, so I can't --

MS. TRIPP: What do you mean?

MS. LEWINSKY: Because if I had the same feelings, that it was so wrong to do -- to -- to deny -- to deny something, then -- then I would not be doing it. Do you see what I mean?

MS. TRIPP: I think down deep, you don't like having to lie.

MS. LEWINSKY: Of course not. I don't think anybody likes to. I don't think anybody likes to, but it's like --

MS. TRIPP: But the scary thing to me --

MS. LEWINSKY: This is how -- this is how family is. This is -- I would lie on the stand for my family. That is how I was raised as family.

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MS. LEWINSKY: But, like I say, I know you don't think so, I know you probably don't believe this, but I really -- and I am telling you this with every bone in my body, okay? I do not think you would lose your job over this Kathleen thing.

MS. TRIPP: Hah.

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MS. LEWINSKY: Okay? I don't. I really don't, because I think the damage has been done.

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. And that's an awful situation for me because I feel like I'm setting you up. So I -- I almost feel like --

MS. LEWINSKY: What if -- okay. Wait a minute. What if I told -- what if I told my lawyer the truth? And told him still I was going to say no?

MS. TRIPP: I --

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MS. LEWINSKY: Then how would that still be different?

MS. TRIPP: Then I could say to Kirby -- I could say to Kirby, "Look, here is the situation. This is how serious it is. She is not going to give in, not one inch. She has chosen, this is what she signed for, she is not getting involved. It's her business. She feels it's a private matter. It is certainly not for anybody else's consumption and she's not going to play."

MS. LEWINSKY: Mmm-hmm.

MS. TRIPP: "She has told her attorney this and she -- they're going to handle it however they're going to

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handle it. But it's her private business. I don't want to be dragged into this because I would have to contradict." And he'll say, "Well, why? Is this the person who -- " blah, blah, blah." And I'll say, "Yes."

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MS. TRIPP: You either have the standards or you don't.

MS. LEWINSKY: What I was getting at before is that to me -- but, I mean, look, my whole thing on this is skewed, but to me, it's one thing to say, okay, you get up there by yourself and say no, but it's something different to say no when you know someone else is saying no and is going to say no until the day she dies.

MS. TRIPP: But -- but I'm -- I'm still -- here's my -- my fear.

MS. LEWINSKY: Mmm-hmm.

MS. TRIPP: My fear is that they have information that we don't know they have, and if they can nail us, we can

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both be nailed. Do you see what I'm saying?

MS. LEWINSKY: Okay. What information do they have?

MS. TRIPP: I don't know. I don't know.

MS. LEWINSKY: I mean, what would they have about you? See, I don't think they could have anything that's connected to you.

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MS. TRIPP: No, only that -- only connected to me through you.

MS. LEWINSKY: Right. But -- so what I'm saying is this, is that -- let's just say -- let's just say for --

MS. TRIPP: You don't think there's a possibility, do you, that anyone at work overheard any of our conversations on the phone?

MS. LEWINSKY: Okay. First of all, I don't think so. But, if they did, if they did, who -- I'll say -- first of all, look, and I'm telling you this honestly and I will tell you this tomorrow morning and I will look you in the eye. You know, if I needed to, I would say, well, I never -- you know, I -- I don't know what you're talking about and this did not happen, and so because this did not happen, she and I certainly never had a conversation. If, let's just say, there was, God forbid, (inaudible), some kind of evidence that then -- that directly -- you know, I don't know, somebody had a video camera of him and me --

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MS. TRIPP: Mmm-hmm.

MS. LEWINSKY: -- I would still say I never told you anything.

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MS. TRIPP: Mmm-hmm.

MS. LEWINSKY: Because, you know what? You can -- okay. First of all, for your sake, but also for my own sake because still, you know --

MS. TRIPP: Mmm-hmm.

MS. LEWINSKY: -- you can look at it both ways. So, I mean, I -- I mean, you -- I sort of assumed that you -- you figured that.

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MS. LEWINSKY: Then I went to go see him.
MS. TRIPP: Right.
MS. LEWINSKY: He said I could come see him. So I went to go see him. And I was there, and he -- you know, and I was so upset, and he said, "Well, let me see what I can

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do," you know. He said -- he says, "Why do they have to take you away from me? I trust you so much," you know.
And then -- and then he said, "I promise you," you know, something like, "if I win in November, I'll have you back like that. You can do anything you want. You can be anything you want. You can do anything you want."
And then I made a joke and I said, "Well, can I be assistant to the president for blow jobs?" He said, "I'd like that."
MS. TRIPP: (Laughing) You didn't say that.
MS. LEWINSKY: I did.
MS. TRIPP: Oh, Monica, Monica, Monica. -- (Laughing).
MS. LEWINSKY: And he just kept saying, "I'll take care of you, I'll take care of you. Don't worry. I'll take care of you. And if you don't" -- you know, and he was attentive for the next couple weeks. And, you know, I cried. I hated my job.
MS. TRIPP: This was April, right?
MS. LEWINSKY: This is April.

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MS. LEWINSKY: Just -- it's not him as much. I'm just questioning the whole experience. I'm like why -- why did I have to go through this? Why has every time I've tried to walk away from it, you know, I mean, like made the ultimatum, it comes out so that I'm still in this stupid thing.

MS. TRIPP: I know.

MS. LEWINSKY: You know? I'm like I don't understand it. What am I supposed to learn? What is it that I'm supposed to gain? I don't feel any better about myself. I don't have more feelings of self-worth or more self-esteem.

MS. TRIPP: Well, the you-know-what of the you-know-what found you awfully attractive.

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MS. LEWINSKY: But big fucking deal.

MS. TRIPP: I mean --

MS. LEWINSKY: He finds anybody attractive.

MS. TRIPP: Oh, that's not true.

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MS. LEWINSKY: It is true. I guarantee you that given the opportunity with anybody, he'd let anybody suck his dick.

MS. TRIPP: (Laughter.)

MS. LEWINSKY: I mean, I'm serious, you know. I mean, it just --

MS. TRIPP: Well, I'd believe that if you were a one-time deal, but look how long that went on. I mean, yeah, he had bouts of conscience and -- and tried to, you know -- And so you kept waiting

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for finite goals to occur.

MS. LEWINSKY: I mean, he still doesn't even know that I counted the days until the election. I had in my -- my little organizer, you know, 100, 99, 98 --

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MS. TRIPP: But the bottom line is, as a political appointee, you're supposed to uphold the -- the position of the administration. Of course.

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: But you are not -- you don't sign up to lie. They don't expect you to lie.

MS. LEWINSKY: No.

MS. TRIPP: They don't. Under oath. I mean, it should not be a part of your, your job description --

MS. LEWINSKY: No. No, I think -- I mean, I think that they're also -- it's also a question of black and white and then shades of gray. I mean, to me, uh, asking you to lie would to say -- would -- for you to say, "Well, I don't know who Kathleen Willey is." Do you know what I mean?

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: It's like that's asking you to lie. But to -- to -- but to say -- but to say, to add certain things -- to say something -- okay. Just like what we talked about before. Okay? If you say, "Here are all the things

EXHIBIT K Linda Tripp tapes LRT-022 2

that she told me." Okay? That makes it seem whatever it was it was very, very, very credible for her.

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You say, "Here are all the things she told me. And now, in light of what -- all these other things, I don't know what's true. I don't know that what she told me then was true."

Doesn't that change it? To you, does that change what --

MS. TRIPP: I think the damage to them is the fact that I say anything that she said to me. Because, look --

MS. LEWINSKY: That is damage. I mean I can't say it's not damage. But there's also a degree. There's a degree of damage and there's also a -- an appearance of, "I'm out to fuck you."

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: And, "Look. This is what happened. I can do the best I can, but I can't," you know? Do -- do you see what I mean?

MS. TRIPP: (Sigh.)

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MS. LEWINSKY: Am I making sense or no?

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MS. TRIPP: You have the luxury of Vernon Jordan knowing the truth. And knowing the fact --

MS. LEWINSKY: What truth?

MS. TRIPP: -- that you are going to do this for

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that --

MS. LEWINSKY: And what does that do for me?

MS. TRIPP: Because that's huge. Vernon Jordan --

MS. LEWINSKY: Tell me what is he -- what is it that him knowing will do for me?

MS. TRIPP: Look. He knows that you are putting your, your, your -- all your credibility and -- legally, it's frightening, but you are putting everything on the line and lying under oath.

MS. LEWINSKY: I already did.

MS. TRIPP: He knows you did that.

MS. LEWINSKY: I already did. I signed it.

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MS. TRIPP: I --

MS. LEWINSKY: So what is it -- so what is it he's going to protect me from? Perjuring myself so I go to jail? Coming out and saying, "Gee, I'm going to tell the truth now, but I signed something under oath." So I'm going to go to jail just to tell the truth?

MS. TRIPP: No. You're not hearing what I'm saying. You -- he is aware of what you have done for this president. He knows what you have done. He is a huge person to be condoning that. He knows what you have done. And, so, you're protected because they're never going to fuck you over.

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MS. LEWINSKY: So, I mean I'm trying to look out for you. I -- to tell you the truth, I'm not concerned all that much anymore because I'm not going to get in trouble. I will not get in trouble because you know what? The story I've signed under -- under oath is what someone else is saying under oath.

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MS. TRIPP: Who?

MS. LEWINSKY: He will.

MS. TRIPP: Oh, the big guy?

MS. LEWINSKY: So, there's other people --

MS. TRIPP: Well, of course.

MS. LEWINSKY: -- that have said nothing happened.

See what I mean?

MS. TRIPP: And you're positive, 100 percent

without doubt positive he's not going to slip up when he

gives his deposition?

MS. LEWINSKY: Hah, him?

MS. TRIPP: Well, he's only human. I mean he's

only human.

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MS. LEWINSKY: Slip up. I -- no. I don't think

so. I don't think so. No. And -- ah, I -- I am not a big

issue here. I'm not a big issue.

You know who are big issues? Paula Jones is a big

issue. Gennifer Flowers who has come forward is a big issue. Dolly Calbrah (phonetic), anybody who has come forward is a

big issue.

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MS. TRIPP: (Sigh.)

MS. LEWINSKY: I am rumor and innuendo. I will get -- if I even get a question, which I assume I will because I'm assuming everyone on that list is going to get a question. (Tape skip.) I mean I just -- I am trying to help you as much as I can because I think you could, you know, I think you could preserve your job.

MS. TRIPP: I have a real problem -- I have to tell you. Put my job aside for now. I have a real problem that you don't have any qualms at all about doing this for him. I mean, to me, it's like where --

MS. LEWINSKY: I have qualms.

MS. TRIPP: Hmpf.

MS. LEWINSKY: I have qualms, but I -- I made a decision that I have to deal with them.

MS. TRIPP: It bothers me no end that you're expected to do this when this is -- this is you, Monica. You are one -- there is no one --

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MS. LEWINSKY: I don't -- I don't believe --

MS. TRIPP: You can only be --

MS. LEWINSKY: -- we're having this discussion. I

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already signed it.

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MS. TRIPP: (Sigh.) I guess, I guess, you know --

MS. LEWINSKY: You know, I just feel like you kind of -- you keep dancing around this issue that you want me to do something, but you won't come out and say it.

MS. TRIPP: No. I don't want you to do anything. It just -- I'm -- I'm talking to you as honestly as I can do in this position, which is to say that if I had a Vernon Jordan in my pocket or at least -- and don't yell at me -- I'm just saying at least someone who said, "I understand. I will help. I will do this. I will show you the way." It would -- it would make me feel a lot better. I feel very much as though I'm adrift.

MS. LEWINSKY: But don't you think -- but -- but you know where you would get that? You would get that by going to -- to -- to Bennett's side. I don't understand --

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not Bennett's side, but -- but his -- I -- I would imagine that, you know, they would give your lawyer some guidance. Something.

MS. TRIPP: Well, that's what I'm going to have to see.

MS. LEWINSKY: I mean -- but I mean, it's like that's what my lawyer has gotten, is guidance.

MS. TRIPP: I mean the -- you -- you know, you've talked to me about, you know, all of this and I keep thinking, "The President is going to say what he's going to say under oath soon." I'm assuming -- is his thing still on for this weekend?

MS. LEWINSKY: It is on for this Saturday.

MS. TRIPP: (Sigh.) And as soon as he does that, as soon as he does --

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: -- if I don't lie, if I don't lie, I am contradicting the President. Do you know what that does to me? I mean that, that almost takes my choice away. And I, I -- it's -- it's making me ill.

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MS. LEWINSKY: When it comes to me -- okay. This is what they're going to do. Uhm, okay. First, they're going to go through all the questions, "Are you aware of anyone else?"

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MS. TRIPP: Mm-hmm.

MS. LEWINSKY: So what do you say?

MS. TRIPP: Now, is that the time to say no, generally? Or no about Schiff or --

MS. LEWINSKY: I mean you could say -- you could say, you know, "I've been in," you know, "I've been in politics for a long time. It's possible I've heard something, but nothing specific that I can remember."

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MS. LEWINSKY: "Stuff like that. Whatever."

"Did she ever say anything to you or intimate

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anything to you about any kind of a, uh, maybe her experiences at the White House?"

"Well, you know, we talked about some things. What it was like, what we missed, what we didn't miss, blah, blah, blah."

MS. TRIPP: Mm-hmm. Mm-hmm.

MS. LEWINSKY: "And did she ever say anything to you about," let's just say they're going to try and trick you. Okay. "Did she ever tell you about her affair with that one?"

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: "No." I mean, well, you --

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: -- could say then whatever, you

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know --

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: You could say, "I don't think so. I think, you know --"

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: "I think that's something I'd remember and I don't recall."

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: "And I don't recall."

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: "I don't recall that."

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: See, there you haven't said no.

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: I don't think -- do you see what I mean?

MS. TRIPP: Yeah.

MS. LEWINSKY: "Are you sure about that? I mean we, we have records that," da, da, da, da.

"Well, I don't, you know, I don't really -- this is the first I've heard of it. I don't really know any -- I, you know -- I don't really know anything. I don't," do you know what I mean? It's different --

MS. TRIPP: Yeah.

MS. LEWINSKY: -- from "No"?

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MS. LEWINSKY: First of all, I think -- first of all, I think your attorney should meet with their people first. That should be the first thing. That's what my guy did.

MS. TRIPP: Meet with?

MS. LEWINSKY: My guy went there.

MS. TRIPP: To where?

MS. LEWINSKY: He went to their offices and had a one-hour meeting as it states on my bill.

MS. TRIPP: To -- to Bennett's office?

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MS. LEWINSKY: Uh-huh.

MS. TRIPP: Okay. (Tape skip.) But your attorney doesn't know about me. Right?

MS. LEWINSKY: No.

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MS. LEWINSKY: Just do yourself a service and have him talk to Bennett's people.

MS. TRIPP: I'm going to tell him.

MS. LEWINSKY: You know? But, also, I mean I want to warn you, uh, that, like the kinds -- the way that they're -- you know, they don't sit down and say, "Oh, so this is your client and this is my client. And this is what my client says and this is what your client should say," or da, da, da, da. Everything is very, very circumspect.

And I think my lawyer had to do some -- I don't know exactly what he did, but he had sort of -- he said it was sort of difficult to get them to talk because they kept saying, "The gag order. The gag order. The gag order."

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: So then he could only -- that it was only like little after little that, now, it's -- you know, they say the gag order and then they tell a little bit more.

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: Do you see what I mean?

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: So I mean I don't -- I -- I -- I --

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what I want to make sure is I don't want to characterize to you that it's like your lawyer is going to call them and they're going to go over and have beers. And -- do you know what I mean?

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MS. LEWINSKY: Yeah. Or you can wait until -- which I could understand. I mean, one more week and then -- I -- I have a feeling, but I could be wrong, I have a feeling even though I'm saying what I'm gonna do, you will have a lot more assurance once I've done it. I have that feeling. That when I have -- when I have finished and --

MS. TRIPP: What do you mean? When you're -- when you actually have a deposition?

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: Well, I mean look, if the President is gonna say one thing and you're gonna say one thing, that makes it me being the only one with the potential --

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MS. LEWINSKY: Not --

MS. TRIPP: -- to say something different.

MS. LEWINSKY: Right. And I think -- and I can see how that's a different -- I can see how you could see that differently. Do you know what I mean?

Like I think there's -- I mean don't you agree? There's a difference between you go first and you say no first as -- as being -- do you know what I'm saying?

MS. TRIPP: Well, I mean it's totally intimidating to me, you know, and I -- I -- I know there are leaks with depositions, so I know we'll know when he is finished what he said. And I know --

MS. LEWINSKY: I don't know. They haven't leaked any of the others. They didn't leak any of what's-her-face.

MS. TRIPP: This one -- this one's huge. It'll leak. It'll be denials, we -- we assume. Correct?

MS. LEWINSKY: Well, from that other sheet of everything he said, there was -- those are definitely denials.

MS. TRIPP: Yeah.

MS. LEWINSKY: I wonder how he'll explain that 128-minute call to Juanita.

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MS. TRIPP: 158.

MS. LEWINSKY: 158 to Juanita.

MS. TRIPP: Say it wasn't him, I guess.

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MS. LEWINSKY: Or, well, I mean the truth is, is it could have been -- "I really don't remember."

MS. TRIPP: (Laughter.)

MS. LEWINSKY: I'm not kidding you. That is the best thing to say. But I also want to warn you. I mean, I'm sure Kirby did this with you, too; but my lawyer -- and I just had to -- this was the hardest part -- is he kept trying to scare me with stuff, too.

MS. TRIPP: Like what?

MS. LEWINSKY: You know? Like perjury.
MS. TRIPP: Yeah. Well, see, now that didn't scare you. Right?

MS. LEWINSKY: It scared the shit out of me. It scared the shit out of me. And all I kept thinking to myself was, "Oh, my God, please, dear God, don't let me turn stark white right now. Please don't let me turn stark white right now."

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MS. LEWINSKY: Exactly. So, you know -- but I mean she's just like -- she -- and she was so mad. Had she not been so mad, I was like, well, I was going to tell my dad.

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But she got so mad. And then, apparently -- well, then I was going to tell my dad because my mom had this really good idea that my parents should come sit in on the deposition.

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: But then the lawyer said that that's not a good idea.

MS. TRIPP: It's not a good idea?

MS. LEWINSKY: It's not because then, really, because then they'll say, "Well, what did you know? What do your parents know about all this?" And then they could subpoena my parents.

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MS. LEWINSKY: They didn't -- they didn't feel like they would be able to give me a direct spot in public relations having -- not having experience, but --

MS. TRIPP: In a civilian firm.

MS. LEWINSKY: What?

MS. TRIPP: In a civilian firm.

MS. LEWINSKY: Right. Which is understandable.

MS. TRIPP: Yeah.

MS. LEWINSKY: And so what they -- you know, what

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they're looking at is -- I'm hoping (inaudible) Revlon, which is what I'm hoping. This is the company that is like connected Revlon. So what their thinking is that they're going to try and see if they can get me, you know, either at (inaudible) or Revlon (inaudible) -- there was two other companies that I had heard of but, like, (inaudible). What they might do is start me out as some kind of like administrator, some kind of -- some administrative staff and

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some -- (inaudible).

MS. TRIPP: Mm-hmm.
MS. LEWINSKY: But when I asked about salary, I mean, it would probably be somewhere in the ballpark of $40,000.

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MS. TRIPP: In other words, you're not just going to be cast adrift.

MS. LEWINSKY: I don't think so. Uh --

MS. TRIPP: What did Betty say when you said that, that, "I'm not signing it"?

MS. LEWINSKY: She said, "Well" -- she said, "Well, (inaudible), I think he's been out of town," or some weird shit like that. I don't know, whatever it was. You know, I'm like -- but --

MS. TRIPP: Did you say again, "I'm not signing it"?

MS. LEWINSKY: I said, "Look. You guys want me to sign something, I'm not signing it until I have something." So -- and that was the people Friday -- Friday or Monday?

MS. TRIPP: This past Friday?

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MS. LEWINSKY: No, it must have been Monday.

MS. TRIPP: Okay. But, anyway, recently? Today's Tuesday. Tuesday.

MS. LEWINSKY: Yeah, yesterday morning.

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MS. TRIPP: Can I ask you something?

MS. LEWINSKY: Yeah?

MS. TRIPP: Are you bound and determined to do what you plan to do?

MS. LEWINSKY: Uh-huh.

MS. TRIPP: Absolutely. Okay.

MS. LEWINSKY: I --

MS. TRIPP: You -- are you -- are you positive in your heart that you want to do that? I mean --

MS. LEWINSKY: Uh-huh.

MS. TRIPP: I'm only saying -- I'm only saying that in case you should change your mind.

MS. LEWINSKY: No. I -- I -- I -- first of all, for fear of my life --

MS. TRIPP: Yeah.

MS. LEWINSKY: -- I would not. For fear of my life, I would not -- I would not cross these three people

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again in my life, number one.

MS. TRIPP: (Inaudible.)

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MS. LEWINSKY: But, number two, I -- some people would see it differently. I look at that woman with such loathe and disgust, I would -- there is nothing I would do to help her. And saying it would just help her.

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MS. LEWINSKY: Because I know it. It's a tape,

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it's not me. It's a picture, it's not me. I -- I don't know --

MS. TRIPP: Okay.

MS. LEWINSKY: This is the age of technology. All I know is that that's not me.

MS. TRIPP: Okay.

MS. LEWINSKY: So --

MS. TRIPP: But what if -- what if an agent?

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: Let's just say a renegade agent did something.

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MS. LEWINSKY: Mm-hmm.

MS. TRIPP: Is it his word against yours?

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: Well, how do you know you'll be backed up?

MS. LEWINSKY: Because I have to be. (Laughter.)

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MS. TRIPP: Here -- here's my -- my biggest fear where you're concerned. Then I'll tell you my fear where I'm concerned. Vernon Jordan does not have your best interests at heart and you know it.

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MS. LEWINSKY: Mm-hmm.

MS. TRIPP: He has his president's best-interests at heart.

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: The day that he told you, or took you, or whatever the hell to his attorney to represent you, that already is very scary to me. Like if you had said you had gotten your own attorney on your own, don't you think that that would make all of us feel better, that you could talk --

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whatever you decide to do under oath --

MS. LEWINSKY: You know what? You know what, Linda?

MS. TRIPP: At least you're telling the --

MS. LEWINSKY: No, that's not true, though. Linda, your lawyer -- if you tell -- that -- that's not the case. That's what I thought, too. If you tell your lawyer the truth -- let's just say whatever, let's just say you stole a handout.

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: And you do not tell your lawyer that you stole the handout because the lawyer then can't represent you.

MS. TRIPP: What?

MS. LEWINSKY: A lawyer can't represent you -- if you think -- they can represent you, but they can't represent

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you that you didn't steal the handout.

MS. TRIPP: What? You're serious?

MS. LEWINSKY: I think so. That's my understanding.

MS. TRIPP: So every convict that goes in for

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everything -- or every --

MS. LEWINSKY: Look at O.J. You think O.J. Simpson said to them, "I did it. Get me off"? "I didn't do it, I didn't do it, I didn't do it." This is -- this is how I feel. I could not live with myself if I caused trouble. I -- that is just -- that is not my nature. I am a good person. I think no matter what -- no matter how he has wronged me, no matter how many (inaudible), no matter how many, it -- it is my choice.

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MS. LEWINSKY: They have not agreed, no. There is no agreement because -- but what my lawyer has said is that what signing this will do is it will show them -- okay. They have on rumor and innuendo I have something (inaudible).

MS. TRIPP: He asked you?

MS. LEWINSKY: Yes. (Inaudible.) So (inaudible).

MS. TRIPP: I think Vernon did a wink-wink with him.

MS. LEWINSKY: I don't know.

MS. TRIPP: I mean, he's not a stupid man -- all right?

MS. LEWINSKY: Hmm. No, this guy seems real.

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Well, you know, I'm good at (inaudible). I mean --

MS. TRIPP: (Sigh.) That's a hard one when your lawyer is (inaudible), don't you think?

MS. LEWINSKY: Well, it is hard, you know, it is hard. It's really hard. It's really hard. But you know what? For my own self, whether (inaudible). This is what you're going to get from it. (Inaudible.) Do you know of anybody? (Inaudible.) Did he have anything (inaudible)? All whatever her claims are.

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MS. TRIPP: And then who's gonna cast who to the winds?

MS. LEWINSKY: Okay. You know what? (inaudible) -- no way -- there is no way. The only way that I am gonna get in trouble is if -- truthfully, is if you say something.

MS. TRIPP: Great. Yet that's the huge -- the huge problem.

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MS. TRIPP: But Vernon Jordan is behind you. He's a very powerful man.

MS. LEWINSKY: He -- no, I don't think he's behind me. I think he's behind me (inaudible). I think he's going to distance himself from me. I don't know why.

MS. TRIPP: He -- he knows the truth, and you know it. And he had the all-powerful way of fixing it.

MS. LEWINSKY: Well, I don't know.

MS. TRIPP: Yes, he did. You've got friends. I have none. I have nobody in the whole world. I have no powerful friends. I have a lot of powerful --

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MS. LEWINSKY: You have (inaudible).

MS. TRIPP: No, I don't. (Inaudible) person.

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MS. TRIPP: So what -- where does that take me?

MS. LEWINSKY: Okay. Let me (inaudible). I

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MS. LEWINSKY: Okay. Let me (inaudible). I guarantee you that they -- (inaudible) -- do you know about any of your people? Who were they? You have someone sitting there. If they know about one person, maybe they know about someone else, okay?

So what I'm trying to say is that I think that the questions they're going to ask you that aren't related to Kathleen are generic questions that they would ask anybody. They will ask me, "Do you know about anybody else?" That's what my -- that's what my subpoena said.

MS. TRIPP: I know.

MS. LEWINSKY: You know? But they will ask me about do I know about anybody else, but they're not asking you do you know anyone else. Then maybe -- maybe they're -- you're saying, "Well, you know, no, not that I" -- or not -- this is whatever.

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This is what my lawyer taught me. You don't -- 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. Might have, but I don't really remember. Maybe, but I don't remember." So --

MS. TRIPP: So a non-answer as opposed --

MS. LEWINSKY: Exactly. So that that's -- that's what I would say, okay? If somebody -- and so they say to you, "Okay. Well, do you know (inaudible) -- do you know about anybody in (inaudible)?"

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(Inaudible.) You know. "Maybe I heard something, but I don't -- I don't remember anything."

MS. TRIPP: The only thing is --

MS. LEWINSKY: (Inaudible.) Well, okay. Let's just say they (inaudible). They go, well, let's give a shot -- they're thinking of themselves. Let's give a shot in the dark. The Tripp woman worked with the Lewinsky girl.

MS. TRIPP: But I --

MS. LEWINSKY: Even though the Lewinsky girl said nothing, let's give a shot in the dark. Do you -- do you

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know anything about her, rumor, or her involvement with the creep, (inaudible). You know? "If I heard something, not that I remember." You know?

And if you -- if you can justify it to yourself and -- do you remember the exact words? Do you remember the exact dates? Do you remember everything that I've said, the exact words about it? Because I don't. You know what I mean?

MS. TRIPP: I would -- no. I know what you mean.

MS. LEWINSKY: And so then they say -- oh, then they -- maybe they think well, (inaudible), let's try it one more time.

I can't -- I can't imagine them asking more than a few questions, and then they're gonna drop it. Why? Why are they gonna drop it? Because they -- they will already know

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that that's what I am gonna say.

MS. TRIPP: Because you'll have --

MS. LEWINSKY: Because I already have -- I will have given them -- not only will I have given them an affidavit, and if that doesn't suffice, they already will have that, they will already know that's what I will say.

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They will ask you anyway, because why not a shot in the dark? Do you see what I mean?

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MS. TRIPP: I guess I would feel a lot better if I had -- call me paranoid, but I would feel a lot better if I had the same protection you had.

MS. LEWINSKY: What protection do you think I have? Because I don't think I have any protection.

MS. TRIPP: What do you mean?

MS. LEWINSKY: I -- well --

MS. TRIPP: I think having the most powerful attorney in the nation take you under his wing is protection. I have Kirby.

MS. LEWINSKY: I mean, I don't know. I -- but -- protection of what? You know? (Inaudible.)

MS. TRIPP: He knows -- your guy knows -- not the big creep, the other guy knows everything, or at least "wink-wink" knows. He's gonna take care of you.

MS. LEWINSKY: In what sense, though? You think -- you think if it came down to it, do you think if it came down to me going to jail and him -- or him having to say the truth -- huh.

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MS. LEWINSKY: He won't settle. Because. They're not gonna settle. It is clear. It's in the papers. He will not settle.

MS. TRIPP: I do not believe any of that shit in the paper.

MS. LEWINSKY: Well, I do. $2 million?

MS. TRIPP: Do you think it's fair -- I mean, look, he's gonna be deposed. He's gonna -- I -- I just keep

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thinking in my mind, I almost think you're doing him a disservice not to tell him ahead of time.

MS. LEWINSKY: No. Because you know what? It doesn't matter because --

MS. TRIPP: Yes, it does matter.

MS. LEWINSKY: -- I will say no.

MS. TRIPP: Because he's gonna say no under oath.

MS. LEWINSKY: Yes, but there's two people saying no, though.

MS. TRIPP: (Sighing.) Yeah.

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MS. LEWINSKY: I mean, it'll be kind of huge. I

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mean, I -- I -- I -- Linda, it's hard for me to understand, I have to be honest with you --

MS. TRIPP: (Sighing.)

MS. LEWINSKY: It is hard for me to understand how -- how -- how you could want to do that to me.

MS. TRIPP: I --

MS. LEWINSKY: I mean, you are hurting one person. You will hurt one person. You will help Paula Jones and you will hurt me.

MS. TRIPP: I'm not here to help Paula Jones. You know that.

MS. LEWINSKY: But that's what -- that's what you'll do, though. That's what you'll do.

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MS. TRIPP: How would that help her?

MS. LEWINSKY: Huh. Huh.

MS. TRIPP: I mean --

MS. LEWINSKY: Because they'll have --

MS. TRIPP: No. You just got through saying it's your word against mine.

MS. LEWINSKY: But it will become -- you think that they'll drop it? You think that if I say -- go up there, I

EXHIBIT L Linda Tripp tapes BW-002 8

sign the thing, I say no. They ask me questions and I say no. You go there and you say, yes, Monica Lewinsky (inaudible) and da, da, da, da, da. You think they're gonna go, "Oh, okay. It's your word against your word. Hmm. Who should we believe?" No. Then they're gonna pull me back in there, they're gonna pull him back in there --

MS. TRIPP: And say what?
MS. LEWINSKY: And then -- then --

MS. TRIPP: But if you continue -- you're telling me you're gonna continue to fucking deny anyway, so how -- how does that -- make me understand this, Monica. How does that --

MS. LEWINSKY: I mean, what if they could get you in -- if there is no way to prove that what I'm saying is wrong?

MS. TRIPP: Oh, I know it could get me in trouble.

MS. LEWINSKY: You know? I mean, telling the truth

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could get you in trouble. I don't know why you'd want to do that.

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MS. TRIPP: Monica, be -- be real here. That's a

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very powerful friend to have, not the big creep, the other one.

MS. LEWINSKY: I don't consider him a friend, Linda.

MS. TRIPP: He took you by the hand? You don't think that's a friend?

MS. LEWINSKY: Huh. I consider a friend (inaudible). I'd consider him a friend if --

MS. TRIPP: Well, I mean, you're assuming he is. I mean, I guess you're --

MS. LEWINSKY: I think you -- I --

MS. TRIPP: -- you're -- you're looking at this from an entirely different --

MS. LEWINSKY: I don't think -- you think he took me because he wanted to be nice to me? No. I think he took me to make sure I went and make sure that I said what I was

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supposed to say.

MS. TRIPP: Right. But he -- he -- then he insinuated himself in the process so that --

MS. LEWINSKY: I insinuated him. If I am asked -- if I'm asked --

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MS. TRIPP: Whatever.

MS. LEWINSKY: If I am asked how I got my lawyer, I'm gonna say, "Well, he suggested it to me." And then they'll say, "Well, how do you know him?"

"Why, everybody knows him."

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MS. LEWINSKY: This -- this is how I have looked at it. This is how I have looked at it, and this is from my Christian Scientist, from talking to this woman, and I have talked to her and I've said, "Well, what about" -- you know,

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I said, "If truth is synonymous with good, then truth is good and good is God, okay? If all those things are synonymous, then the right thing to do is to not hurt someone."

"That's true. That's correct."

MS. TRIPP: Well, that -- that does make sense.

MS. LEWINSKY: So the truth -- well, what is truth? I mean, I'm not trying to have an existential conversation with you.

MS. TRIPP: I know that, I know.

MS. LEWINSKY: But what is the truth? Linda, did

you ever see anything?

MS. TRIPP: No.

MS. LEWINSKY: Did you, you know --

MS. TRIPP: But I know everything. That's -- I wish I didn't, it's a huge burden.

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MS. TRIPP: I mean, all these years of testifying and doing this and doing that, it -- it would never have crossed my mind to lie under oath. I mean, I just --

MS. LEWINSKY: No, I --

MS. TRIPP: I can't -- I can't under -- make you understand how big this is to me.

MS. LEWINSKY: No, I know it's a big thing, and I -- (sighing). You know, I know that it's not a matter -- I would be indebted to you for life. I would do anything. I would write you a check for the entire portion that I own in Australia. Because, to me --

MS. TRIPP: (Laughing.)

MS. LEWINSKY: -- because even though (inaudible)

EXHIBIT L Linda Tripp tapes BW-003 2

right now and you're in my inner life, I love him.

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MS. TRIPP: I know.

MS. LEWINSKY: And just to even protect him.

MS. TRIPP: I know that, Monica, believe me.

MS. LEWINSKY: You know? But I wouldn't -- but --

but -- do you understand that I want you to come out smelling like roses because I want good for you, too? You know?

MS. TRIPP: I do believe that.

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MS. LEWINSKY: Oh, okay. Listen, this is very

important. My lawyer -- what did he say? -- there's

something in my notes, there's something that made me think

of it. It's very important that you -- I -- I don't know

that I would be -- I don't if you -- what you're gonna say

about if you spoke to Bruce or not.

EXHIBIT L Linda Tripp tapes BW-003 3

MS. TRIPP: I'm not allowed?-

MS. LEWINSKY: I would -- what?

MS. TRIPP: I'm not allowed?

MS. LEWINSKY: I don't know. I would say you forgot.

MS. TRIPP: Wait a minute.

MS. LEWINSKY: I would say --

MS. TRIPP: Wait a minute. When was this? This

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was when I called him in --

MS. LEWINSKY: Right.

MS. TRIPP: Oh, and then --

MS. LEWINSKY: What I -- if I were you, I would say, "Well, I don't -- I might have, but I don't remember." That's the phrase. That's the phrase my lawyer told me.

Everything is, "I might have, but I don't remember."

EXHIBIT L Linda Tripp tapes BW-003 4

"Were you ever alone with the President?"

"Um, it's possible I may have taken him a letter on the weekend, but, you know -- I might have, but I don't really --"

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MS. LEWINSKY: No, no. But two -- two thoughts, okay? One, I'm not saying -- I think you need to be careful

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with what you say about Kathleen. If you were to say -- if you were to come out and say, "I know nothing," okay, which is -- which is not -- that would be bad for you, okay? Because then what they're gonna say is that somebody --

MS. TRIPP: Got to me.

MS. LEWINSKY: Right. And that then they'll try and do everything they can to try and get you, okay? Even --

do you see what I mean?

MS. TRIPP: Yes.

MS. LEWINSKY: That you can't do.
MS. TRIPP: No, I know that.

MS. LEWINSKY: But I think you can manipulate with Kathleen -- I think you can manipulate the stuff with Kathleen, you know, you (inaudible). The truth is really -- and you've got to convince yourself of it, convince yourself of the truth, but right now, I mean, look -- the other question, too, look -- okay. Let's just say --

MS. TRIPP: I should come up with several versions.

MS. LEWINSKY: -- five years down -- let's just say five years down the line, (inaudible) everything I did, da, da, da, da, and (inaudible) this whole situation.

And then I have another friend and my other friend comes out and says, "Well, she asked me to lie for her. You

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know, she said all these things, but it really wasn't true,"

something like that.

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MS. LEWINSKY: But you also -- I mean, also,

there's an issue of, gee, you think it was fun coming up with

a fucking retainer for the lawyer? Huh, not fun, not fun.

$2500, $2500, of which -- you know, almost all is gone.

MS. TRIPP: No way.

MS. LEWINSKY: Mm-hmm.

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MS. TRIPP: Even if you're just doing an affidavit?

MS. LEWINSKY: Oh. Every phone call, every

everything. Every -- he has a phone call -- he met with

Bennett. He met with Bennett and Kathy Sexton.

MS. TRIPP: Who's that?

MS. LEWINSKY: She's --

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MS. TRIPP: Oh.

MS. LEWINSKY: -- the female working -- I haven't heard her name in the paper, though.

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MS. TRIPP: Well, that's obviously not a motivator.

MS. LEWINSKY: But as you said before, you were talking to me like weeks ago, you were saying, well,

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(inaudible) and he'll settle. He'll settle.

MS. TRIPP: I did think that, frankly.

MS. LEWINSKY: And I know that not to be the case. I knew it from the day, you know, Gwen responded to that thing that day, that -- remember the thing I gave that day? Remember I told you I gave him that thing, my idea?

MS. TRIPP: Who's "him"?

MS. LEWINSKY: Gwen.

MS. TRIPP: Who's "him"?

MS. LEWINSKY: Oh, that's what my mom calls him.

MS. TRIPP: Who's Gwen? Why do you call Vernon Gwen?

MS. LEWINSKY: That's -- my mother decided his nickname was.

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MS. LEWINSKY: Okay. His reaction to that was a clear indication to me that the creep won't settle. And I know he won't. And talking about -- and everything you read in the paper, she -- (inaudible) now is asking $2 million. Didn't you read the paper today?

MS. TRIPP: Uh-uh.

MS. LEWINSKY: It was yesterday. She is asking -- yesterday or today, she was asking $2 million for settlement. Now she wants --

MS. TRIPP: How did that change?
MS. LEWINSKY: I asked my lawyer, I said, "How come" -- I said, "I've read disparaging things." I said, "One thing says she (inaudible), and then another (inaudible)." (Inaudible.) "Well, I heard that it was $2 million the first time I heard it."

And he said, "Oh. What somebody claims in a suit as damages is different from what they can claim as money for settlement." That's why.

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EXHIBIT L Linda Tripp tapes BW-005 3

MS. TRIPP: Okay. Well, how I feel inside is -- is not exactly how I define it. With me, to me, there's a reason for telling the truth, that the truth is the right thing to do.

I mean, I don't -- I don't think it's my conscience so much as I just think it's a fact of life. I think -- I think that you're required to tell the truth under oath. But --

MS. LEWINSKY: Do you believe there should be

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classified documents?

MS. TRIPP: Yes.

MS. LEWINSKY: Why?

MS. TRIPP: National security.

MS. LEWINSKY: Why?

MS. TRIPP: Because if it falls into --

MS. LEWINSKY: Then the American people don't know the truth.

MS. TRIPP: Well, because, I mean, they're not privy to the --

MS. LEWINSKY: Right. But, I mean, do you see what

EXHIBIT L Linda Tripp tapes BW-005 4

I mean? Do you see what I'm getting at? I mean, you're saying because the truth should be known, because the truth is the right thing, the truth is -- the truth is -- is what it should be.

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MS. LEWINSKY: Mm-hmm.

MS. TRIPP: My terror is that you'll -- there is someone powerful -- there are two someones, but there is someone outside of the issue who's very powerful --

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: -- who knows the truth and has helped you. I have no one like that.

MS. LEWINSKY: Okay. What is it you think this person -- when you say, "You have someone who knows the truth

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and is powerful" --

MS. TRIPP: If it should ever change -- if

MS. LEWINSKY: Like?

MS. TRIPP: -- if anything should ever go sour --

MS. LEWINSKY: Like what?

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MS. TRIPP: I don't know.

MS. LEWINSKY: Because you know what? It means diddly shit.

MS. TRIPP: How do you figure?

MS. LEWINSKY: Hah. To whom do you think Vernon would ever admit I told him? Or (inaudible)? He would say, "Well, she said those things, I don't think they're true."

MS. TRIPP: What do you mean? That you would deny -- he would say that you were hallucinating?

MS. LEWINSKY: Do you -- I mean, what do you think? You think that somehow if something or another happens, (inaudible), that he would then say, "Yes, it's true. She told me and, yes, it's true"?

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MS. LEWINSKY: But when you say -- when you say -- no, no, no. I understand. But when you say to me, "Well, you have Vernon, you have Vernon," what is that I have? What is it that you think I do?

MS. TRIPP: I'd be willing to bet that you got a very high caliber attorney, right?

MS. LEWINSKY: I don't think so. He looks a

EXHIBIT L Linda Tripp tapes BW-005 6

schlemielka. He wears -- he wears Jerry Garcia ties.

MS. TRIPP: But I thought Vernon said that was his personal attorney.

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MS. LEWINSKY: I don't know. I believe that. Oh, I didn't -- I mean, I thought that at first, and then I started to think about it, and I started to wiggle in the office (inaudible).

I mean, he seems really smart, you know, but he is very -- I mean, he's not at all what I would consider a high-powered attorney. If this guy walked in, you'd say he probably worked at Radio Shack.

MS. TRIPP: Come on.

MS. LEWINSKY: I -- I swear to you -- I'm sorry, your opinion of a high-powered attorney, do you not think of somebody that's dressed well?

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MS. TRIPP: Monica, your subpoena had some specific thing there that scared the fuck out of me.

MS. LEWINSKY: It didn't scare me. You know why? I mean, it scared me, but then the fact is that not my

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attorney (inaudible) had anything to say, like, gee, that's weird. (Inaudible.)

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MS. TRIPP: They didn't say it?

MS. LEWINSKY: No. Nobody asked me one thing. And, in fact, Vernon told me that was a vanilla subpoena, vanilla. That is what everybody who -- there's a rumor or whatever it is, that's what everybody got. That's what the woman said.

MS. TRIPP: Really?

MS. LEWINSKY: Mm-hmm.

MS. TRIPP: So you think that was just serendipity that there happened to be the hat pin in there.

MS. LEWINSKY: I'm saying is it possible that whoever it is might know -- might have thought something, maybe (inaudible). You know, my mom says (inaudible) maybe he bought 20 hat pins and they assumed. It's very possible, very possible that he bought 20 hat pins. Look how he shopped. He got 20 hat pins and they said, well, let's --

MS. TRIPP: Throw them out?

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MS. TRIPP: I mean, I can't even envision right now, I have to tell you, okay? So of course, my gut tells me you tell the truth under oath. Right? And then -- now, you're telling me he's being deposed Saturday.

MS. LEWINSKY: Uh-huh.

MS. TRIPP: And he's going to say nothing happened.

MS. LEWINSKY: Uh-huh.

MS. TRIPP: And you're going to write a letter that says nothing happened.

MS. LEWINSKY: I'll probably sign it before. If I find out, if I find out -- I'm supposed to call them -- today -- yesterday was Monday, today is --

MS. TRIPP: Tuesday the 13th because I had to do

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all my JCOC things this morning and they're due --

MS. LEWINSKY: I'm calling -- I call my guy tomorrow and he's waiting to hear from me if I'll come in and sign it. So, I also am supposed to call the people. So I'll call the people in the morning. If I find out --

MS. TRIPP: What people?

MS. LEWINSKY: The job people. If I find out that

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I'm --

MS. TRIPP: They haven't offered it, though.

MS. LEWINSKY: Talked about it. But if I call and find out they have a spot for me like as in, "You start on the 26th here."

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: Okay?

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: I will go sign that thing.

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MS. LEWINSKY: It's long. I mean, it sounds like -- and then -- no, no, no. But, I mean, that's like a paragraph.

MS. TRIPP: Oh.

MS. LEWINSKY: It's maybe like ten paragraphs.

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MS. TRIPP: Oh. Ten?

MS. LEWINSKY: Yes.

MS. TRIPP: I thought you meant two sentences.

MS. LEWINSKY: No. No. It's like ten paragraphs.

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Then there's the statement about, "Have you ever (inaudible) the President?" And "Have you ever --

MS. TRIPP: Yeah, yeah.

MS. LEWINSKY: -- (inaudible) inappropriate," dah, dah, dah.

MS. TRIPP: Yeah.

MS. LEWINSKY: Then there is something about -- then the paragraph (inaudible), and then comes the meaty paragraph that I never had a sexual relationship, you know, nor -- like nor do I know of anybody who has --

MS. TRIPP: You're going to sign that?
MS. LEWINSKY: Mm-hmm. (Inaudible), I never had sex with him. That's a sexual relationship.

MS. TRIPP: What is -- what is the definition of sex?

MS. LEWINSKY: Intercourse.

MS. TRIPP: Oh. Well, yeah. Okay.

MS. LEWINSKY: I never had intercourse. I did not have a sexual relationship.

MS. TRIPP: Okay. All right. So that's -- that's that paragraph. What else?

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MS. LEWINSKY: Then the rest, you know, don't know about anybody else, uhm, I have no information -- oh, yeah, I have no -- oh, yeah, somewhere in the beginning it says I have -- I cannot fathom like why you're bringing me into this.

Then it says something about since I do not, you know, that I saw him on occasions when I worked there and since I've left, I've seen him at official functions, (inaudible), something or another, when others were present.

MS. TRIPP: Mm-hmm.

MS. LEWINSKY: Uh -- and then my last paragraph says something about, uhm, not wanting to be dragged into this.

MS. TRIPP: But it happened?

MS. LEWINSKY: (Inaudible.)

MS. TRIPP: Oh.

MS. LEWINSKY: Not wanting to be dragged into this for unwarranted attorney's fees --

MS. TRIPP: Right.

MS. LEWINSKY: -- invasion of privacy and something

EXHIBIT L Linda Tripp tapes BW-005 12

else.

MS. TRIPP: Okay. And you're gonna sign that?

MS. LEWINSKY: I'm gonna sign that.

MS. TRIPP: All right. Will you let me know when you sign it, then?

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MS. LEWINSKY: Mm-hmm.

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MS. LEWINSKY: This has been asked (inaudible) the lawyer, you know? My lawyer -- one of the two. One of the two, whenever it was, after you had intimated to me --

MS. TRIPP: That I would tell the truth.
MS. LEWINSKY: -- you were -- right.

I said to him, "What if someone's been tapping my phone and -- that's illegal, but they fed the information to someone else? So that this someone else is going to pretend they knew and that I told them or whatever it was.

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MS. TRIPP: Right. That's close enough. And what did he say?

MS. LEWINSKY: And he said, "Well, as long as you

EXHIBIT L Linda Tripp tapes BW-005 13

say it didn't happen, it didn't happen."

MS. TRIPP: So --

MS. LEWINSKY: And I said, "What if they say that I told them and they know all these details or whatever 'cause they've been tapping my phone."

"It's not true." You know?

And then my mom said, "Well, you know, if worse comes to worse, you can always say, 'Well, they must have misunderstood me.'" You know?

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MS. TRIPP: So, Vernon -- Vernon believes that -- I mean, this is important to me to hear because he's a huge lawyer.

MS. LEWINSKY: Okay.

MS. TRIPP: He believes that if no one else knows --

MS. LEWINSKY: Right.

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MS. TRIPP: Like in my case, if no one else knows that I'm not going to be truthful, it's -- it's assuming --

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well, right now no one knows what I know.

MS. LEWINSKY: Right.

MS. TRIPP: You would think that he -- based on what he told you --

MS. LEWINSKY: Uh-huh.

MS. TRIPP: That me saying, "I don't know -- I don't know what you're talking about."

MS. LEWINSKY: Right.
MS. TRIPP: Is the thing to do because there's no other proof.

MS. LEWINSKY: Right.

MS. TRIPP: Well, he's a big lawyer.

MS. LEWINSKY: Yeah.

MS. TRIPP: He's like the biggest.

MS. LEWINSKY: It's like -- it's -- you know? I mean, my mom and I laugh about this all the time.

MS. TRIPP: He's big, Monica.

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MS. TRIPP: Did he say anything about -- now, this is -- this is touchy and you don't have to answer it.

MS. LEWINSKY: Right.

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MS. TRIPP: But did he address the perjury issue at all? Because that is perjury.

MS. LEWINSKY: Okay. He -- yeah. He said that -- he said, "You're not gonna go to jail. You're not gonna go to jail."

MS. TRIPP: You're not gonna go to jail, but did he -- did he -- did he assess what could happen? I mean, assuming -- let's say worst case, they come up to me or to you and say, "You on this date and this date and this date said something completely wrong to us. It's obviously a falsehood."

And let's just say it's perjury or can be construed as perjury.

MS. LEWINSKY: I would say it's not. What I said is true. It did not happen. She is -- I did not say that. She must have misunderstood. Maybe --

MS. TRIPP: I mean, you're not hearing what I'm

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saying. I understand all that.

MS. LEWINSKY: Okay.

MS. TRIPP: I -- I -- I've gotten that.

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MS. LEWINSKY: See, no. No. I understand what you're saying. What I'm trying to show you is that what he has said is there's no way to get caught in perjury in a situation like this.

MS. TRIPP: Really?

MS. LEWINSKY: In a situation like this --

MS. TRIPP: He's sure?

MS. LEWINSKY: There's no way.

MS. TRIPP: He's sure.

MS. LEWINSKY: That's -- but that's what he's told me.

MS. TRIPP: When he presented it to you, did he seem sure?

MS. LEWINSKY: Yes.

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MS. TRIPP: It's scary.

MS. LEWINSKY: It is scary. You know, it was scary to me when my lawyer said to me, "Okay. Well, before I sit down and draft up this affidavit, I need to ask you some tough questions." I said, "Okay."

EXHIBIT L Linda Tripp tapes BW-005 17

MS. TRIPP: Who's asking you this now?

MS. LEWINSKY: The lawyer. My lawyer.

MS. TRIPP: Oh, your -- your lawyer.

MS. LEWINSKY: My lawyer. He said, "Did you ever have sexual relations, dah, dah, dah?"

And I said, "No."

"Did you ever dah, dah, dah?" (Inaudible.)

"No."

"Did you ever offer?"

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"No."

"Was your job, dah, dah, dah, ever connected with?"

"No."

"Nah, nah, nah?"

"No."

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MS. TRIPP: (Laughing.) Well, I can tell you that it -- look. He is the leader of the free world. I am terrified beyond belief of his reach.

Now, you may think that I'm being an idiot here, but I have to tell you that you do not contradict --

MS. LEWINSKY: I agree with you.

MS. TRIPP: I mean, uh, obviously, you know I believe that you should -- you should tell the truth under oath. I mean that's not even an issue with us. But it's like --

MS. LEWINSKY: I don't think --

MS. TRIPP: -- telling the truth under oath when someone who is omnipotent is --

MS. LEWINSKY: Uh-huh.

MS. TRIPP: -- I mean, that's very frightening to me.

MS. LEWINSKY: I will tell you one thing.

EXHIBIT L Linda Tripp tapes BW-007 2

MS. TRIPP: I'm scared to death.

MS. LEWINSKY: Okay? This might -- I don't know -- change your thinking a little or whatever. If he asked me to lie under oath if he hurt -- physically hurt someone, I would not lie under oath.

To me, there's -- there are things --

MS. TRIPP: Well, you're looking at a gray area.

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MS. LEWINSKY: Exactly. And that's how I see this. I mean, look at the issue.

M

points to make in affidavit

Your first few paragraphs should be about yourself -- what you do now, what you did at the White House and for how many years you were there as a career person and as a political appointee.

You and Kathleen were friends. *At around the time of her husband's death* (the President has claimed it was after her husband died. Do you really want to contradict him?), she came to you after she allegedly came out of the oval and looked (however she looked), you don't recall her exact words, but she claimed at the time (whatever she claimed) and was very happy.

You did not see her go in or see her come out.

Talk about when you became out of touch with her and maybe why.

The next you heard of her was when a Newsweek reporter (I wouldn't name him specifically) showed up in your office saying she was naming you as a someone who would corroborate that she was sexually harassed. You spoke with her that evening, etc. and she relayed to you a sequence of events that was very dissimilar from what you remembered happening. As a result of your conversation with her and subsequent reports that showed she had tried to enlist the help of someone else in her lie that the President sexually harassed her, you now do not believe that what she claimed happened really happened. You now find it completely plausible that she herself smeared her lipstick, untucked her blouse, etc.

You never saw her go into the oval office, or come out of the oval office.

You have never observed the President behaving inappropriately with anybody.

You are not sure you've been clear about whose side you're on. (Kirby has been saying you should look neutral; better for credibility but you aren't neutral. Neutral makes you look like you're on the other team since you are a political appointee)

It's important to you that they think you're a team player, after all, you are a political appointee. You believe that they think you're on the other side because you wouldn't meet with them.

You want to meet with Bennett. You are upset about the comment he made, but you'll take the high road and do what's in your best interest.

December 18th, you were in a better position to attend an all day or half-day deposition, but now you are into JCOC mode. Your livelihood is dependent on the success of this program. Therefore, you want to provide an affidavit laying out all of the facts in lieu of a deposition.

You want Bennett's people to see your affidavit before it's signed.

Your deposition should include enough information to satisfy their questioning.

By the way, remember how I said there was someone else that I knew about. Well, she turned out to be this huge liar. I found out she left the WH because she was stalking the P or something like that. Well, at least that gets me out of another scandal I know about.

The first few paragraphs should be about me– what I do now, what I did at the White House and for how many years I was there as a career person and as a political appointee.

Kathleen and I were friends. At around the time of her husband's death, she came to me after she allegedly came out of the oval and looked _____, I don't recall her exact words, but she claimed at the time _____ and was very happy.

I did not see her go in or see her come out.

Talk about when I became out of touch with her and maybe why.

The next time I heard of her was when a Newsweek reporter showed up in my office saying she was naming me as a someone who would corroborate that she was sexually harassed by the President. I spoke with her that evening, etc. and she relayed to me a sequence of events that was very dissimilar from what I remembered happening. As a result of my conversation with her and subsequent reports that showed she had tried to enlist the help of someone else in her lie that the President sexually harassed her, I now do not believe that what she claimed happened really happened. I now find it completely plausible that she herself smeared her lipstick, untucked her blouse, etc.

I never saw her go into the oval office, or come out of the oval office.

I have never observed the President behave inappropriately with anybody.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS	)	
	)	
DUCES TECUM #D902	)	Misc. No. 98-068
	)	(Filed Under Seal)
AD TESTIFICANDUM #D937	)	
	)	

RESPONSE OF THE REAL PARTY IN INTEREST MONICA LEWINSKY TO MOTION TO QUASH SUBPOENA DUCES TECUM AND SUBPOENA AD TESTIFICANDUM

Comes now the real party in interest, Monica Lewinsky, by and through counsel, in response to the motion of Francis D. Carter to quash the Grand Jury Subpoena Duces Tecum and the Subpoena Ad Testificandum issued by the Office of the Independent Counsel ("OIC"). Ms. Lewinsky's response in support of Mr. Carter's motion rests upon the following grounds: (1) the subpoenas are overly broad and unreasonable in scope and in violation of the Department of Justice's policies governing subpoenas issued to attorneys; (2) the information sought in the Subpoena Duces Tecum is protected by the attorney-client privilege and (3) the information sought under the Subpoena Ad Testificandum is also protected by the attorney-client privilege. Ms. Lewinsky, as the real party in interest, asserts her Fourth and Fifth Amendment rights as well as her Constitutional right to effective assistance of counsel under the attorney-client privilege.

The subpoenas issued by the Independent Counsel intrude upon an area of rights historically protected by law and legal tradition. Ms. Lewinsky's position is fully explained in the attached memorandum of points and authorities.

Respectfully submitted,

Nathaniel H. Speights
D.C. Bar No. 952036
SPEIGHTS AND MITCHELL
1511 K Street, N.W., Suite 811
Washington, D.C. 20005-1419
(202) 783-6300

William H. Ginsburg
GINSBURG, STEPHAN, ORINGHER & RICHMAN
10100 Santa Monica Boulevard
Los Angeles, CA 90067

Attorneys for Monica Lewinsky

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to the Motion to Quash were telecopied and mailed, first-class postage prepaid, this 25 day of February, 1998, to each of the following:

Paul Rosenzweig
Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, D.C. 20004

and

Charles J. Ogletree, Esq.,
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GRAND JURY SUBPOENAS	)	
	)	
DUCES TECUM #D902	)	Misc. No. 98-068
	)	(Filed Under Seal)
AD TESTIFICANDUM #D937	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RESPONSE OF THE REAL PARTY IN INTEREST MONICA LEWINSKY TO THE MOTION TO QUASH SUBPOENA DUCES TECUM AND SUBPOENA AD TESTIFICANDUM

I.

INTRODUCTION

This is a response by the real party in interest, Monica Lewinsky, to the motion of Francis D. Carter to quash the Grand Jury Subpoenas Duces Tecum #D902 and Ad Testificandum #D937, pursuant to Rule 17(c)[1] of the Federal Rules of Criminal Procedure. The subpoenas were issued by the Office of the Independent Counsel ("OIC") to her former counsel, Francis D. Carter, for the production of documents in Mr. Carter's possession relating to Ms. Lewinsky, including all notes and documents held by Mr. Carter, by March 4, 1998. The subpoenas issued by the Independent Counsel are overly broad and unreasonable in scope and are in contravention of the policies of the Department of Justice governing subpoenas issued to attorneys. D.O.J. Manual 9-2.161(1). Monica Lewinsky has been targeted by the OIC and is the subject of the instant Grand Jury.

The documents which are subject to the subpoenas issued by the Independent Counsel relate to Mr. Carter's representation of Ms. Lewinsky. The production of these documents will

[1] Under this Rule, the Court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

violate her Constitutional right to effective assistance of counsel under the attorney-client privilege, her Fourth Amendment rights to be free from unwarranted government intrusions on her person and papers, and her Fifth Amendment rights against self-incrimination.

The Subpoena Ad Testificandum #D937 seeks the testimony of Mr. Carter in areas of his representation of Ms. Lewinsky. The scope of this subpoena is overly broad and unreasonable because the testimony sought would invade the time honored sanctity of the attorney-client relationship. As a result thereof these subpoenas should be quashed.

II.

ARGUMENT

THE ATTORNEY-CLIENT PRIVILEGE IS ABSOLUTE AND MUST BE PROTECTED TO ENCOURAGE FULL AND FRANK COMMUNICATIONS BETWEEN ATTORNEYS AND THEIR CLIENTS

A.

MS. LEWINSKY IS THE REAL PARTY IN INTEREST

Ms. Lewinsky is the real party in interest in these proceedings and has a primary interest in the Motion to Quash of Attorney Francis D. Carter that is presently before this court. The information sought by the Grand Jury Subpoenas relates to his representation of Ms. Lewinsky in Jones v. Clinton, LR-C-94-290, United States District Court for the Eastern District of Arkansas.

It is clear on the face of the Grand Jury Subpoenas that it is not Attorney Carter who is the target of the Grand Jury proceedings, but Ms. Lewinsky.[2] Mr. Carter therefore has no personal stake in the outcome of the Grand Jury proceedings. He is obligated as her attorney not to reveal any confidence or secret which may have been imparted to him as a result of his representation of her. D.C. Rules of Professional Conduct, Rule 1.6(a)(1). It would serve no

[2] Mr. Carter similarly argues that Ms. Lewinsky is the real party in interest. Carter Motion, at 4

purpose for him to remain as the central figure of this inquiry since he is merely a third party custodian of the documents sought. Ms. Lewinsky has demanded return of her documents from Mr. Carter to prepare her defense in this case.

In reviewing a motion to quash a grand jury subpoena, the Court must balance the public interest in safeguarding grand jury proceedings from undue interruption and the witness's interest in asserting a right not to comply with a grand jury request. Cobbledick v. United States, 309 U.S. 323, 327-28 (1940).[3] Here the balance favors the rights of Ms. Lewinsky.

As the real party at interest Ms. Lewinsky has a right to intervene in these proceedings to oppose the subpoenas and urge the protection of her constitutional rights and the attorney-client privilege. Perlman v. United States, 247 U.S. 7, 12 (1917). She is in the best position, through her current attorneys, to assert her Constitutional rights as well as her claim of attorney-client privilege.

B.

THE SUBPOENAS ARE IN VIOLATION OF THE ATTORNEY-CLIENT RELATIONSHIP

The Subpoena Duces Tecum and Subpoena Ad Testificandum, if allowed to stand, would compel document production and testimony from Mr. Carter in violation of the attorney-client privilege. Attached to the Subpoena Duces Tecum is a six page Subpoena Rider requiring the production of any and all documents relating to Mr. Carter's representation of Monica Lewinsky in clear violation of the her Sixth Amendment Right to Counsel.[4] The Constitutional right to

[3] In Cobbledick, the Court concluded, on the facts in that case, that denial of a motion to quash the grand jury subpoena was final for purposes of immediate appeal. Cobbledick, supra, at 324-25.

[4] The rider requires the production of any all documents referring or relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, including but limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings and memoranda. Such

(continued on next page)

effective assistance of counsel takes on added significance once a criminal grand jury is empanelled.

Ms. Lewinsky is the target of a Federal Grand Jury Investigation and as such is in clear jeopardy without effective assistance of legal counsel to represent her in this matter. The Subpoena Duces Tecum issued by the Independent Counsel will have a chilling effect upon Ms. Lewinsky's ability to communicate with any attorney that she has previously retained, presently retained or will retain in future to represent her in any matter related to the present Grand Jury investigation. Allowing these subpoenas to stand will cause serious and irreparable harm to the public's confidence in the fair administration of justice.

The sanctity of the attorney-client relationship has been preserved by nearly all the courts where prosecutors have sought to breach it. In Upjohn Co. v. United States, 449 U.S. 339(1981), where the issue was the scope of the attorney-client privilege in the corporate context, the Court reiterated the rationale of the privilege, stating:

> The attorney client privilege is the oldest of the privileges for confidential communications known to the common law... Its purpose is to encourage frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer being fully informed by the client. 449 U.S. at 389. (Emphasis supplied).

The foundation of the attorney-client privilege was addressed by the United States Supreme Court in Hunt v. Blackburn, 128 U.S. 464 (1888) wherein the court stated:

> ...privilege is founded upon the necessity, in the interest of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. 128 U.S. at 470.

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*(continued from preceding page)
documents should include, but are not limited to, any documents referring or relating to the financial terms and arrangements for payment in your representation of Monica Lewinsky.

Thus, it is clear that the attorney-client privilege is sacrosanct, having a deep historical basis within the common law and is part of the bedrock underlying the Sixth Amendment's Right to Counsel. The Independent Counsel's subpoena strikes at the heart of the privilege by requiring the production of all information concerning the legal representation of Ms. Lewinsky. Compliance with this subpoena would undermine the ancient principle of frank communication between an attorney and his client that promotes the broader public interests in the observance of the law and the administration of justice.

The Grand Jury Subpoenas issued by the Independent Counsel have made the attorney-client relationship, and the privilege, the target of government intrusion without any substantial reason therefor. Allowing the subpoenas to stand would be a grant to the Independent Counsel of authority that would make the domain of defense lawyers the target of prosecutorial invasion and undermine the adversarial system of justice which is at the core of our legal system. It would topple the foundation upon which the privilege rests which is "the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1980).

The subpoenas would require a full disclosure of all information transmitted to Mr. Carter by Ms. Lewinsky. It would deprive her of the aid of attorneys who have a knowledge of the law and are skilled in its practice. Moreover, it would open to prosecutorial inquiry that area of assistance, protected by the privilege, that can be safely and readily availed of by a person only when it is free from the consequences of disclosure.

The investigative powers of the Grand Jury cannot support this pernicious effort to breach the attorney-client privilege. In United States v. R. Enterprises, 498 U.S. 292 (1990) the United

States Supreme Court, addressing the limits on the investigatory powers of the Grand Jury, stated:

> The investigatory powers of the grand jury are nevertheless not unlimited... Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass.

498 U.S. at 299

In the instant case the Independent Counsel, through the grand jury, is engaged in such an arbitrary fishing expedition by selecting as a target of the investigation Mr. Carter. The clear inference to be drawn from making Mr. Carter a target is that the Independent Counsel seeks to intimidate and harass Mr. Carter and Ms. Lewinsky. The Independent Counsel is well aware of the attorney-client privilege and the damage his actions will inflict upon the privilege. The malice is clear given the status of the time honored sanctity of the privilege and pressure brought to bear upon Mr. Carter for the sole purpose of avoiding the development of independent sources for the prosecution of this case.

Unless the subpoenas are quashed, no attorney can safely confer with his client without apprehension that the documents and information, delivered to him by his client, will be the subject of a subpoena for documents or to testify by the Independent Counsel. It will turn the time honored profession of the advocate into the prosecutor's unwitting tool. The issuance of the subpoenas has already hampered communication between Mr. Carter and Ms. Lewinsky's present counsel[5] rendering any communication and or documents exchanged subject to the long shadow cast by the subpoenas presently at issue.

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[5] Mr. Carter, by letter, informed new counsel that he could not meet with him to confer on the case except through Carter's lawyer.

C.

THE SUBPOENA DUCES TECUM ALSO VIOLATES MS. LEWINSKY'S FOURTH AND FIFTH AMENDMENT RIGHTS

Enforcement of the Subpoena Duces Tecum directed to Mr. Carter would also violate Ms. Lewinsky's Fourth and Fifth Amendment Rights under the United States Constitution. At issue in the instant case is whether the Independent Counsel can compel the production of documents held by Attorney Carter that are the property of Ms. Lewinsky. Ms. Lewinsky informed Mr. Carter, through her current counsel, and by a signed declaration, that she does not waive any rights or privileges she may assert with respect to documents, materials or information in Mr. Carter's possession.

Ms. Lewinsky's objection to the production of the documents rests upon two Constitutional rights: (1) the right to be free from unwarranted government intrusions on her person and papers and (2) the right against self incrimination. These rights protect a citizen from the overwhelming force of the government improperly directed towards them.

(1)

PRODUCTION OF THE DOCUMENTS WOULD VIOLATE MS. LEWINSKY'S FOURTH AMENDMENT RIGHTS

Since the Subpoena Duces Tecum seeks to invade Ms. Lewinsky's private papers, for which there exists a legitimate expectation of privacy, for the sole purpose of gathering evidence of an alleged crime, its reach is barred by the Constitution. The production of documents pursuant to the Subpoena Duces Tecum, the proposed use of which by the Independent Counsel before the grand jury is as a basis for an indictment against her, constitutes an unreasonable search and seizure in violation of her Fourth Amendment rights. The Fourth Amendment of the United States Constitution states:-

> The right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue but upon probable cause, supported by Oath or Affirmation and particularly describing the place to be search, and the persons or things to be seized.

In the instant case the Independent Counsel seeks to seize the papers and effects of Ms. Lewinsky that are in Mr. Carter's possession for the purpose of using them as evidence against her. In Boyd v. United States, 116 U.S. 616 (1886), the United States Supreme Court, after discussing Lord Camden's decision in Entick v. Carrington and Three Other King's Messengers, 19 Howell's Trials 1029, related that case to the seizure of a person's papers for the sole purpose of obtaining evidence against him holding that such action violated the Fourth Amendment. The Court stated:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost together. 166 U.S. at 630.

Here the Independent Counsel seeks the compulsory extortion of Ms. Lewinsky's private papers that are in the custody of her attorney to use as evidence to help convict her of a crime. It has been recognized that the Fourth Amendment protects an individual where there exists a legitimate expectation of privacy and there is a semblance of government compulsion against the accused. See, Couch v. United States, 409 U.S. 322, 336 (1973). Moreover, it has also been recognized that "private information not obtained through compelled self-incriminating testimony is legally protected by the Fourth Amendment." Fisher v. United States, 425 U.S. 391, 401 (1975).

(2)

PRODUCTION OF THE DOCUMENTS WOULD
VIOLATE MS. LEWINSKY'S FIFTH AMENDMENT RIGHTS

A government subpoena compelling the production of a document compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. United States v. Doe, 465 U.S. 605, 612. The attorney-client privilege is broader than the self-incrimination privilege. Here the act of producing the privileged documents by Mr. Carter, in the absence of a waiver by Ms. Lewinsky of the attorney-client privilege and all other rights and privileges, would have an incriminating effect similar to compelling Ms. Lewinsky herself to produce the documents. The court In Fisher, supra, also stated the following concerning the application of the Fifth Amendment to the requirement that a person comply with a subpoena:

> It is clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only to testimonial communications that are incriminating...
> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It would indicate the taxpayer's belief that the papers are those described in the subpoena.. The elements of compulsion are clearly present... 425 U.S. at 410

Since the production of the documents would involve testimonial self-incrimination, Ms. Lewinsky's right not to incriminate herself should therefore be protected.

CONCLUSION

Ms. Lewinsky joins in the motion of Mr. Carter to quash these subpoenas that "are extraordinary in their breadth and encompass materials protected by privileges specifically designed to protect the confidentiality of the attorney client relationship." Carter Motion, at 29. As Mr. Justice Story noted, "confidential communications between client and attorney, are not to

be revealed at any time." Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826). This Court should, therefore, exercise its authority and quash the subpoenas.

Respectfully submitted,

Nathaniel H. Speights
D.C. Bar No. 952036
SPEIGHTS AND MITCHELL
1511 K Street, N.W., Suite 811
Washington, D.C. 20005-1419
(202) 783-6300

William H. Ginsburg
GINSBURG, STEPHAN, GRINGHER & RICHMAN
10100 Santa Monica Boulevard
Los Angeles, CA 90067

Attorneys for Monica Lewinsky

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	(Filed Under Seal)
AD TESTIFICANDUM #D937	:	
	:	

REPLY TO OPPOSITION OF UNITED STATES TO MOTION TO QUASH

The Independent Counsel's Opposition to Mr. Carter's Motion to Quash Subpoenas misconstrues the arguments made by Mr. Carter and Amici (NACDL and DCACDL) and misstates the obligations of the government in this case. For the reasons explained below as well as in Mr. Carter's Motion to Quash and Memorandum, this Court should quash both subpoenas.[1]

I. The Independent Counsel has Failed to Demonstrate the Reasonableness of the Subpoenas.

This Court has an obligation, pursuant to its supervisory power over the grand jury and Rule 17(c), to assess the reasonableness of a subpoena issued to an attorney about his representation of a client. Before the government, whether through the Office of the Independent Counsel or the Department of Justice, can rummage through the files of an attorney and question him about his thoughts and strategies, this Court must be satisfied that the important principles embodied in the confidentiality of the attorney client relationship are adequately protected. The

[1] As Mr. Carter explained in his Motion to Quash and Memorandum, Monica Lewinsky is the real party in interest in this proceeding. The government seeks her files and information primarily about Mr. Carter's representation of her. Therefore, Mr. Carter hereby adopts all of the claims and arguments made by Ms. Lewinsky in the Response of the Real Party in Interest filed on February 25, 1998.

nature of the confidential relationship is central to the adversary system and designed to promote justice. Given the breadth of the investigatory tactics currently being used by the Independent Counsel,[2] permitting unchecked and unrestrained subpoena power is incompatible with the review authority granted this Court. The Independent Counsel has completely ignored this critical aspect of the arguments of both Mr. Carter and Amici (NACDL and DCACDL).

A number of factors relate to the determination of whether or not the subpoenas issued to Mr. Carter are reasonable. As explained in Mr. Carter's Memorandum in Support of Motion to Quash (hereinafter Memorandum), the reasonableness of a subpoena to an attorney, about the attorney's representation of a client, turns on much more than the temporal scope of the subpoena. The Independent Counsel's argument that the subpoena is reasonable merely because it is limited to one year and eighteen specified individuals is beside the point. See Opposition at 15. Instead, the Court must look to the entire context of the case to determine the reasonableness of the subpoenas. United States v. R. Enterprises, 498 U.S. 292, 299 (1991).

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[2] The Independent Counsel has issued subpoenas to lawyers, advisors, Secret Service agents and family members, to name only some of the individuals swept into the broad ranging investigation. See Phil Kuntz, Justice Agency . . . to Fight Starr's Bid, WALL ST. J., February 25, 1998 at A24; All Things Considered, (NPR news broadcast, February 23, 1998) (transcript available at http://www.npr.org or 1998 WL 3643901).

A. The Violations of the Department of Justice Guidelines and the District of Columbia Ethical Rules Demonstrate the Unreasonableness of the Subpoenas.

Contrary to the assertions of the Independent Counsel, neither Mr. Carter nor Amici argued that the violations of the Department of Justice Guidelines[3] were an independent basis to quash the subpoena. Rather, the guidelines are policy statements of what constitute the minimal standards of reasonableness when the government issues a subpoena to a witness or seeks to have contact with a represented person. These guidelines were developed in explicit recognition of the important values protected by a scrupulous concern for the confidential relationship between lawyer and client. They are, at the very least, a benchmark to inform the Court about what is reasonable under the circumstances. When an attorney for the government violates those guidelines in issuing a subpoena to an attorney or by contacting a represented person, the Court can conclude that the subpoenas or the conduct is unreasonable.

The Independent Counsel concedes that compliance with the Department of Justice policies is generally mandated by 28 U.S.C. §594(f) but claims that compliance is not possible because to seek review from within the Department of Justice would defeat the goals of creating an "independent" office. This argument misses the point of the policies. The requirement of review by the Assistant Attorney General serves the significant purpose of removing the decision-making for certain types of actions from the individual prosecutors intimately involved in the investigation. "Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the

[3] See D.O.J. Manual §9-2.161(a) (guidelines concerning subpoenas to attorneys); 28 C.F.R. part 77 (regulations regarding contact with represented individuals).

representation of a client, it is important that the Department exercise [sic] close control over the issuance of such subpoenas." D.O.J. Manual §9-2.161(a). Therefore, the "line Assistant" is not given unfettered discretion to issue subpoenas that could encroach on protected areas, such as the relationship between attorney and client.

But despite arguing that the guidelines do not provide a basis to quash the subpoenas and that the Independent Counsel is not governed by the guidelines, the government nevertheless suggests that Deputy Independent Counsel Robert Bittman in fact conducted the review required by §9-2.161(a). This argument is legally and factually insupportable. First, the government cannot merely assert that it did follow the guidelines and consider the factors required. There must be some information provided for the Court to assess that assertion. Furthermore, review by Mr. Bittman is not the type of independent review the guidelines anticipate. Most important, the facts here belie the claim that he considered the factors outlined in the policy.

The guidelines require the government attorney to seek alternative sources for the information before issuing a subpoena to an attorney. D.O.J. Manual §9-2.161(a)(B). Here, the subpoena was issued within days of the beginning of the investigation, long before any alternative sources were pursued. The guidelines require the government attorney to seek only non-privileged documents. Id. §9-2.161(a)(E)(6). Here, the subpoenas made absolutely no distinction between privileged and non-privileged information. Finally, the guidelines require a narrowly drawn subpoena. Id. §9-2-161(a)(E)(5). These subpoenas are extraordinarily broad. See Memorandum in Support of Motion to Quash at 9-10. Nothing about the issuance of the subpoenas to Mr. Carter demonstrates consideration of the importance of the attorney client relationship.

Even more telling on the question of the reasonableness of the government conduct is the claim that the contact with Ms. Lewinsky while she was represented by Mr. Carter[4] was proper despite the express prohibitions of D.C. Rule of Professional Conduct 4.2 and the Department of Justice guidelines. The Independent Counsel does not dispute that Ms. Lewinsky requested an opportunity to call her attorney, Mr. Carter. Rather, the FBI agent asserts only that she was not prevented from doing so. Similarly, the Independent Counsel does not dispute that the attorneys attempted to negotiate a cooperation agreement in express violation of the regulations designed to govern this type of contact.[5]

Instead, the Independent Counsel makes two arguments to justify the contact. First, the government contends that Ms. Lewinsky was not interviewed by the government attorneys about the subject matter of the representation and second, that contact with a represented individual is authorized if the person has not yet been indicted.[6] Both claims are without merit.

As Mr. Carter's Memorandum explains, the District of Columbia no-contact rules apply to any person represented by counsel, whether or not the person is a technical party to a lawsuit. See Memorandum at 12 n. 9. "This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." Rule 4.2, comment 4 (emphasis added). The government's argument that the rule requires the represented

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[4] There is no dispute that Mr. Carter represented Ms. Lewinsky during the contacts made at the government request by Ms. Tripp on January 13, and by the government lawyers on January 16, 1998.

[5] As explained in Mr. Carter's Memorandum, the regulations demand even less of government attorneys than the D.C. Rules of Professional Conduct. See Memorandum at 16.

[6] It is significant that the Independent Counsel does not contest that the attorneys in his office are governed by the D.C. Rules of Professional Conduct.

person to be a "party to something" is simply not the law in the District of Columbia. Therefore, United States v. Balter, 91 F.3d 427 (3d Cir. 1996), has nothing to do with the Court's determination in this case.

Furthermore, the government's contention that the Office of the Independent Counsel attorneys were not contacting Ms. Lewinsky about the "subject matter of the representation," Rule 4.2, is factually untrue and completely inconsistent with the government's position at other points in its pleading. Mr. Carter represented Ms. Lewinsky in connection with her potential testimony at a deposition in the Jones v. Clinton lawsuit. As part of that representation, an affidavit was prepared and filed in connection with a Motion for Protective Order. The attorneys in the Office of the Independent Counsel contacted Ms. Lewinsky about her proposed testimony in the Jones v. Clinton case and specifically about her affidavit. The subject matter is the same, whether the representation encompasses the civil suit or a criminal investigation arising from the civil suit. See Memorandum at 15; D.C. Bar Ethics Opinion #263 (Civil Protection Order proceeding and criminal contempt case arising out of the violation of the CPO constitute the same subject matter).

Interestingly, the Independent Counsel argues that the criminal investigation of Ms. Lewinsky's conduct in the civil case is not the same subject matter as the representation in the civil case itself for Rule 4.2 purposes. But for purposes of determining the scope of the crime fraud exception to the various privileges asserted, the Independent Counsel contends that the "false affidavit here, moreover, was not a mere incidental aspect of the attorney's representation of the client. It was a principal task for which Ms. Lewinsky hired Mr. Carter." Opposition at 9. Similarly, for purposes of the allegation that she waived her privileges, the Independent Counsel

argues: "the pertinent 'subject matter' [is] the single subject for which Ms. Lewinsky retained Mr. Carter, her response to the subpoena in the civil case." (Opposition at 12). The contact with Ms. Lewinsky by the Office of the Independent Counsel was obviously concerning the same subject matter as the representation.

The contention that the contact with Ms. Lewinsky was authorized because it was before indictment misses the point. The investigation by the Office of the Independent Counsel has been conducted in complete disregard of the attorney client relationship. The purpose of the rule prohibiting contact with represented persons is to protect individuals from the inherent inequity untrained people face when dealing with skilled lawyers. "The harms that may flow from the disparity in sophistication and skill between a lay person and a lawyer are as likely to occur prior to the initiation of formal proceedings as they are following the filing of papers." ABA Formal Op. 95-396, Communications with Represented Persons (1995). Here, there were numerous lawyers and agents questioning and negotiating with a young, untrained, frightened Monica Lewinsky.

All of the cases cited by the government involved circumstances far less egregious than these. None of the cases involved agents who could be considered the "alter ego" of the prosecutor. And only one involved the prosecutors themselves. United States v. Weiss, 599 F.2d 730 (5th Cir. 1979). Furthermore, the Court in Weiss noted the conduct by the prosecutors there, meeting with a represented individual about a different matter and discussing future cooperation, "flirted with violation of" the ethics rule. Here, numerous experienced lawyers, interrogating Ms. Lewinsky and seeking to negotiate a cooperation agreement in direct contravention of 28 C.F.R., part 77, violated D.C. Rule of Professional Conduct 4.2 and

demonstrated an unreasonable interference with the attorney client relationship. See also In re FMC Corp., 430 F. Supp. 1108, 1110-11 (S.D.W.Va. 1977) (Government attorneys could not interview control group during investigation without consent of counsel for corporation); United States v. Foley, 735 F.2d 45, 48 (2d Cir. 1984) (Assistant U.S. Attorney violated no-contact rule by interviewing defendant before charged "in spite of specific request from [defendant's] soon-to-be appointed Legal Aid Attorney not to do so").

The subpoenas issued to Mr. Carter were a direct result of the illegal contacts with Ms. Lewinsky. Moreover, they were issued without any respect for the attorney client relationship and in direct violation of the Department of Justice principles designed to protect that honored relationship. For these and the reasons articulated in Mr. Carter's Memorandum, the brief of Amici and the Response of the Real Party in Interest, Ms. Lewinsky, this Court must conclude that the subpoenas are unreasonable.

II. The Attorney Client and Work Product Privileges Applicable to the Subpoenaed Information Have Not Been Forfeited by Sufficient Evidence of the Crime Fraud Exception or Waiver.

The Independent Counsel does not dispute that the attorney-client and work product privileges apply to the subpoenaed information and materials.[7] Furthermore, the government

[7] The Independent Counsel complains that Mr. Carter has not submitted an index of privileged materials. Opposition at 4-5. Because the subpoena is unreasonable, as explained above, compliance with any portion of the subpoena should not be required. Similarly, the government's limitless request unfairly puts the obligation on Mr. Carter to comb through files. Instead, the Independent Counsel must make a narrow, reasonable request for specific non-privileged information. See D.O.J. Manual §9-2.161(a). Furthermore, as Mr. Carter's Memorandum notes, should an index ultimately prove necessary, it can be provided at the appropriate time. Contrary to the Independent Counsel's assertions, Mr. Carter is not claiming a blanket privilege under any of the

makes absolutely no showing of extraordinary need for the materials pursuant to Fed. R. Civ. P. 26(b)(3). See Upjohn v. United States, 449 U.S. 383, 398 (1981) (work product privilege substantially incorporated in Rule 26(b)(3); greater showing than substantial need and inability to obtain the equivalent without undue hardship necessary to obtain materials protected by work product privilege). Rather, the Independent Counsel alleges that the privileges have been waived or an exception to the privileges (crime-fraud) permits disclosure. As the party seeking the privileged materials, the government bears the burden of proof. See In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) (party seeking to pierce privilege has burden of showing proof of adequate justification). The government has not sustained its burden.

A. The Ex Parte Submission of Evidence in Support of the Crime Fraud Exception to and Waiver of the Privileges Violates Due Process and Therefore the Court Should Strike the Submission or Order its Disclosure to Mr. Carter and Ms. Lewinsky.

The Independent Counsel has submitted materials to the Court, ex parte, in support of its claims that the crime fraud exception to the privileges permits disclosure and that the privileges have been waived. Mr. Carter can only surmise what the submission includes from the arguments made in the Opposition. However, it appears that the submission contains tape recordings (or transcripts of the recordings) made over a period of several months by Linda Tripp.[4] As an initial matter, the government should disclose all of the tape recordings, not just

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specific privileges. He is seeking an order to quash an unreasonable subpoena.

[4] Ms. Tripp is obviously a critical witness to the resolution of the issues before the Court. Counsel requests that this Court issue a summons directing her to appear at the hearing on this motion to provide relevant and necessary testimony.

selected portions. Without an opportunity to evaluate the context in which Ms. Lewinsky's alleged statements were made, neither the Court nor the parties can fully assess the statements' meanings. See FRE 106 (codifying common law rule of completeness).[9]

Although the Independent Counsel asserts that submitting such materials ex parte it is "general practice,"[10] Opposition at 9, this procedure in this case violates the parties' due process rights and denies the parties a meaningful opportunity to participate in the proceeding.

> The importance of the [attorney client and work product] privilege[s] . . . as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege . . . We are concerned that the privilege be given adequate protection, and this can be assured only when the district court undertakes a thorough consideration of the issue, with the assistance of counsel on both sides of the dispute.

Haines v. Liggett Group, Inc., 975 F.2d 81, 96-97 (3d Cir. 1992) (emphasis added).[11] "In camera proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process. . . . Whenever

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[9] FRE 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time or any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

[10] The entire argument concerning the appropriateness of submitting the materials ex parte is as follows: "Consistent with general practice, the OIC is submitting evidence relating to the crime-fraud exception (as well as waiver), some of which is covered by Rule 6(e), in camera," followed by several citations in a footnote. Opposition at 9 n.3.

[11] Although Haines involved civil litigation rather than a grand jury investigation, the mere assertion of an investigation does not automatically cloak everything in the Independent Counsel's possession with grand jury secrecy.

the legal rights of individuals are to be adjudicated, the presumption is against the use of secret proceedings." In re Taylor, 567 F.2d 1183, 1187-88 (2d Cir. 1977) (emphasis added, citations omitted).

The Independent Counsel relies on only one case from the District of Columbia to support this procedure. See Opposition at 9 n.3 (citing In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982)). However, that case involved the opposite procedure from the one proposed by the Independent Counsel. There, the party asserting the privilege submitted the allegedly privileged documents ex parte for review by the court. The procedure makes sense under those circumstances because the party asserting the privilege should not be required to reveal the privileged documents to the party seeking disclosure before an exception to the privilege has been found. "There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents." United States v. Zolin, 491 U.S. 554, 571 (1989). Here, the documents were submitted ex parte by the Independent Counsel, the party seeking disclosure of information falling within the important and "zealously protected" privileges. Haines v. Liggett, 975 F.2d at 90 (quoting 8 Wright & Miller, Federal Practice and Procedure §2017 (1970)). There is simply no compelling reason for an ex parte submission in this case.

Significantly, the Independent Counsel concedes that only "some of [the ex parte submission] is covered by Rule 6(e)." Opposition at 9 (emphasis added). Therefore, at a minimum, this Court should order disclosure of all portions of the submission not explicitly protected by Rule 6(e).

However, even with respect to information allegedly protected by the grand jury secrecy provisions of Rule 6(e), the mere assertion that the materials are the subject of a grand jury investigation does not render them automatically protected. To the extent the submission consists of anything other than actual testimony before the grand jury, the materials are simply not protected by Rule 6(e). For example, it is apparent from the Independent Counsel's arguments that the submission consists, at least in part, of information contained on the tape recordings made by the Linda Tripp at the request of the government as well as the conversations Ms. Tripp illegally recorded.[12] These materials are not "matters occuring before the grand jury" protected by Rule 6(e)(2) merely because the Independent Counsel plans to introduce them in evidence before the grand jury. In re Grand Jury Impanelled October 2, 1978, 510 F. Supp. 112, 115 (D.D.C. 1981) (documents that pre-exist the grand jury not protected by Rule 6(e) merely because they were shown to the grand jury); Securities & Exchange Com'n v. Dresser Indus., 628 F.2d 1368, 1382-84 (D.C.Cir.) (en banc) (Rule does not require "a veil of secrecy over all matters occurring in the world that happen to be investigated by a grand jury"; not a valid defense to disclosure that information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury), cert. denied, 449 U.S. 993 (1980).

Even those courts that have permitted in camera inspection of grand jury materials, for the purpose of determining the existence of an exception to the privilege, have required a balance between the government's interest in secrecy and the individual's interest in a fair determination

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[12] For the reasons explained below, the Court should not consider any of the tape recordings obtained by the Independent Counsel from Ms. Tripp. Also, disclosure of all of the tape recordings is required by 18 U.S.C. §2518(10)(a).

of the issue. In re Taylor, 567 F.2d at 1188; In re Antitrust Grand Jury, 805 F.2d 155, 161-62 (6th Cir. 1986). The traditional reasons for grand jury secrecy are completely inapplicable in this, the most public of investigations.[13] Any interest in secrecy cannot possibly outweigh the importance of preserving the sanctity of the confidential relationship at issue here. Furthermore, the current proceedings on the Motion to Quash are under seal and the Court can impose a protective order to prevent additional disclosure of the information. Therefore, balancing the interests requires disclosure of the submission to Mr. Carter and Ms. Lewinsky in advance of the hearing on the Motion to Quash. If the government is unwilling to disclose the information, the Court should strike the Independent Counsel's ex parte submission.

Finally, even if the Court determines that the submission includes material specifically protected by Rule 6(e), the Court should order disclosure because Mr. Carter and Ms. Lewinsky have a particularized need for the information. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 221 (1979).[14] Preserving attorney client confidentiality, the work product privilege and

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[13] The Supreme Court has explained the interests served by preserving grand jury secrecy as follows:

> First, if prindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 & n. 10 (1979).

[14] To demonstrate particularized need, the party seeking disclosure of grand jury materials must show that (1) the material sought is needed to avoid a possible injustice in another judicial

Ms. Lewinsky's Fifth Amendment privilege require a meaningful opportunity to respond to the government's allegations of exception and waiver. The requested disclosure of grand jury matters is very narrow and consists only of information presented in support of the crime-fraud exception. Without access to the materials, Mr. Carter and Ms. Lewinsky cannot respond in any more meaningful way to the factual allegations made by the government. Therefore, the Court can easily find that they have demonstrated particularized need.

B. The Tape Recordings Were Illegally Obtained and May Not Be Used for Any Purpose.

The State of Maryland forbids the recording of oral communications, unless every party to the conversation is fully informed and consents. MD. CODE §§ 10-402 (criminal liability) and 10-410 (civil liability). It has been reported extensively in the news media that, while at her home in Maryland, Linda Tripp recorded certain phone conversations with Monica Lewinsky. See, e.g., Stephen Labaton, How a Single Telephone Call Was the Catalyst for a Crisis, N.Y. TIMES, Jan. 25, 1998, at A1 ("Ms. Tripp said she possessed surreptitiously recorded audio tapes"). Those recordings violated both federal and state law. Federal law[15] prohibits the use of these tapes, and any evidence derived therefrom, in all judicial proceedings. 18 U.S.C. §§ 2515, 2518. In particular, the Independent Counsel is forbidden by Title III's exclusionary provision

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proceeding; (2) the need is greater than the need for continued secrecy; and (3) the request is structured to obtain only the material needed. Douglas Oil, 441 U.S. at 222.

[15] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520, created the statutory scheme regulating the interception and use of wire, oral or electronic communications.

from using these illicit recordings in support of its attempts to pierce the attorney-client and work product privileges.

Title III generally prohibits any interception of oral communications by private persons, but provides a limited exception where one of the parties to the communication knows about the recording. 18 U.S.C. § 2511(2)(d). This limited exception is unavailable when the recording was made in a state where the surreptitious eavesdropping is outlawed or constitutes tortious conduct. See id. (One-party knowledge exception inapplicable where "such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State"). In Maryland, it is both a crime and a tort to record a telephone conversation without the fully-informed consent of all parties involved.

Linda Tripp's conduct is criminalized in the Maryland Code at § 10-402, subsections (a)(1)-(3) and (c)(3). Unlike Title III, Maryland law does not authorize a one-party knowledge or consent exception. Tape recordings and other interceptions of oral communications are legal only "where all of the parties to the communication have given prior consent to the interception." MD. CODE § 10-402(c)(3). Additionally, Ms. Tripp's illegal interceptions are made tortious by statute at MD. CODE § 10-410(a), which defines civil liability in such circumstances:

> Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, or uses or procures any other person to intercept, disclose, or use the communications, and shall be entitled to recover damages from any person. . . .

Id. As the Maryland cases explain, the state legislature did not believe Title III went far enough in providing protection against the sort of surreptitious recordings at issue here. See, e.g., Wood v. State, 431 A.2d 93 (Md. 1981) (Maryland subtitle guarantees greater protection from

surreptitious eavesdropping and wiretapping than that afforded the people by Congress; illegally-obtained recordings cannot be used as evidence).

> The Maryland Wire and Electronic Surveillance Law is in a number of respects more stringent than its federal counterpart. For example, 18 U.S.C. § 2511(2)(c) permits an interception when one of the parties to the communication has given prior consent. Maryland law, on the other hand, requires prior consent of all parties to the communication.

State v. McGhee, 447 A.2d 888, 891, n.7 (Md. Ct. Spec. App. 1982) (affirming suppression of evidence and dismissal of indictment). See also Benford v. ABC, 554 F. Supp. 145, 151 (D.Md. 1982) (clear purpose of Maryland's subtitle is to prevent unauthorized interception of conversations where one of the parties has reasonable expectation of privacy).

The exclusionary provisions of Title III are comprehensive and absolute:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication, and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515. Congress was explicit in 18 U.S.C. § 2511(2)(d) when it stated that criminal or tortious recordings shall not find protection under the "consent or knowledge" exception. It is enough that Ms. Tripp's alleged tapes were made in contravention of Maryland criminal and civil provisions, to conclude that they are in violation of Title III, and therefore inadmissible in any proceeding. See, e.g., Biton v. Menda, 796 F. Supp. 631, 633 (D.P.R. 1992) (if state law makes recording conversation a crime, Title III would be violated by disclosure); United States v. Underhill, 813 F.2d 105 (6th Cir. 1987), cert. denied, 482 U.S. 906 (1987) (where it is a crime to make records of certain transactions, the recording is itself an "unlawful act" within the

prohibition of Title III); Hirschey v. Menlow, 747 P.2d 402 (Or. Ct. App. 1987) (because it is illegal for someone to record his or her conversation in state without the consent of all participants, such recording automatically falls within the "for the purpose of committing [an] unlawful or tortious act" language of 18 U.S.C. § 2511(2)(d), and is therefore civilly actionable under § 2520).

The procedure for raising a claim of unlawful interception is detailed in 18 U.S.C. § 2518(10)(a):

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that--(i) the communication was unlawfully intercepted. . . .

Id. (emphasis added). The federal courts have recognized that this statutory provision of Title III incorporates more exacting state standards, where, as here, the fruits of state-outlawed wiretapping or eavesdropping is offered in evidence by federal prosecutors. See, e.g., United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976) (in dictum, but citing numerous holdings and legislative history as support); United States v. Lilly, 534 F. Supp. 1247, 1253-1254 (N.D.N.Y. 1982) (citing numerous Circuit Court holdings); United States v. McNulty, 729 F.2d 1243, 1264-1265 (10th Cir. 1983) (en banc) (citing numerous authorities); United States v. Vario, 943 F.2d 236, 244 (2d Cir. 1991), cert. denied, 502 U.S. 1036 (1992) (federal courts required to apply "those more stringent state statutory requirements or standards that are designed to protect an individual's right to privacy"); United States v. Sotomayor, 592 F.2d 1219, 1225-1226 (2d Cir. 1979), cert. denied, 442 U.S. 919 (1979) (same).

The above-cited cases, and others like them, demonstrate that states are allowed to enact parallel communications legislation more protective of citizens' privacy than Title III, and that the federal statutory exclusionary rule applies to these state-created rights.[16] Courts, both federal and state, have also recognized that Congress sought to protect the privacy of citizens from both unlawful private, as well as improper governmental, wiretapping, bugging, and unauthorized interceptions. See, e.g., United States v. Vest, 813 F.2d 477, 480-482 (1st Cir. 1987) (it makes no difference that the Government was the "innocent recipient" of the illegally intercepted communications; the evidence is excluded all the same); Rodgers v. Wood, 910 F.2d 444 (7th Cir.), reh'g denied, 914 F.2d 260 (1990) (holding that when someone unlawfully intercepts a communication that reveals criminal acts by the conversants, it violates 18 U.S.C. § 2511(1)(c) to disclose the contexts of the communication to the police or prosecutor).

Mr. Carter has the requisite standing to raise each of the foregoing arguments. See Gelbard v. United States, 408 U.S. 41 (1972) (witnesses before the grand jury have standing to raise Title III defenses against contempt charges for refusing to answer questions based upon evidence obtained from intercepted oral communications). The Supreme Court in Gelbard relied upon 18 U.S.C. § 3504 as additional support for its conclusion that § 2515 is available as a defense to grand jury witnesses:

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[16] On this same point, see United States v. Geller, 560 F.Supp. 1309, 1312 (E.D.Pa. 1983), aff'd without op., 745 F.2d 49 (3d Cir. 1984), cert. denied, 469 U.S. 1109 (1985) ("State standards which are more protective of this same area must, however, be given effect [in federal proceedings]."); Navarra v. Bache Halsey Stuart Shields, Inc., 510 F.Supp. 831, 833-835 (E.D.Mich. 1981) (state law, where more protective than federal law, supplements Title III's own provisions).

> (a) In any . . . proceeding in or before any . . . grand jury . . . (1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act; . . . (b) As used in this section "unlawful act" means the use of any electronic, mechanical or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States . . . .

18 U.S.C. §3504 (emphasis added); Gelbard, 408 U.S. at 52-53. Ms. Lewinsky, on whose behalf Mr. Carter asserts the attorney-client and work product privileges as her attorney, is a "party aggrieved" within the meaning 18 U.S.C. §§ 2518 and 3504. That term is defined at 18 U.S.C. § 2510 as "a person who was a party to any intercepted . . . oral . . . communication or a person against whom the interception was directed." See, e.g., Fisher v. United States, 425 U.S. 391, 402 n.8 (1976) ("it is universally accepted that the attorney-client privilege may be raised by the attorney").

C. The Evidence Proffered Fails to Make a Sufficient Showing of the Crime Fraud Exception to Warrant Disclosure of the Privileged Information.

The sum total of the evidence offered by the Independent Counsel to show the existence of a crime or a fraud by Ms. Lewinsky is the allegation that she made unsworn statements to others that were inconsistent with the statements she made under oath in the affidavit. As the Independent Counsel conceded, to establish the crime-fraud exception, he must satisfy the burden of proving "the elements of an ongoing or imminent crime or fraud." Opposition at 8 (citing In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997)). To prove perjury,[17] the government

[17] The only criminal conduct relevant to the crime-fraud exception is the allegation that Ms. Lewinsky's affidavit was false. Other alleged criminal conduct being investigated by the Independent Counsel and the grand jury would not constitute a basis for piercing the privileges based

must demonstrate a knowing and willful false statement, under oath in a proceeding authorizing sworn testimony under federal law regarding a fact material to the proceeding. United States v. Dunnigan, 507 U.S. 87, 94 (1993).

However, more than a mere allegation that the statement was false is necessary. "In proving the crime of perjury, the uncorroborated testimony of a single witness is not sufficient to establish the falsity of the statements of a defendant under oath." United States v. Haldeman, 559 F.2d 31, 97 n. 185 (D.C. Cir. 1976) (citing Hammer v. United States, 271 U.S. 620, 626 (1926)). The only evidence offered to prove the falsity of the statement under oath is Monica Lewinsky's own uncorroborated, unsworn statements.

Similarly, the evidence presented here would be insufficient to prove a false declaration under oath prohibited by 18 U.S.C. §1623. "[T]wo inconsistent statements, only one of which is made under oath, are insufficient, without additional independent evidence, to support the conclusion that the one made before the grand jury was untrue." United States v. Cross, 638 F.2d 1375, 1378 (5th Cir.), modified, 655 F.2d 50 (1981).

Contrary to the Independent Counsel's claim that Ms. Lewinsky's allegedly inconsistent statements demonstrate that her sworn statements were false, the fact that the affidavit was made under oath supports the conclusion that the sworn statements were true and the out-of-court, unsworn statements were false. As this Court undoubtedly has witnessed in countless trials, witnesses often make inconsistent statements -- to the police, to other witnesses, to the grand jury. Instead of prosecuting for perjury, the government often takes the position that the sworn

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on the crime-fraud exception because there is no allegation that Ms. Lewinsky utilized Mr. Carter's services for any other misconduct.

statements are true and the inconsistent statements made to others are false. See Parker v. United States, 363 A.2d 975, 977 (D.C. 1976) ("The witness had previously testified under oath and it must be presumed that he knew the significance of the oath," therefore, government entitled to impeach witness on claim of surprise); Price v. United States, 545 A.2d 1219, 1224 (D.C. 1988) ("prosecutor was entitled to rely on the witness' prior testimony given under oath"). Furthermore, under the Federal Rules of Evidence, an inconsistent statement given under oath is admissible not merely for impeachment, but as non-hearsay testimony admissible for the truth of the matter asserted. FRE 801(d)(1).

Because witnesses often make inconsistent statements, Amici persuasively argued that the allegations at issue in this case were not sufficiently grave to warrant piercing the protections of the attorney client and work product privileges. NACDL and DCACDL did not argue, as suggested by the Independent Counsel, that perjury is too trivial to warrant a finding of the crime-fraud exception. Instead, the brief of Amici accurately argues that these allegations demonstrated a very common circumstance in litigation in the criminal and civil courts -- statements by witnesses inconsistent with sworn testimony. This is simply not a sufficiently serious allegation to justify piercing the confidentiality of the attorney client relationship. As the Court explained in In re Sealed Case: "the violation involved must be of sufficient weight to warrant abridging the privilege. 'No court should order disclosure . . . if the disclosure would traumatize the adversary process more than the underlying legal misbehavior.'" 676 F.2d 793, 815 (D.C. Cir. 1982), (citation omitted). Permitting wholesale invasions of the confidential attorney client relationship whenever a witness or a party makes an inconsistent statement in connection with litigation would constitute a remarkable deviation from this principle. It would

dramatically interfere with the nature of the relationship as well as the way attorneys represent clients.

Here, more significantly, the issue about which Ms. Lewinsky was subpoenaed to testify was ruled by the judge presiding over that case to be inadmissible at the trial. Ordering disclosure of an entire attorney file based on an allegedly false sworn statement about an issue not sufficiently important in the relevant trial to be admissible -- demonstrated solely by unsworn inconsistent statements -- is precisely the type of disclosure that "would traumatize the adversary process more than the underlying legal misbehavior."

The Independent Counsel cites only two cases applying the crime-fraud exception to allegations of perjury. The circumstances in both cases were dramatically different from those presented here. In In re Grand Jury Proceedings, 835 F.2d 237 (10th Cir. 1987), a decision about the appellate procedures for review of an order granting a motion to compel, the district court found the existence of crimes and frauds spanning a ten-year period including commission of numerous instances of frauds on the courts, obstruction of justice and perjury. Obviously, that is a far different scenario from the allegations here. At worst, the Independent Counsel contends that Ms. Lewinsky's single act consisted of signing an allegedly false affidavit about her personal life. The other case cited by the Independent Counsel, United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975), held that the conversations at issue were not privileged at all because they were made in the presence of at least five other individuals in addition to the client and the lawyer. The court also noted that the discussions involved potential perjury.

III. Materials in Mr. Carter's Possession are Protected by the Fifth Amendment

A. Materials Provided to Mr. Carter by Ms. Lewinsky are Privileged Pursuant to her Fifth Amendment Right.

The Independent Counsel's response to Mr. Carter's argument that he cannot be required to produce items protected by Ms. Lewinsky's Fifth Amendment privilege confuses the relevant and applicable law. First, there is no dispute that if the Fifth Amendment would preclude the government from compelling Ms. Lewinsky to produce certain items or documents, Mr. Carter may not be required to produce the material. The government ultimately concedes as much. Opposition at 13. Second, production of the materials must be incriminatory and involve a testimonial compulsion. See Memorandum at 26-28. The Independent Counsel apparently recognizes that if the act of production is testimonial, then the material may not be compelled by means of a subpoena. Opposition at 14 n. 6. See United States v. Doe, 465 U.S. 605, 612 (1984). However, the government suggests that if the information is incriminatory, because it provides a link in the chain of evidence necessary to prosecute, the material retains no Fifth Amendment protection. Opposition at 13-14. That is plainly wrong. Hoffman v. United States, 341 U.S. 479, 486 (1951). If the items are incriminatory, and compelled production is testimonial, they are privileged. Id.; Doe, 465 U.S. at 612.

The items are in Mr. Carter's possession because they were subpoenaed by the plaintiff in the Jones v. Clinton law suit. Ms. Lewinsky provided them to Mr. Carter seeking legal advice. Compelled production of those items would violate the Fifth Amendment just as surely as if she were asked what she possessed. Therefore, Mr. Carter may not be compelled to produce them. Fisher v. United States, 425 U.S. 391 (1976).

B. Mr. Carter Cannot be Compelled to Produce Documents or to Testify Pursuant to His Fifth Amendment Right.

Although the Associate Independent Counsel has repeatedly asserted to counsel that Mr. Carter is not a target of this investigation, the Independent Counsel's Opposition to Mr. Carter's Motion to Quash does not contend that Mr. Carter was not involved in any wrongdoing by Ms. Lewinsky. Instead, the Opposition suggests only that, in assessing the legal standard for the existence of the crime fraud exception to the privileges, the attorney's involvement in the client's wrongdoing is not necessarily relevant. "It bears emphasis that the courts ordinarily look to the client, not to the lawyer, for the requisite scienter and actions. The attorney need not know or even suspect the client's planned wrongdoing." Opposition at 7-8 (emphasis in original). Accordingly, Mr. Carter has no choice but to assert his own Fifth Amendment privilege in refusing to testify or to produce documents. The Independent Counsel contends that all of Mr. Carter's legal work on behalf of Ms. Lewinsky was in furtherance of the alleged criminal acts -- production of the so-called false affidavit. "The false affidavit here, moreover, was not a mere incidental aspect of the attorney's representation of the client. It was a principal task for which Ms. Lewinsky hired Mr. Carter." Opposition at 9. Therefore, his testimony concerning the legal work he did for Ms. Lewinsky and documents reflecting that work could potentially prove incriminating.

IV. Conclusion

The subpoenas issued to Mr. Carter are unreasonable and demand privileged material. No exception or waiver has been demonstrated. Accordingly, this Court should quash the subpoenas.

Wherefore, for the reasons set forth in this Reply, Mr. Carter's Motion to Quash and Memorandum, the brief of Amici NACDL and DCACDL, and the Response of the Real Party in Interest, and for any other reasons that may appear to the Court at a hearing on this Motion, Mr. Carter respectfully requests that this Court grant the Motion to Quash.

Respectfully submitted,

Charles J. Ogletree, Jr.
272658

Jamie S. Gardner
#375811

Counsel for Francis D. Carter, Esquire

Harvard Law School
320 Hauser Hall
Cambridge MA 02138
617-495-5097

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Opposition of the United States to Motion to Quash has been served, by first class mail and by hand, upon Paul Rosenzweig, Tom Bienert, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and upon Counsel for Monica Lewinsky, Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005 and William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles CA 90067; and upon counsel for Amici, David W. DeBruin, Esquire, Jerome L. Epstein, Esquire, Nory Miller, Esquire, Jenner & Block, 601 13th Street, N.W., Washington, D.C. 20005, this _____ day of March, 1998.

_____
Charles J. Ogletree, Jr.

TOTAL P.24

HARVARD LAW SCHOOL
320 Hauser Hall
Cambridge, Massachusetts 02138

CHARLES J. OGLETREE, JR.
Professor of Law
Faculty Director of
Clinical Programs

Director
Criminal Justice Institute
Trial Advocacy Workshop
Saturday School Program

February 27, 1998

Paul Rosenzweig, Esquire
Tom Bienert, Esquire
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004

Dear Paul and Tom:

Thank you for your cooperation in accepting this faxed draft of our Reply brief. You will be served with a filed copy on Monday, March 2, 1998. I look forward to meeting you both on Wednesday.

Sincerely,

Jamie S. Gardner
Counsel for Francis D. Carter

TEL: (617) 496-2054 FAX: (617) 496-3956 E-MAIL: ogletree@law.harvard.edu

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68
	)	(Under Seal)

OPPOSITION OF THE UNITED STATES TO "RESPONSE"[1] OF MONICA LEWINSKY TO MOTION TO QUASH SUBPOENAS

The United States of America, by Kenneth W. Starr, Independent Counsel, hereby opposes Monica Lewinsky's motion to quash two grand jury subpoenas issued to her former attorney, Francis Carter.

Ms. Lewinsky's pleading raises little more than the same issues asserted by movant Carter in his motion to quash. As a result, the United States adopts its Opposition to Carter's motion in response to the bulk of Ms. Lewinsky's motion.

Ms. Lewinsky does raise two additional arguments: that the subpoena duces tecum violates the Fourth Amendment because it "seeks the compulsory extortion of Ms. Lewinsky's private papers" (Lewinsky Motion at 8), and that both subpoenas violate Ms. Lewinsky's Sixth Amendment right to counsel. (Lewinsky Motion at 3-6). Both arguments lack merit.

Lewinsky's attempt to analogize the subpoena duces tecum to

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[1] Although Ms. Lewinsky calls her pleading a "Response," it does not respond to anything. Instead it is a motion to quash the subpoenas or, at a minimum, a motion for joinder in Francis Carter's motion to quash. Ms. Lewinsky's motion is untimely, in light of the briefing schedule agreed upon by the parties.

a forcible seizure is misplaced. Courts have consistently recognized that Fourth Amendment challenges to subpoenas are "narrowly limited to overbreadth and indefiniteness." Doe v. United States (In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987), 834 F.2d 1128, 1134 (2d Cir. 1987); see United States v. Calandra, 414 U.S. 338, 346 (1974) (Fourth Amendment violated only if the subpoena is "far too sweeping in its terms to be regarded as reasonable"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 195 (1946) ("No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them."); In re Grand Jury Proceedings, 115 F.3d 1240, 1244 (5th Cir. 1997); In re Grand Jury 87-3 Subpoena Duces Tecum, 884 F.2d 772, 778 (4th Cir. 1988) (Fourth Amendment usually applied as a safeguard against inappropriate "intrusion[s] upon the rights of privacy" that can result from a "forcible search"), rev'd on other grounds, 498 U.S. 292 (1991); United States v. Palmer, 536 F.2d 1278, 1281-82 (9th Cir. 1976). Lewinsky's Fourth Amendment challenge is, therefore, equivalent to the overbreadth argument made by movant

Carter, which we have already answered.

Nor does the issuance of the grand jury subpoenas implicate the Sixth Amendment, for the simple reason that no Sixth Amendment right to counsel attaches prior to indictment. E.g., Kirby v. Illinois, 406 U.S. 682, 688 (1972); In re Grand Jury Subpoenas, 906 F.2d 1485, 1493 (10th Cir. 1990) (citing In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 243 (2d Cir. 1985); In re Klein, 776 F.2d 628, 634 (7th Cir. 1985); United States v. (Under Seal), 774 F.2d 624, 628 (4th Cir. 1985)). Monica Lewinsky has not yet been indicted, thereby precluding application of the Sixth Amendment to her situation.

Even if charges were pending, the Sixth Amendment would not be implicated unless the subpoenas were served during the course of a particular attorney's representation and created an actual conflict between that attorney and the client. E.g., In re Grand Jury Matter John Doe 1, 926 F.2d 248 (4th Cir. 1991); In re Grand Jury Subpoena for Attorney Representing Reyes-Requena, 913 F.2d 1118, 1130 (5th Cir. 1990); In re Grand Jury Subpoenas, 906 F.2d 1485, 1494 (10th Cir. 1990). In other words, there must be an attorney-client relationship in existence at the time the subpoenas are issued. As Mr. Carter and Ms. Lewinsky both acknowledge, Francis Carter did not represent Ms. Lewinsky at the time he was served with the subpoenas. No attorney-client relationship existed at the time, rendering the Sixth Amendment

entirely inapplicable.

For these reasons, and the reasons set forth in the United States' Opposition to Francis Carter's motion to quash subpoenas, this court should deny Ms. Lewinsky's motion to quash the subpoenas.

DATED: February 27, 1998.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

ROBERT BITTMAN
Deputy Independent Counsel

THOMAS H. BIENERT, JR.
Associate Independent Counsel
1001 Pennsylvania Ave., NW
Suite 490-N
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Opposition of the United States to Motion to Quash, was served via facsimile and was mailed, via United States mail, first class postage prepaid, on this the 27th day of February, 1998 to:

Charles J. Ogletree, Jr.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
Attorney for Movant Carter

William H. Ginsburg
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, CA 90067-4012

Nathaniel H. Speights
Speights & Mitchell
1511 K St, NW, Suite 811
Washington, D.C. 20005-1419
Attorneys for Monica Lewinsky

David W. DeBruin
Jerome L. Epstein
Nory Miller
Jenner & Block
601 13th St., NW
Washington, D.C. 20005
Attorneys for Amicus NACDL

Thomas H. Bienert, Jr.
Associate Independent Counsel

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	MISC. 98-0068
MOTION TO QUASH GRAND JURY SUBPOENA OF FRANCIS D. CARTER	Washington, D. C. March 4, 1998 11:00 a.m.

TRANSCRIPT OF HEARING ON MOTION
BEFORE THE HONORABLE NORMA HOLLOWAY JOHNSON
CHIEF JUDGE, UNITED STATES DISTRICT COURT

APPEARANCES:

For the Office of Independent Counsel:	THOMAS BIENERT, ESQUIRE ROBERT BITTMAN, ESQUIRE ROGER HEATON, ESQUIRE
For the Movant, Francis D. Carter:	CHARLES J. OGLETREE, JR., ESQUIRE JAMIE S. GARDNER, ESQUIRE Harvard Law School Criminal Justice Institute Cambridge, Massachusetts
For Monica Lewinsky:	NATHANIEL H. SPEIGHTS, ESQUIRE Speights & Mitchell 1511 K Street, N.W. Washington, D. C. 20005-1419
Official Court Reporter:	GORDON A. SLODYSKO 4806-A U. S. Courthouse Washington, D. C. 20001 (202) 273-0404

Computer-Aided Transcription of Stenographic Notes

PROCEEDINGS

THE DEPUTY CLERK: Miscellaneous Number 98-68, In Re: Motion to Quash Grand Jury Subpoena of Francis D. Carter. Representing the Independent Counsel are Tom Bienert, Bob Bittman and Roger Heaton; representing the witness is Nathaniel Speights and Charles Ogletree. The witness is present in the courtroom.

THE COURT: All right. Well, Mr. Carter is present in the courtroom. I guess you are a presumptive witness or something like that, Mr. Carter. I don't know.

But, at any rate, let me say to you that I had two people escorted to the foyer because I don't know who they are and whether or not they can be in this proceeding. As you know, this is a matter touching upon a grand jury matter, and I just really don't let the public in. But if you can convince me that they are not, quote, the public, end quote, I will be happy to hear from whoever brought the persons with them.

MR. OGLETREE: Thank you, Your Honor. Charles Ogletree, on behalf of Frank Carter.

The two people who are here with me that will balance out our team to complement the prosecution's lawyer are Jamie Gardner, she is an associate of mine. Jamie Gardner? She is an associate with the Criminal Justice Institute and has been with me on all the papers in this case, and jointly represents Frank Carter in this case.

THE COURT: Is she an attorney-at-law?

MR. OGLETREE: Yes. She actually practiced at the Public Defender Service for about a dozen years, taught at Georgetown; and I was able to persuade her to leave Washington to come to Harvard. She teaches with me in the Criminal Justice Institute at Harvard. She is a member of the D. C. Bar, still very active here, and a central party on this case.

THE COURT: All right.

MR. OGLETREE: David DeBruin the Court may know. David is also actually a former associate. David worked with me at the Public Defender Service. He is the lawyer who filed the amicus brief on behalf of the NACDL, the National Association of Criminal Defense Lawyers, and DCCDL, District of Columbia Association of Criminal Defense Lawyers. He is here as amicus. And his comments are relatively brief. But they both have completely abided by the fact that this matter is under seal and confidential, and I have the utmost faith in both of them.

There may be some later issues about Mr. DeBruin, about whether or not he should be here if tapes are played or things like that, and I've already talked to him about that. If there is an issue, we are certainly happy to agree with any opposition about his role -- not in the legal arguments, but if there is a substantive part of the hearing where he needs to be excused, I would have no objection to that.

THE COURT: Very well.

Does the United States, the Independent Counsel wish to be heard?

MR. BITTMAN: Yes, Your Honor. Robert Bittman on behalf of the United States.

We have no opposition to Ms. Gardner being present. She is on the papers with Professor Ogletree. With regard to Mr. DeBruin, we do object to Mr. DeBruin being present. We feel that the only people that should be in this hearing are those absolutely necessary to conduct the hearing for Your Honor, and we do not believe that he is necessary to be here. He has made his position known in papers and filings, so I don't believe he is necessary to be here. And I think that's all that we should have at this hearing.

THE COURT: Very well.

MR. BITTMAN: I make one correction, by the way, Mr. Clerk. Counsel, Mr. Speights, is not representing the witness, I don't believe.

MR. CARTER: No.

MR. BITTMAN: Yes. He's representing Ms. Lewinsky.

THE COURT: Oh. Absolutely. Oh, okay. Yes. I'm aware of that. Thank you.

Well, let me just say this to you. Ms. Gardner may certainly come into the proceedings. I knew there was a second person. I haven't looked at the papers today, and that's why

her name was not familiar to me.

But I do remember very well Mr. DeBruin filing his paper and filing a proposed order, asking that he be permitted in the argument. And I said no then. And I prepared a different order, letting him know that I would consider his position, but he could not participate in this.

So, you might tell Ms. Gardner she may come in. And you may tell him I have ruled that he may not attend.

MR. OGLETREE: May I speak to Mr. DeBruin for just a second before we start?

THE COURT: Certainly.

MR. OGLETREE: Thank you.

(Ms. Gardner entered the courtroom)

MS. GARDNER: Good morning, Your Honor.

THE COURT: Good morning, Ms. Gardner. We're happy to have you. But I did not recall your name on the briefs.

MS. GARDNER: Thank you very much.

THE COURT: But now I am convinced. And I know you understand the nature of a grand jury proceeding. You're certainly welcome to be here.

MS. GARDNER: Thank you, Your Honor.

THE COURT: All right. Now, we know that a subpoena was served on Mr. Francis Carter requiring him to appear before a grand jury that has been impaneled in this court. And pursuant to that subpoena, he is to appear, I think tomorrow,

to testify before the grand jury. He thereafter retained counsel, Mr. Ogletree and Ms. Gardner, and they have filed a motion in his behalf.

I'm informed that Mr. Speights is here today because he represents Ms. Monica Lewinsky, and it appears that it is her privileges that are truly at issue here, and she has filed papers in this matter. And as far as I'm concerned, he is rightly here and should be heard. And apparently there is no objection from either the Independent Counsel's office or Mr. Carter. Is that correct?

MR. OGLETREE: That's correct, Your Honor.

THE COURT: All right. Then, since it is your motion, Mr. Ogletree, I'll be happy to hear from you first. And then I will hear whatever it is Mr. Speights wishes to say on behalf of his client. Then I will hear from the Office of Independent Counsel. And I'll give you an opportunity for rebuttal.

MR. OGLETREE: Thank you, Your Honor.

Your Honor, Charles Ogletree, on behalf of Frank Carter. Mr. Carter is well known to this Court, having practiced in this jurisdiction for nearly 30 years as a highly respected and reputable attorney. He, as you know --

THE COURT: Mr. Carter could not have been practicing in this city for any 30 years.

MR. OGLETREE: It's close to it.

THE COURT: Well, look --

MR. OGLETREE: 25?

THE COURT: I remember when he was a law clerk, and I'm not 30, so...

MR. OGLETREE: For a period of time. But he is still a very young lawyer.

THE COURT: And I'm still a very young judge. Is that all right?

MR. OGLETREE: Absolutely. That goes without saying, Your Honor.

THE COURT: All right.

MR. BITTMAN: Stipulated.

THE COURT: Thank you.

MR. OGLETREE: We have a number of concerns, and they relate to a number of statutory rules, a number of cases, and the Court's supervisory power with respect to grand jury subpoenas. We're talking about Federal Rule of Criminal Procedure 17. We're talking about the Department of Justice guidelines, which talk about subpoenas to attorneys. We're talking about Title 28 that talks about contact with represented parties; the D. C. Rules of Professional Conduct, particularly 4.2; the Federal Rule of Civil Procedure 26, and the Federal Rule of Criminal Procedure relating to grand jury proceedings, the statutory rules. And we're talking about Supreme Court precedents dating back as far as the Upjohn, Nobles, and Zolin cases dealing with issues, work product

privileges and the crime-fraud exception and waivers, as well as a number of D. C. Circuit cases.

This is our concern. It is not unusual for the Government to issue subpoenas to obtain information from witnesses that's relevant. The grand jury has a right to every man's testimony. That's been a long held view. Even that view is balanced by the sense that subpoenas to witnesses to appear before the grand jury must be reasonable and can't be overly broad. That not only is the case in terms of the rules for grand jury proceedings, but more importantly, Department of Justice policies which tries to set out some grounds for the prosecutors to effectively and fairly and reasonably pursue witnesses.

In this case, there are a number of claims that we make that we ask the Court to consider. There's no question that Mr. Carter represented Ms. Lewinsky. There's no question that producing these documents would not only violate the attorney-client privilege but her Fifth Amendment privilege. It's been clear that she's been identified as a target of the grand jury and that the Government wants this information to make its case against her.

It is also true that in this case the subpoena is unlimited in scope. The Court has seen it. I've never seen a subpoena so broad, requesting a lawyer to produce every conceivable document that he has or to even create documents

based on any thoughts or oral discussions or other reports. It's the scope of it that's one of our fundamental concerns.

And more importantly, I think that if the Court looks at this entire case, the only rational way to proceed is to quash the subpoena. This is a case where the Government largely ignores the major arguments that we make. There is a threshold requirement. In this case, we don't know what the Court has heard in terms of recordings. That's not clear. And we hope that that will be clear by the end of this hearing. But it's clear that a couple of things are without dispute.

Maryland law has firmly held it illegal for parties to participate in illegal wiretaps without the consent of all the parties. In this case, it's without any doubt that Linda Tripp taped Monica Lewinsky without her knowledge, and clearly without her consent. Her tapes were illegal, and they were tortious in terms of Maryland state law. That's the threshold; that's where this starts. On the other hand -- that's the state issue. On the federal level, Title III forbids taping of citizens generally. It makes exceptions if there is one-party consent, but it's not available if the consenting party is involved in some crime or tortious activity. So we have both state and federal claims that are at stake here.

And if the taping was illegal by state law, and as it was, without dispute, then federal law presumes that there was a criminal or tortious purpose on the part of Linda Tripp in

doing that. Therefore, her tapes are illegal under Title III as they are under Maryland state law. And the tapes that are illegal under Title III can't be used in this court as the basis to subpoena the lawyer. And the Government can't use these tapes to pierce Monica Lewinsky's protected privileges.

What they had done, Your Honor, is to, in a sense, start with an illegality to obtain evidence, then grant Linda Tripp some form of immunity, recognizing she committed a crime, then wire her to go in and have another conversation with Monica Lewinsky. And it's clear that she's the alterego of the Government during that presentation.

And what's even more important -- and we don't argue this much in our brief, but it's important to make it on the record. The timing is incredible; that not only is Ms. Tripp a government alterego in having her taped conversations with Monica Lewinsky on January 13th, but in terms of violating Maryland state law, she also reveals that in some sense by talking to the Jones lawyers on January 16th in preparation for President Clinton's deposition on January 17th. So not only --

THE COURT: What date did she talk with the --

MR. OGLETREE: January 16th.

THE COURT: January 16th she talked with the Jones lawyers?

MR. OGLETREE: January 16th. This is what's important, because there is a question of secrecy and privacy.

There is a further violation of the law when she in a sense reveals these tape recordings by talking, not to the Government, but to private parties. That is a violation. But more importantly, the whole scenario here --

THE COURT: Now, excuse me one minute. The female pronoun you just used a minute ago refers to Ms. Tripp?

MR. OGLETREE: Yes. Ms. Tripp.

THE COURT: All right. I just want to be sure. All right.

MR. OGLETREE: Ms. Tripp. I'm sorry. I'll use the names consistently.

THE COURT: All right.

MR. OGLETREE: This is exactly the conduct that Ms. Tripp engaged in. And it's clear that the subpoena to Frank Carter for his records relating to Monica Lewinsky stem from the Government's illegality and Ms. Tripp's illegality in collecting evidence. There is no clean hands here. There's no fresh start. It's all part, we submit, of a poisonous fruit that dated back to the illegal state tapings and the Title III prohibition in the way that they were used.

And the reason it's so clear is that not only is she in a situation on January 13th -- this is Ms. Lewinsky, where she -- with the Government's consent, taping Monica Lewinsky, but they then use that to confront Monica Lewinsky on January 16th and to tell her a number of things. And Mr. Speights is

here to proffer to the Court any further factual allegations that are necessary. But what we can say without a doubt is that as a result of this initial illegality, there is a confrontation of Monica Lewinsky, and she's confronted by at least a half a dozen attorneys, whether from the Independent Counsel's office or U. S. Attorney's office, and several law enforcement agencies, from the FBI and other agencies; and that she's in their custody for the better part of a day; and that they know, because they have the tapes from Linda Tripp, they know because, they have her affidavit that had been prepared during the representation by Mr. Carter, they know she's a represented witness. There is no doubt about that. They can't get over that. And despite that she's represented by a lawyer, they nonetheless go forward and start to question her, and in fact, try to make an offer to her.

There are two violations that we think are crystal clear that precede the Government's effort to subpoena these documents. Not only the federal violation of the statutes for Maryland and the Title III, but also 4.2 of the Rules of Professional Responsibility that talk about what Government agents can and cannot do in contacting represented witnesses. They not only know that she's represented and don't contact her lawyer, but even beyond that, they actually discuss dispositions, for her to be a cooperating witness. They give her a deadline to do this within that day or their offer will

expire. So it's clear that they know she's represented, but they want her away from her lawyer, they want her when she's surrounded by Government authorities, and they want her to make a deal without legal counsel. And she's clearly at that point a target. There would be no other reason for them to do that. And it's that whole series of conduct before we even get to the subpoena that we think is the basis for the Court to quash the subpoena.

Beyond all of our arguments about the state law and the federal law violation and our arguments about 4.2's violation and the Department of Justice guidelines, there's even more concern about the nature in which the Government goes about this. That is, any subpoena -- putting aside all of our arguments, a subpoena to a witness has to be reasonable, it has to be limited in some scope, it has to be focused. It's clearly not reasonable on its face because there is not a single indication that the Government has sought any of the alternative ways to obtain this evidence short of piercing the attorney-client privilege.

They have not subpoenaed Monica Lewinsky. They have not brought her before the grand jury. And she is really the central person here. They are, in a sense, avoiding that by going around her and going to her lawyer to get things that, if they really have the basis, they should be able to go to the witness, issue a subpoena to Monica Lewinsky, tell her to come

in and testify. Linda Tripp is the person who did the tapes. Issue a subpoena to Linda Tripp, have her come in and go on the record. But going through Frank Carter to get him to, in a sense, become a witness against his client is the part that we find most disturbing.

More importantly, we are disturbed by the fact that, adding even more confusion about this process -- and that should certainly influence the Judge's decision -- when Mr. Carter was subpoenaed in January, he was subpoenaed to go to a grand jury in the Eastern District of Virginia, which makes no sense at all. Thankfully, at the time that we brought that to the prosecutor's attention, they were simultaneously calling us and saying, well, forget about Virginia; come to D. C. But the whole sense of this being out of control, and no real basis to go into Virginia, and having Ms. Tripp wired when she talked to Ms. Lewinsky, are the kind of violations the Court has to seriously examine before even getting to the question of whether or not the attorney-client privilege should be pierced.

And so on the basis of all of those arguments, we would ask the Court to deny their request to have Frank Carter either produce documents or to become a witness.

The Government, in their reply, has asserted, well, there are some nonprivileged items and some privileged items. That may be the case. But that's not the essential issue here.

If there is illegality in the Government's effort to obtain this evidence, they can't say "We did something wrong and we want the nonprivileged things even though we violated the law." It applies to everything that they are asking for, because they don't have a basis on this record to come forward and ask for this material. And the ethical rules make that clear, the Department of Justice guidelines make that clear, the case law makes it clear. And we think that there is no sufficient reason for the Court to deny that request.

Finally, and most importantly, one of the things that the Government has skated around, we have not formally asserted a Fifth Amendment privilege for Frank Carter because the Government has consistently told us Mr. Carter is not a target, he is not a subject. We have listened to the tapes, and it's our representation that in fact he was unaware of what his client was in fact doing. But yet, there is still a question about the Fifth Amendment privilege, given the way the Government has proceeded. They ignore that in their response. They really haven't addressed it, about his role. And so there are additional claims that we will bring to the Court's attention based on what they ultimately decide to do.

We certainly think that if the Court, for example -- let me speak hypothetically. If the Government presented the Court with all the tapes of Linda Tripp, said "Here's all the transcripts," which I doubt that they did, but let's assume

that they gave you selected references. That is, in our view, not a sufficient basis for the Court to make such an extraordinary determination to pierce the attorney-client privilege. We understand that there were at least a dozen conversations. And for the Court to even attempt to rule on a waiver or the crime-fraud exception based on excerpts, as opposed to a complete transcript, and without us having a chance to challenge those and put them in context, would be inappropriate.

The Court should not be misled about what exactly happened. The Court should not be misled and have an incomplete record. Things could be offered selectively; they can be offered out of context. And that's part of why we need a full record, and if we have that record and have those tapes, we'd be able to respond to them. That's the first question.

The second point is that if the Government attempts to rely on Linda Tripp's taped conversations with Monica Lewinsky on January 13th, that's even more difficult in the sense that Linda Tripp's role in all of this is so tainted on the record, and she clearly was the Government's alterego. And that, too, would mean the Court would have to have the entire record of all the hearings before making any kind of ruling, and we would have to have the opportunity to challenge them as well.

What the Government simply does is what it does in most normal cases: Well, we'll submit it ex parte. But this

is not a normal case. This is a case where there has been a clear violation of Maryland law, it's a case where there's been a clear violation of Title III. It's a case where there is a clear indication that the source of the Government's subpoena is Linda Tripp's conversations with Monica Lewinsky. There are too many questions here for the Court to skip to crime-fraud or waiver without asking how did we get here. And we got here through a very torturous path that we think it's appropriate for the Court to consider.

There are other claims that we will make. I want to just lay those out for the Court now, and also hope that the Court would hear from Mr. Speights, because he fills in in some appropriate ways issues that we can't raise because he represents the actual client, Monica Lewinsky, and is in a better position than any of us to say what would happen if the Court were to grant this; and, more importantly, what that does to the attorney-client privilege if Mr. Carter's rights as her lawyer are not protected. Then what would happen to her future lawyers and future clients?

Well, those are claims I'd like to make now, and I'll save the rest for rebuttal.

THE COURT: Certainly. Thank you.

Mr. Speights, we'll be happy to hear from you now.

MR. SPEIGHTS: Thank you, Your Honor.

May it please the Court. I'm Nathaniel Speights. I

represent Monica Lewinsky, who I believe in this matter is the real party in interest.

I think that the issues that we are discussing here are really not ripe for discussion. The Government has made a claim based on the Fisher case that they could get this information directly from Ms. Lewinsky, and therefore, why should the Court prevent them from getting it from her attorney? Well, there are two reasons for that:

One, as a practical matter, the right to attorney-client privilege, that is, to have things that we tell lawyers held in the strictest confidence, is one of our most sacred rights and predates our own Bill of Rights and our own Constitution. This is an important right in western jurisprudence. And there has been erosion to the right. There has definitely been erosion. But I know of no case where a person who is the subject of a criminal investigation and is the sole target of that criminal investigation has not been able to utilize her attorney to obtain legal advice.

Now, in this case, Mr. Carter was sought out by Ms. Lewinsky for legal advice. He assisted her. As a result of the Government's misconduct, which is very clear and evident, and I believe that even they will admit to this, on January 16th, Ms. Lewinsky is lured by the Government to a hotel room in Virginia, and she is told about a document. And that document is an order from the United States Court of

Appeals for the District of Columbia Circuit, Independent Counsel Division, filed January 16, wherein the Court grants permission for the Independent Counsel to, quote -- "Notification to the Court of initiation of a preliminary investigation and application of the Court for expansion of the jurisdiction of the Independent Counsel." And the case is entitled "In re Monica Lewinsky." Now, she's a represented person. I don't know whether the Court is familiar with this order, but I would be happy to pass it out.

THE COURT: I presume you're talking about the order from the three judges up there?

MR. SPEIGHTS: The one from the three judges.

THE COURT: Oh, sure, I'm familiar with it. The Special Division, yes.

MR. SPEIGHTS: It's also known as the Special Division.

THE COURT: Yes.

MR. SPEIGHTS: Now, they know she's a represented person. They also know that Mr. Carter --

THE COURT: Who knows she's a represented person?

MR. SPEIGHTS: The Office of the Independent Counsel.

THE COURT: Oh, okay. Not the three-judge panel.

MR. SPEIGHTS: No, not the three-judge panel.

THE COURT: You're talking about the Office of the Independent Counsel.

MR. SPEIGHTS: The Office of Independent Counsel. So they know that she's a represented person, and they know that their investigation centers around the matters involved in the Jones case down in Arkansas.

THE COURT: Yes.

MR. SPEIGHTS: They also know that Mr. Carter is a former public defender for this jurisdiction.

THE COURT: Surely.

MR. SPEIGHTS: And is a fine criminal lawyer. They know these facts.

THE COURT: Yes.

MR. SPEIGHTS: These are public facts in public record. They say to Ms. Lewinsky, when she asked if she could call Frank Carter, they say, "You can't call Frank Carter. You can call anybody else except Frank Carter." She says, "I don't know any other lawyer. I had a hard time getting Frank." They represent to her --

THE COURT: Let me ask you: You are now relating to me, I guess, what your client has told you? Because I haven't heard --

MR. SPEIGHTS: This is my attorney proffer, Your Honor. I am proffering this to the Court.

THE COURT: Okay. Because I hadn't heard that before.

MR. SPEIGHTS: That this is what occurred.

THE COURT: Okay.

MR. SPEIGHTS: Frank Carter is her lawyer. She has gone to him for legal advice. He has prepared the affidavit. The Office of the Independent Counsel, through the person of Mr. Mike Emmick, represents to Ms. Lewinsky that the reason they don't want her to call Frank Carter is that he might tip off Vernon Jordan. She can call any other lawyer, quote unquote, are his words.

Now, they knew they had applied to the Justice Department. They knew that Ms. Lewinsky was a target of their investigation; they knew that she was represented by counsel. Yet, they decided to violate not only the Canons of Ethics, Rule 4.2, and the Justice Department regulation, but they decided to violate her right to have counsel of her choice present to assist her with crucial matters.

THE COURT: Now, let me just ask you something, Mr. Speights. And I don't want to be unkind or unfair to you. But are you submitting to me at this time -- because I've read the papers, and I didn't see any of this in the papers. Are you submitting to me at this time that Ms. Lewinsky sought to have Mr. Carter with her on that day and was denied that right?

MR. SPEIGHTS: I am submitting that to you, Your Honor.

THE COURT: I just wanted to be sure we understand each other.

MR. SPEIGHTS: And I submit it to you in the words

that they used.

THE COURT: They, who?

MR. SPEIGHTS: The office of the Independent Counsel.

THE COURT: Okay.

MR. SPEIGHTS: And the words were, "You can call any other lawyer but Frank Carter."

THE COURT: All right.

MR. SPEIGHTS: Now, this is what they told her.

THE COURT: All right. And you say that was Mike Emmick.

MR. SPEIGHTS: And that was Mike Emmick.

THE COURT: All right.

MR. SPEIGHTS: Now, Special Agent Fallon's partner, I cannot recall his name right now, suggested to Mr. Emmick and others that if they were going to continue questioning her, that they should have her sign an Advice of Rights form, FBI standard form.

These issues are not issues that we look at in a vacuum. These issues are substantial constitutional rights, the Sixth Amendment right to counsel, the Fourth Amendment right to be free of unreasonable searches and seizure. These are issues that are raised by the process that we're using here. Because I daresay that if we asked even the Office of Independent Counsel to withdraw this subpoena, issue a subpoena to Ms. Lewinsky, and to litigate these issues under the Fisher

context, I think we'd have a clearer and better opportunity to resolve these issues, because I think that she has constitutional rights that would be impaired. But what they've done here is they've said: We don't know -- we're not going to say what we believe the involvement of Mr. Carter was with Mr. Jordan. We're not going to put that before the Court at this time. What we are going to put before the Court is a wedge between attorney and client.

Mr. Carter was Ms. Lewinsky's attorney for this matter. As a result of these subpoenas --

THE COURT: Now, you just said Mr. Carter was her attorney for these matters.

MR. SPEIGHTS: That's correct.

THE COURT: And "these matters" refer to what?

MR. SPEIGHTS: These matters refer to the preparation of an affidavit and preparation for a deposition in the Jones matter down in Arkansas.

THE COURT: Okay. All right.

MR. SPEIGHTS: And I think that --

THE COURT: That's why I had to ask you, because I want to be sure what you're talking about. Okay.

MR. SPEIGHTS: Because, you see, I think they try to make a distinction here between the civil case in Arkansas and their investigation in the criminal matter. And I think it's a distinction without a difference because, according to

Mr. Starr's brief, on page 9, he states that the evidence discloses that the affidavit is materially false, in support of his argument that this comes within the crime-fraud exception -- which I don't believe it does, because the crime-fraud exception is generally involving a series of crimes, not a claim of one instance of perjury. But I think that what's illustrative here, Your Honor, is that in order for them to even maintain this criminal investigation -- and I know that is not before this Court at this time -- they have to show that the affidavit is materially false.

Now, materiality is the key to perjury. In order for them to make a claim that there is a crime even under investigation here, that is, the perjury crime, they would have to show materiality to the underlying issues, that is, the issues that were involved in the Jones case. That can't be done.

As a matter of law, this issue has been visited by the judge in the Jones case, the Office of the Independent Counsel had an opportunity to be heard on the issues, and the judge issued an order, dated January 29th, in which she found that "The Court determines, however, that the Lewinsky matters are not essential to the core issues in this case." She goes on to state that, "In fact, some of the evidence might not even be admissible as extrinsic evidence under Rule 608(b)." And she excludes all evidence from that case.

I don't know whether the Court has seen this order.

THE COURT: I don't know either.

(Documented handed up to the Court)

MR. SPEIGHTS: But this order was -- I know that the Office of Independent Counsel has seen it. This order was issued by Judge Webber Wright on the 29th of January.

We were before Judge Webber Wright on these issues as well, because we did not believe that Ms. Lewinsky's testimony was in any way material to her issues. And in fact, previously, when the judge had allowed depositions to be taken of people who were alleged to have been sexually harassed by the President of the United States, she ruled that the questions that are the subject of this affidavit were only collateral, and that while discovery could be had on them, she did not believe that they went to the core issues as to sexual harassment. And here, she reaffirms that ruling in excluding all Lewinsky matters.

So, this issue as to waiver does not apply in this case because: One, there is no crime-fraud here. By the Government's own admission, this is a single instance of a claim of perjury. And, interestingly enough, what the Government tries to do is they try to use extrajudicial prior inconsistent statements to bootstrap that the sworn affidavit is false. Now, this Court has tried many a case where people have been impeached with outside statements, but that in and of

itself does not make out a crime of perjury.

So I think that there are two problems here. One is there is no waiver. She has not waived. Two, that Mr. Carter is not the correct vehicle to get this information. They can get this information directly from Ms. Lewinsky and follow the procedures that the Court has set out, so that Ms. Lewinsky can raise her constitutional rights directly before this Court, so that she does not have to rely on a third person, i.e., her attorney. Because then we get into the Perelman doctrine; you know, does Mr. Carter have to stand here and take a contempt citation in order to protect the sanctity of the attorney-client privilege, or does Ms. Lewinsky have a right to have this matter declared final under Perelman and then reviewed so that her constitutional rights, which are the real rights at issue here, can be properly protected and reviewed by the appellate court before there is production of these documents and attorney impression.

And let me say finally, in closing, Your Honor, there is one other very, very practical matter, why I find this procedure to be abominable, is because I'm Ms. Lewinsky's attorney now. And if the Court would say -- set a precedent and say they could subpoena Mr. Carter, have him tell what he knows, have him produce documents that she's given him, then when my wife gets tired of all these cameras in front of our house and makes me quit this case, they're going to subpoena me

and have me come in and do the same thing all over again.

So I think that it's the procedure here that is invalid, and it's void really from the very beginning, because the information that they're seeking to gather here from Mr. Carter -- they issued a subpoena on January 21st, 1998, the first subpoena, where he was to return to Virginia. And that had two deleterious effects. First is that this is the first subpoena they issued. They had not taken one testimony, one witness before our grand jury. Two, I contacted Mr. Carter around this time and said, "Mr. Carter, I need the file, and I need to have a couple hours of your time to go over what happened." Mr. Carter informs me of the subpoena issued by the Office of Independent Counsel, and sends me a letter saying that any contact that I have with him should be through his lawyer, Mr. Ogletree.

Well, I understand why those things occur, why he said those things and why he sent me that letter. But what happens here is that this is denying my client -- our client, his client as well, the right to effective assistance of counsel, and that is, I wasn't privy to the meetings between Mr. Carter and the lawyers in the Jones case. You know, I don't know what transpired there. But that is essential for me to bring a defense for her, as to what was said between him and Mr. Fisher, him and Mr. Bennett, what documents were exchanged, what his thought processes were in preparing the affidavit.

You know, what things did he use to research the definitions of the words used in the affidavit. These are all things that, as her present counsel, I need to know. He is unable to tell me those things because of this subpoena and because of this amorphous idea that perhaps he has some connection to Vernon Jordan that might make him a target, that might make him have to assert some Fifth Amendment right.

And quite frankly, Your Honor, if you'll look at the subpoena and the persons that are listed, they list a person named Fred Carter. It says Fred Carter. So, I could understand where he might have these concerns. But the process that the Government is using is flawed, and it's causing a deleterious effect, not only on my client's constitutional rights, but I think that if the Court rules in their favor, that it will have a chilling effect on every criminal lawyer in this jurisdiction as to what he can ask his client; whether he's going to have to try the case blind because he might be subpoenaed if the client discharges him. He might be subpoenaed by the Government to give up the client's personal confidences.

So, I think that there are other less intrusive ways for the Government to obtain this information. If they would follow their own guidelines in the Justice Department manual and attempt to use those other less intrusive means, perhaps they could prevail in gaining the information that they want.

But they can't do it through the attorney. This circuit has recently upheld the right of attorney-client privilege and has placed an extremely high burden on the Government to show why the privilege should be abrogated.

THE COURT: Mr. Speights, let me ask you: Are you suggesting to me that because Mr. Carter was at one time retained by Ms. Lewinsky, that he is her attorney forever?

MR. SPEIGHTS: He is her attorney forever as far as those confidences are concerned. And I think the cases are replete with that. That even when -- if you look at some of the civil cases, Your Honor, where the stakes are much lower, even where the client is involved with the attorney in a fee dispute, the attorney may not violate the attorney-client privilege -- may not. And so I say yes.

As far as those rights are concerned, those rights are inviolate, you know. And we used to say as lawyers, when we learned about these rights, that these are things that you had to take to your grave. And I think that that still remains.

Now, recently in this circuit, through the Office of the Independent Counsel, they got two or three judges to agree that when the client dies, that you can subpoena the attorney, which is in the Supreme Court right now. I think it's a wrong decision, because I think it's again chipping away at our most fundamental and cherished rights. But I know of no case where they can subpoena the lawyer's files when the lawyer dies. So

I think, as far as Mr. Carter is concerned, even beyond his grave the privilege would still exist as to Ms. Lewinsky.

THE COURT: All right. Thank you.

Now, is it your position that the crime-fraud exception has no bearing whatever on her relationship with Mr. Carter?

MR. SPEIGHTS: Has no bearing whatsoever, Your Honor. I mean, first, I don't even think that there is any proof other than these Linda Tripp tapes, which, again, are not admissible in this court, not admissible for the grand jury. Title III makes that clear, that they cannot go before the grand jury.

THE COURT: Let me ask you, you're not talking about all the tapes, are you?

MR. SPEIGHTS: I'm talking about all of the tapes that were taped in Maryland. Now, let me just say that the January 13th tape --

THE COURT: I thought you were talking about just the tapes that were done in Maryland. That's why I asked you about were you talking about all the tapes.

MR. SPEIGHTS: Right. Correct.

THE COURT: Because I might have a different view from you on that.

MR. SPEIGHTS: Yes. Well, I think that even the January 13th tape is suspect, Your Honor. And I say that because of this.

THE COURT: But you're not saying that it's necessarily illegal, but it might be suspect.

MR. SPEIGHTS: That's right.

THE COURT: Yes.

MR. SPEIGHTS: It's not illegal per se, as the Maryland tapes are.

THE COURT: All right.

MR. SPEIGHTS: The Maryland tapes are -- this is one of the few statutes that we have on Title III, you know, because grand juries have vast powers. In my years when I was a prosecutor, we could -- as we used to say, we could indict a ham, you know, and you certainly could ask the ham any questions you wanted. But the Congress decided --

THE COURT: The problem is, you would never get any response.

MR. SPEIGHTS: That's right. But the Congress decided that where it was illegal wiretapping, that you couldn't even use it in the grand jury. Could not even use it in the grand jury.

As far as the power of the Independent Counsel to wire Linda Tripp and create what we used to call a controlled informant or a cooperating witness, a Government agent, on January 13th, I don't think they could do that, because, you see, Your Honor, if you think about the way the Independent Counsel statute works, we have a constitutional right that

there should be no bills of detainer, that is, no special legislation targeted at just us. Well, Monica Lewinsky has her own special order issued by the Special Division of this court, giving the OIC power to extend its investigation. Now, that's a lawful order of this court; and until tested, the Supreme Court has ruled that the OIC statute is constitutional. So from that date forward, they had power to investigate Monica Lewinsky. But prior to that, they did not. They did not have power.

So, on January 13th, when they were wiring Linda Tripp up as a Government agent, alterego of the Government, she was not acting under color of law. She was acting as the Government's agent. She was not acting as a consensual one party for some reason other than -- that is permitted in Virginia. She was acting as a government agent.

THE COURT: The "she" you are using now is Linda Tripp?

MR. SPEIGHTS: Linda Tripp. That's correct.

THE COURT: Yes.

MR. SPEIGHTS: So, no, they did not have power on that tape.

Now, whether that particular tape is admissible for grand jury purposes or not, I don't dispute that it may very well be. But I don't -- I haven't heard that tape. It would be impossible for me to address it. But I do know that when

you have -- and we've discussed these in the brief. Where you have crime-fraud, you know, it has to be a pattern of criminal activity, a pattern of abuse. Not that one person told a lie in one affidavit in one case down in Virginia -- in Arkansas, excuse me. That's not what the crime-fraud exception would be, because if that were to be true, in any case where there was a prior inconsistent statement used to impeach someone, they could be indicted for perjury. And their attorney, the Government would have you believe, their attorney's records could be seized.

So I think -- you know, they're giving the crime-fraud exception far too broad a brush. And it certainly does not apply in this case to a person talking on a tape to someone else, not under oath, outside of court, as I say, extrajudicial conversation, to contradict a sworn affidavit. I don't think that it rises to that level from a factual standpoint.

THE COURT: All right. Thank you very much.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: It's still morning.

MR. BIENERT: Good morning, Your Honor. I'm Thomas Bienert, for the Independent Counsel.

THE COURT: Thank you.

MR. BIENERT: May it please the Court.

Mr. Speights says in his brief filed on behalf of Ms. Lewinsky that enforcement of these subpoenas, quote, "will

turn the time-honored profession of the advocate into the prosecutor's unwitting tool." We submit to you, Your Honor, he got the issue right there; he just misplaced who is the unwitting tool.

This is a narrow inquiry. The evidence shows that Frank Carter was an unwitting tool of Monica Lewinsky to commit perjury, to obstruct justice, and to try to get others to do the same. The focus in this case, Your Honor, is very simple: Is the attorney-client privilege, which all of us absolutely recognize as extremely important, waived because of Monica Lewinsky's knowing use of Mr. Carter to commit a crime? If she did knowingly use him to commit a crime, as the case law indicates, the attorney-client privilege, quote, vanishes, unquote. Mr. Carter is a witness like anyone else. It is our contention that that is exactly what happened here.

The evidence demonstrates that Monica Lewinsky specifically went to Mr. Carter so she could lie to him and use him to try to get out of testifying in the Paula Jones case; and short of that, to lie, and to try to get others to lie.

The defense counsel -- I'm sorry. The counsel for the movant give a whole litany of things that are totally off in different directions, have nothing to do with that inquiry. I'd submit to the Court, put those in a bottle, they should do. Those may be appropriate arguments for them to make. Of course, we'll contest them. Just not today. There's no

charging in this case. There is a huge distinction between what happens pre-charging and post-charging.

We are not here to deprive Monica Lewinsky, or anyone, of any right they will have. They can bring motions to quash; they can allege Government misconduct; they can claim that we made deals with them and then broke our deals. But all of that happens when it's on the table. It's not on the table now.

And I'd submit to Your Honor that the blatant attempt -- I've watched them argue for about 50 minutes, and if two minutes were spent on the subpoena, that's a lot. This is a distraction. It's an attempt to get the Court looking at things that just aren't on the table. And what my intention to do, Your Honor, is to focus on what is on the table: the subpoena; attorney-client privilege, whether or not it's vitiated by criminal exception; and why that subpoena is a reasonable subpoena and meets the standards that this Court should look at.

First of all, attorney-client privilege. Absolutely, put a fork in it, an extremely important privilege. But as we all recognize, and no one here is going to dispute, it goes out the window if the crime-fraud exception applies. And as this Court's circuit has held, the standards for that is, did the client make privileged communications? We agree with that. We assume privileged communications were made to Mr. Carter. Did Ms. Lewinsky do it to further an unlawful act, and did she do

it -- and did she carry out her intended unlawful act? We submit she has.

She went to Mr. Carter to try to commit perjury, to get out of having to give truthful information in a federal district court proceeding. Short of that, she continued by filing a false affidavit, and she attempted to obstruct justice by manipulating other witnesses in the same district proceeding's testimony. The privilege vanishes. It's gone.

Even assuming that the Court finds that there wasn't sufficient evidence to find crime-fraud, well, then we get to waiver, a totally separate and independent basis for Mr. Carter to go from sanctified attorney-client privilege person to witness, because, as the case law indicates, Mr. Carter is doing the right thing by trying to protect Ms. Lewinsky's privilege, but Ms. Lewinsky has to protect it. She has to treat it as valuable jewels. Has she done that? No.

Ms. Lewinsky, as the evidence submitted to the Court indicates, has been telling everyone -- well, not everyone, but certain people, and it's certainly in the evidence we've submitted, step by step, what's happening with Mr. Carter, what his plans are, what she's going to do. She's not treating this as jewels. She's not protecting it. And as counsel point out, it's her privilege. She didn't protect it; she waived it.

Once the Court finds either crime-fraud exception, waiver, where are we now, Your Honor? We're just back to a

standard inquiry: Is this a subpoena that must be quashed because it is unreasonable or it's overly broad? And as I'm sure the Court is aware, that's among the lowest thresholds that this Court ever has to determine. It's not probable cause. It's not even relevance. The standard is whether or not the subpoena -- that there is no reasonable possibility -- and by the way, just for purposes, I'm talking about the subpoena duces tecum now, the subpoena to Mr. Carter for documents and for items.

THE COURT: Yes. All right.

MR. BIENERT: The standard is, is there no reasonable possibility that that subpoena could lead to relevant materials? And I'd submit, absolutely there is. The evidence shows that the entire basis for her going to him was based on trying to commit a crime. And now it's the crime that we are investigating. It's the very crime -- what's interesting about this case, and why this is such a clear example of crime-fraud exception, many of the cases out there deal with situations where a client goes to an attorney for an ostensibly legitimate reason and then somehow intertwined in that they do something illegal. And even those cases will find that when a proper showing of the illegality is shown, attorney-client is waived. But this is a much easier call.

She did not go to Mr. Carter for an ostensibly legitimate reason. She went for the specific reason of keeping

him in the dark so she could commit a crime. And what's interesting here is her involvement with Mr. Carter is the corpus, to some degree of the crime. It's the documents that she prepared through Mr. Carter. It's the things that she told Mr. Carter. It's the things that she tried to get Mr. Carter to do on her behalf that embody the crime in this case. So, the subpoena is absolutely reasonable. Or to state it in the inverse, it's not proper to say that there's no reasonable possibility that it will lead to relevant evidence, because what happened between her and Mr. Carter is extremely relevant.

Next we go to the is it overly broad. Is the Government here asking for something that is so onerous that it would just not be reasonable to expect Mr. Carter to be able to comply? I'd submit, absolutely not.

And as I'm sure the Court is aware, what are the ways that the Government can try to limit inquiries, to try to make them reasonable, to try to make sure that Mr. Carter doesn't have to abandon his practice for weeks while he's looking for documents, etc.? The biggest way is by time. You put a limitation on that subpoena: Don't go back and look through everything you've ever filed, don't go back and look through everything you have; let's find a reasonable time. And as Your Honor may recall from the subpoena, the time is extremely reasonable. We've only asked for documents going back to January of 1997, approximately a year.

Secondly, what's another way that you limit that subpoena? You specify topics. We're not asking him to look through every document he's ever gotten. We're only interested in things relating to Monica Lewinsky, Linda Tripp, Kathy Willey, and an itemization of other witnesses named on the subpoena, who all are potential players in this case.

I'd also point out, there's a heck of a practicality here that makes the subpoena more eminently reasonable. As counsel has indicated, Mr. Carter only represented Ms. Lewinsky for a very short time. He began representing her sometime in December and he quit representing her sometime in January. I would submit that just using common sense in this situation, the great likelihood is that the bulk of what he has is only occurring in a two-month period. Let's assume that there's some stuff through this month. December, January, February. It's very limited. And it would be quite surprising if it amounted to more than a couple of redwells.

It's not an overly broad subpoena; it's not unreasonable. And, frankly, even if it were, if there was some convolution that it were, it's incumbent on Mr. Carter to give a specificity, give some specificity to the Government, give it to the Court, as to why it would be too cumbersome for him to do. He hasn't even done that.

So, for those reasons, Your Honor, I'd submit the subpoena is reasonable; it is not overly broad.

This could be the penultimate situation where crime-fraud clearly exists, because the whole reason for going to Mr. Carter was to get him to be an unwitting tool for her to commit her crime. That is the issue. We submit that it is clearly properly before the Court, and the Court should focus on it and should find that the subpoena should not be quashed and should deny the motions.

Unless the Court has any questions about the many issues that the opponents raise that I would submit should be saved for another day, that's all the comments I have.

THE COURT: All right. Thank you very much.

I'm going to take a ten-minute recess, and we will be happy to hear from both counsel in rebuttal. Okay?

MR. OGLETREE: Thank you, Your Honor.

(Recessed at 12:01 p.m. until 12:15 p.m.)

THE COURT: Yes, Mr. Ogletree. We are ready to hear your rebuttal.

MR. OGLETREE: Thank you, Your Honor. This will not be extensive.

THE COURT: You take as much time as you want. Okay? Or need.

MR. OGLETREE: Thank you.

Let me just deal with some of the central points in this case. The Government asserts here today that, you know, Frank Carter only represented Monica Lewinsky for two months,

there can't be that much material, why is there such a burden. But for the Independent Counsel engaging in the conduct that we think is illegal, Frank Carter would still be the attorney for Monica Lewinsky and they would have no opportunity to go after this material or to go after her. They pierced that relationship by, in effect, removing him as counsel by swooping down on her as they did.

I think it's clear as well, Your Honor, that the Government not only in their brief, but today, completely not only ignore, but in effect concedes the validity of our principal argument, that Title III and Maryland state law were violated. And that should end the inquiry for this subpoena today. They don't make an argument. They don't respond.

THE COURT: Let me ask you: Why do you believe that those two points should end the inquiry here?

MR. OGLETREE: For this reason. The way that this works is that the only way the Government is able to raise the issue of Monica Lewinsky being a target of the grand jury is on the basis of evidence that was unlawfully seized. They didn't come to this through their own investigation. They didn't come to this through some request for her. They don't come to it through the normal processes. She was involved as a potential witness in a civil proceeding, a deposition, and a person who was the alterego of the Government, Linda Tripp, specifically and intentionally taped recordings of Monica Lewinsky and

provided that evidence to the Government.

It is clear that the evidence was illegally obtained and it was provided to the Government. Every single tape recording in this case, in our view, violates either Maryland statute, federal statute, or Rule 4.2. And I think that point is being missed.

Even if you look at the Government's taped conversation between Linda Tripp and Monica Lewinsky on January 13th, I think the timetable is so important. They didn't have authority at that point. Their authority had not been expanded. They had not gone through the three-judge panel; they had not had the approval of the Attorney General. Remember, Linda Tripp had all these illegal tapings. There was another one on the 13th without approval. And then they obtained the authority for the first time on January 16th.

Now, if they submitted to the Court some recordings after January 16th, we would be in a very different posture, saying they have the authority; the Court's reviewed it, the Attorney General's authorized it. But the order that Mr. Speights provided to the Court is dated January 16th. The cat was already out the bag. The evidence was already considered. And all that evidence was used for them to ultimately say "We want to expand our jurisdiction," which became legal on January 16th. That does not at all excuse the conduct that occurred before January 16th.

THE COURT: Mr. Ogletree, let me ask you this question. It's not really a legal question, just a plain common sense question. Let's assume, for the sake of argument in this case, that most of the evidence that the Government received -- and I haven't been assured of that yet, but that most of the evidence that they received from Ms. Tripp came about through her illegally recording in Maryland.

MR. OGLETREE: Right.

THE COURT: Now, I don't know whether it was by telephone or in person, but I don't guess it really makes much difference. But whether it was by telephone or by recording in person, wouldn't you think that maybe Ms. Tripp heard it as well as recorded it? I mean, don't you think she may have heard it by her own ear as well as record it?

MR. OGLETREE: Yes.

THE COURT: If she heard it by her own ear, that wouldn't be illegal and she could perhaps tell us about that, though her tapes might not be admissible. You know, that's something I'd like to hear from you on.

MR. OGLETREE: That's a very important point, Your Honor, the interesting point. That's one of the points. Why do they need to use any of this evidence from Frank Carter and his file at all to make their point? That is, if Linda Tripp has the evidence, why not call Linda Tripp --

THE COURT: Oh, wait a minute, wait a minute. Now, we

know, I think we all know, at any rate, it's been alleged -- and I will just admit, in in camera submissions I got some transcripts from Ms. Lewinsky -- not Ms. Lewinsky, from Ms. Tripp. But what I'm trying to say is this: I might not be able, based upon your presentation, to give any credit to the tapes because of Title III, because of Maryland law, one thing after another, but I think you and everyone else here has more or less suggested that Tripp was listening with her own ears too, and not just taping. Does that make a difference?

MR. OGLETREE: I don't think it makes a difference in illegality. The point is that it's not just listening to the tapes and whether or not she could offer or proffer the results of these tapes if she were called to testify independent of the tapes. The point is that we know how serious this violation was because, if that were the case, the Independent Counsel would not have gone through the trouble of immunizing Linda Tripp. It's serious enough for them to say: Something was wrong; we're giving you immunity to become, in essence, a witness for us.

But more importantly, the statute in Maryland is clear that the receipt of the information without consent is a violation and is considered not only, of course, a criminal violation, but it's also tortious, a civil penalty under Maryland state law. And --

THE COURT: But that, I think, would lie solely with

Ms. Lewinsky. And I don't think we are talking about any civil remedies here, are we?

MR. OGLETREE: Well, Ms. Lewinsky certainly reserves all those possible remedies. And I certainly am not conceding --

THE COURT: In another case.

MR. OGLETREE: Right. Not for this Court. It's part of the full presentation.

THE COURT: Yes.

MR. OGLETREE: But that doesn't change the nature of the illegality, and it doesn't change the point that the Government here rests its case and its argument on the -- in fact, that's what they submitted to you: transcriptions of illegally recorded information. And it's not untainted simply because --

THE COURT: Among other things, let me say.

MR. OGLETREE: Among other things.

THE COURT: Let's just say among other things.

MR. OGLETREE: But, see, that's one of the problems. And we think that as a threshold matter we should be entitled to see that material, for this reason:

The Court has been given material, and -- given material by the Government and other ex parte communications, but that does not extinguish our right for an adversarial process to examine the veracity of that material and then to be

able to assert any additional claims based on what's presented. The Court has heard only the Government's version of these tapes. They have not heard from Ms. Lewinsky. They have not heard from Mr. Carter.

THE COURT: Ms. Lewinsky certainly could have filed anything in camera that she wanted to.

MR. OGLETREE: There's no question about that. And the Government could have had her in the grand jury.

THE COURT: As I said, she could have filed anything in camera this she wanted to; Mr. Carter could have filed anything in camera that he wanted to. I mean, you know, I got what everybody gave me.

MR. OGLETREE: My point is, we're objecting to the idea of the Court making a judgment on the basis of in camera inspections.

THE COURT: You see, I'm not saying to you that that will be the basis, but there is no question, and I'm sure that you know and the Government has told you that there was an in camera submission.

And we are not here to try anybody. If we were here to try somebody, I would agree with you, I would not have permitted them to do it. And I don't think they would even have suggested doing it.

But my point is, still: Can I believe some of the things that I have received in an in camera submission, which I

can't even give to you, 'tis true.

MR. OGLETREE: We disagree with that, that you can't give them to us.

THE COURT: Oh, do you?

MR. OGLETREE: Yeah, absolutely. If the Court is saying -- I mean, the point is that if the Government is proffering to the Court a basis to pierce the attorney-client privilege -- that's what they're saying, that here's a crime-fraud exception.

THE COURT: Yes.

MR. OGLETREE: Even if they prevail on that, assuming arguendo they prevail on that, that doesn't mean that they then have the authority for unlimited inquiry into everything that Frank Carter has or everything that he knows. That's not what it means. I mean, even if they establish there's a crime-fraud exception, it doesn't mean they have an unlimited -- reasonableness and limits are part of the subpoena power. And there's no proffer here as to reasonableness or limits. And the attorney-client privilege doesn't go out the window. That's not what happens.

THE COURT: Oh, no, no, no.

MR. OGLETREE: That's not what happens.

THE COURT: Oh, no.

MR. OGLETREE: It means there are exceptions to it, but those are narrowly-drawn exceptions.

THE COURT: And no one is suggesting that, either. Okay?

MR. OGLETREE: Absolutely. And I think that, more importantly, that one of the problems is that it's clear that a central issue here, the Government has to determine that there is no reasonable possibility that the subpoena could reveal relevant information. They have conceded that the way Ms. Lewinsky used Frank Carter demonstrates that even they don't believe that his files will reveal anything. What can his files reveal? Because their position is that she lied to a lawyer. So what is it about their argument that suggests that they should have access to the lawyer's files when their point is that they know what she's told the lawyer. They have the affidavit. That information is not only in their possession but, in essence, a public document. There is nothing that they have argued today that suggests that they need to go through Frank Carter's files in order to make their claims as they've presented them.

And the other point, we have not seen a single proffer, and it's clear that not all material is protected from disclosure under Rule 6(e). And none has been provided. I mean, they've just made a blanket assertion. And we have had no proffer as to materials that may or may not be appropriately submitted ex parte. They just make that blanket claim. That's not the way it applies. That's not the way the Court should

interpret it. The point we made before, it's obvious.

And the only point is that in part of the Government's submission about Ms. Lewinsky's request for counsel, there's an affidavit from Special Agent Patrick Fallon, where he says that she didn't request counsel, etc. Mr. Speights' comment unequivocally indicated that that was not the case.

And if you look at Special Agent Fallon's affidavit, it is in some respects disingenuous where he says, "She was repeatedly advised she was free to leave at any time and did so on numerous occasions." But a paragraph later, "Ms. Lewinsky was accompanied by agents and investigators to the Pentagon City Mall, where she went shopping and ate dinner." Free to go where? It says she was never refused permission to call her attorney, and in fact, we have a clear indication just to the contrary. And all of this, again, occurred before the Justice Department or the Special Division of the Court intervened to allow the expansion of the authority.

THE COURT: Let me just ask you about that. What is your position with respect to that, since the Special Division, of course, had not given the Office of Independent Counsel authority to do that? Mr. Speights, of course, addressed it. What is your view with respect to that?

MR. OGLETREE: We think it is absolutely illegal. And we think that, as I said earlier when I referenced 4.2, and I'll cite the specific language, I mean it's just so clear. It

says, 4.2 prohibits a lawyer from knowingly communicating with a represented person, that's Monica Lewinsky, about the subject matter of the representation -- and the subject matter was her affidavit in the Jones versus Clinton case -- without the consent of that person's lawyer. It can't be clearer. It goes on to say, "This prohibition applies to the conduct of lawyers in both civil and criminal matters and covers any person known to be represented by a lawyer with respect to the matter to be discussed." It further states that "A lawyer may not avoid the need to secure consent of counsel by closing her eyes to circumstances that make it obvious that the person to be communicated with is represented with respect to the matter in question."

Our point is not the civil-criminal distinction. They knew she was represented by Frank Carter. There's no question about that. They had the affidavit. They knew that she was represented by Frank Carter; they talked to Linda Tripp. They knew she was represented by Frank Carter; they listened to the tapes. All of that. And knowing that she had a lawyer, knowing that she was represented, they nonetheless confronted her, talked to her, did not allow her to talk to her lawyer. And in fact, made her an offer, which is another violation of 4.2 and of the Justice Department guidelines, about her cooperation agreement. You can't do that. You just can't ask a represented witness to waive those rights without some

express indication that she was willing to do so. And they just don't have that here in any respect.

So, we think that the conduct was in violation of 4.2 as well as the other authority that we've cited.

THE COURT: So it's your position that without question, on the date that she talked with the Office of Independent Counsel, she was still represented by Mr. Carter.

MR. OGLETREE: Absolutely.

THE COURT: And that without any question in your mind, there has been no crime-fraud exception.

MR. OGLETREE: Right.

THE COURT: Is that what you're saying to me?

MR. OGLETREE: Absolutely. And it's also important, Your Honor, think about this. The Government spent, at least conservatively, eight hours with Monica Lewinsky. The least they would be able to present was: Here is a statement from Monica Lewinsky saying, "I know I have a lawyer. My lawyer just represented me. I just was in his office a week ago, or days ago. He worked on an affidavit. And I am no longer willing to be represented by Frank Carter. I'm going to cooperate with the Government." They can't assert that because that didn't happen.

Monica Lewinsky never ever gave up her right to a lawyer. She only lost that right when they, in a sense, grabbed her in Virginia, took her and held her for -- I'm not

talking about beating and torturing her, but the point is that this 24-year-old woman, without family, without counsel, without anybody there that she knew. And knowing at the moment she had been betrayed by Linda Tripp by some of the most intimate details of her life being betrayed. How could she say that she was comfortable and represented and nothing untoward happened? That's not the case.

And the fact of the matter is, how do we know she wanted a lawyer? Because the moment she talked to a responsible person who knew her, her mother and her father, a lawyer was on the phone instantly. Mr. Carter wasn't terminated because of some prior relationship. Mr. Carter was, in a sense, replaced because Mr. Ginsburg on the phone said, "I am now her lawyer. Don't talk to her." And so he asserted the same claim that Frank Carter would have asserted. Why didn't they let her talk to Frank Carter? Because they knew Frank Carter would have said, "You can't talk to my client without talking to me." They would have been in federal court right now with Frank Carter if they tried to contact him and explained they wanted to talk to Monica Lewinsky.

It is the sense that, if you look at this entire case of what the Government did, they went about it the wrong way. And we can't just leapfrog to whether there's a crime-fraud exception and ignore what they did before January 13th, on January 13th, and all the way up until the point that they had

authority on January 16th.

THE COURT: Do I have any indication at all from your papers as to when her representation by Mr. Carter ended?

MR. OGLETREE: Yes.

THE COURT: I do?

MR. OGLETREE: There is an affidavit from Frank Carter indicating that it -- indicating that, in fact, he was informed on January 20th, I believe that's the right day, by Mr. Speights when he called Monica Lewinsky. I want to say January 19th.

MR. CARTER: It was the 19th.

MR. OGLETREE: January 19th, when he called. As far as Frank Carter was concerned, on January 19th, this was his client. There was an unbroken line of representation. There was nothing from the client. There was nothing from anyone else. And only when he paged her and then Mr. Ginsburg and Mr. Speights responded and said, in effect, yes, we're representing Monica Lewinsky now, after she had been the subject of what I would call a sting -- you can put a nicer word on it, but the sting on January 16th, 1998. So he was in continuous representation.

THE COURT: In other words, what you're saying to me is Mr. Carter had no knowledge that he was no longer her attorney of record until January 19th.

MR. OGLETREE: That's exactly right.

THE COURT: When he heard from new counsel --

MR. OGLETREE: That's right.

THE COURT: -- that he was no longer involved in the case.

MR. OGLETREE: Exactly.

THE COURT: So your position, then, is that Mr. Carter believed until that date he was still representing Ms. Lewinsky, at least with respect to what she had retained him to do, and that was, to represent her in the Jones -- in the civil case.

MR. OGLETREE: That's right. But I wouldn't even put it that narrowly, Your Honor.

THE COURT: You wouldn't?

MR. OGLETREE: She retained Frank Carter to represent her and tell her what were her legal rights with regard to the subpoena she had received. Now, that is Jones versus Clinton. But that, as you know, on that matter there's a whole series of issues. And it's a subject of public knowledge that Mr. Carter did a number of things on her behalf in the context of that case and in trying to advise her of any issues that might come up.

This was clearly an established relationship; it was an ongoing relationship. And the client never in any way changed that until the Government descended upon her on January 16th and told her in no uncertain terms that she was in trouble

and that they had a deal for her right then on the spot, and that she had to take it that day. I mean, that's been stated over and over again. And as much as there is an effort to deny that, it seems only logical that if Ms. Lewinsky was so quick to say "Give me a lawyer" after they confronted her, it's impossible to imagine that she would have said "Frank Carter's not representing me for these few minutes or these few days." It's just inconceivable.

The relationship -- in fact, there's another factual issue that's in our pleadings but that's very obvious. The reason the relationship was ongoing is that -- and these are -- I'm trying to speak of matters of record not to reveal any privileges, but it's a matter of public record that the affidavit was signed on January 7th. It's a matter of public record now that Mr. Carter tried to inform the Jones lawyers that Ms. Lewinsky had nothing to testify by sharing that affidavit with them.

It's a matter of public record that Mr. Carter filed with Judge Susan Webber Wright in Arkansas a motion to quash the subpoena in Jones versus Clinton. That happened -- it was served on January 16th, I believe, by Federal Express. And so as of Friday of that week, he was her lawyer and was planning to go to court. And in fact, even more significant, Your Honor -- this may not be a matter of public record, but it's not disputed. Judge Wright had scheduled a hearing for

Mr. Carter to argue that motion, and I believe it was on January 23rd. It was going to be scheduled a week later.

So Mr. Carter was the lawyer, he was the continuing lawyer. And that's why -- the reason we know this is clear, that's why Mr. Carter and Mr. Speights had such differences, because Mr. Carter is saying "I'm representing this client," and Mr. Speights says, "No. I am now." And Mr. Carter had no notice, no authority, no relinquishing of his authority as counsel. And he insisted, as he should, in writing that there had been a change in counsel before he took any steps that would compromise that relationship.

THE COURT: That was to be a hearing in Little Rock?

MR. OGLETREE: That's exactly right. It was going to be, actually, a telephonic hearing on January 22nd that was set by Judge Wright to ascertain whether or not there were appropriate bases to quash the subpoena.

THE COURT: All right.

MR. OGLETREE: They knew all that. And I think if you simply look at those arguments, we don't even have to get to the question of whether crime-fraud -- I'm not going to spend a lot of time on crime-fraud because I think -- first of all, I don't think it applies in light of what's happened before. But even if it does, that is never a license to say that everything and anything is available to the Government.

And they clearly were only questioning Ms. Lewinsky

on, quote, the same subject matter. 4.2 says you can't question -- it doesn't matter if it's a civil or a criminal case. It's the same subject matter. They want to question her about what she told Carter in her affidavit in the Jones case. That's what they wanted. That's what they hoped to obtain. And that is what we find particularly disturbing.

And they talk about the subpoena. I know the Court has seen subpoenas. This is the most artful I've ever seen -- compliments to the OIC. I mean, not only are there more than a dozen individuals that they are asking about, but what did they mean by a document? When they say this was narrow, is it reasonable and is it within some foreseeable scope? They have a three-page definition of what they mean by a document. Just what that means. And it means:

"All records of any nature whatsoever within your possession, custody or control, or the custody, possession or control of any agent, employee, representative, including, without limitation, attorneys, investment advisors, investment bankers, bankers and accountants, or other persons acting or purporting to act for or on your behalf or in concert with you."

Narrowly drawn? Specific? And that's just the first paragraph. And it goes on and on about all kinds of things that they are pursuing. This is not a narrowly drawn subpoena. Not only do they want the originals, they wanted all copies of

any documents that had ever been in his existence or that he could reproduce or recreate. It's just the kind of a subpoena that doesn't comply with Rule 17.

And more importantly, we just want to reassert the point that we think that before the Court can make a ruling, that we need to resolve the issue of the grand jury testimony. And I think -- I assume they will concede not all of it is unavailable to us. There may be some arguments that they could make --

THE COURT: What grand jury testimony are you talking about?

MR. OGLETREE: I'm sorry. The recording, the in camera submissions. That under Rule 6(e), that if they're making ex parte submissions, they have not identified, either today or in their pleadings, that every single thing that they provided to the Court is unavailable to us for us to have what the law calls for, an adversarial hearing on whether or not this material is sufficient for the Court to make a determination that the attorney-client privilege should be breached.

Those are my arguments. Thank you, Your Honor.

THE COURT: Thank you very much, Mr. Ogletree.

Mr. Speights?

MR. SPEIGHTS: Very briefly, Your Honor.

I think that so that the record is clear in this case

in terms of when Mr. Carter ceased to be Ms. Lewinsky's lawyer, the subpoena in this case that was issued with a Virginia date on it was issued --

THE COURT: With a what?

MR. SPEIGHTS: With a Virginia return on it.

THE COURT: Oh, okay.

MR. SPEIGHTS: Was issued on January 21st, 1998. Mr. Carter and I submitted an order to the judge, Judge Webber Wright in Arkansas, to substitute me for him. The judge approved that order by a telephonic conference on January 22nd, 1998. So that would have been the date that Mr. Carter --

THE COURT: Ceased.

MR. SPEIGHTS: -- ceased to be the lawyer for judicial purposes. Because, you know, when -- a court has to -- when you're in a court case, you can't just change lawyers. The judge has to approve it.

THE COURT: Yes.

MR. SPEIGHTS: And we submitted to Judge Wright that we were prepared to go forward with the hearing on the various motions, including one that OIC was involved in later that week, on the 29th, where we had moved to quash a subpoena and to exclude her testimony.

So, that is the date. So at the time the subpoena was issued, Mr. Carter was her lawyer. And that's the little danger here. But there's a more fundamental issue involved

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here, Your Honor, from my client's perspective, and that is her constitutional protection, her Fifth Amendment protection.

What I suggested to the Court earlier is that the Government could believe that they can get these documents through her. I think they've misapplied the Fisher case. But if they could get these documents through her, then they would have to follow the procedures set out by the court in Lefkowitz versus Turley, which is a case involving -- describing the Fifth Amendment right, which is at 414 U. S. 70. And that case says that the privilege is not dependent on any type of -- or nature of proceedings; it's a broad privilege. It goes to administrative procedure in civil, any type of proceedings. And it says that when the Government is seeking to compel evidence or testimony that might be violative of a person's constitutional right, their Fifth Amendment right, then they could only compel it under certain circumstances. And it talks about the Kastigar decision.

And what the Government lawyer alluded to here was that, you know, that we have a motion pending to enforce the immunity agreement because, if the immunity agreement is not enforced, then there's a Kastigar hearing to determine what evidence was obtained through independent means. She's not waiving her Kastigar rights. She's never waived them. And what they are doing here, using Mr. Carter as a foil, is not only violative of our rules of judicial administration, but is

violative of her constitutional rights, because there is nothing in Mr. Carter's files that is unique to Frank Carter. And the Government --

THE COURT: How do you know that?

MR. SPEIGHTS: Well, I take that back, Your Honor. There may be --

THE COURT: I'm terribly sorry, but I had to ask you that.

MR. SPEIGHTS: There may be one thing. Maybe Frank has a special client intake sheet that only he uses.

THE COURT: Yes. You didn't have to answer that. All right. I'm just being facetious, but I couldn't let it pass.

MR. SPEIGHTS: I know, Your Honor.

What the Government does in the subpoenas, they say: Listen, we're interested in Monica Lewinsky. This is all about Monica Lewinsky. And if they can get around her Fifth Amendment right not to incriminate herself by using Mr. Carter, then perhaps they have gained a tactical advantage in this case. So I think that that's important for the Court to take into effect, that how does Fisher apply? Could they have gone and gotten these documents, and certainly Mr. Carter's strategy, his trial -- there's two subpoenas here, one for documents and papers, and one for him to --

THE COURT: His testimony, yes.

MR. SPEIGHTS: For him to testify.

THE COURT: Yes, I know.

MR. SPEIGHTS: About what Monica Lewinsky told him. Not about --

THE COURT: Which would be perfectly all right if I can find the crime-fraud exception. Okay?

MR. SPEIGHTS: Well, it may very well be, under their interpretation of what you can look for under the crime-fraud exception. But I think even under the crime-fraud exception you would still have to look for --

THE COURT: Absolutely.

MR. SPEIGHTS: -- just relevant evidence.

THE COURT: Absolutely.

MR. SPEIGHTS: You couldn't go into the person's strategy, things that they -- you know, those kinds of things. But what I'm saying --

THE COURT: Well, there is no reason to believe anybody would, either.

MR. SPEIGHTS: Right. But what I'm saying here, Your Honor, is that I don't think that they've made any showing as to -- I don't even think they can show as a matter of law to this court that the crime of perjury was committed. The elements just aren't there. And Judge Wright is the only court who could determine whether or not the affidavit and testimony of Monica Lewinsky was material to her proceedings. She's already ruled on that.

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And so, you know, I think that they are really trying to bootstrap a lot of different things here, and they want to let some constitutional issues go without being addressed. And that is the real problem for Monica Lewinsky, because Monica Lewinsky is the person who is in jeopardy here. You know, as I said before, it's Monica Lewinsky's rights that are being violated here in a court.

As the judge said in Lefkowitz, "Claims of overriding interest are not unusual in Fifth Amendment litigation, but they have not fared well." And I think that in order for them to use the crime-fraud exception to override her Fifth Amendment claims, it would be almost impossible for them to show that.

THE COURT: All right. Thank you so much, Mr. Speights.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: I am going to ask counsel for the Office of Independent Counsel if you would come forward and just answer a few questions for me. And, of course, if there is anything you wish to say in summation, I'll permit it, because I have permitted a bit more questioning.

MR. OGLETREE: Your Honor, if I could just make one point for the record. I have not said this for the record before, but we are in agreement that there is no -- Mr. Carter is not expected to appear tomorrow. That's off the calendar.

THE COURT: I don't know.

MR. OGLETREE: No, no. That's what we've been told. That there was no expectation of any testimony for him tomorrow.

MR. BIENERT: Not tomorrow, Your Honor.

THE COURT: All right.

MR. OGLETREE: And whatever the Court decides to do, if there is a ruling, that we're going to talk about it expeditiously at a convenient time.

Mr. Carter, as the Court may know, is involved in a two-month trial before Judge Kramer in Superior Court that started last Monday, and she has kind of excused him to be here today.

I'm not going to get into the state-federal authority, but he is representing --

THE COURT: Oh, no, I'm not concerned about that either. And I certainly did not know, but I know Mr. Carter is a trial lawyer. And you know I know that.

MR. OGLETREE: Right.

THE COURT: I did not know -- I knew he had been scheduled to come in tomorrow.

MR. OGLETREE: Right.

THE COURT: I'm not sure that I would be able to rule by tomorrow, though I'm going to try to.

MR. OGLETREE: It's not an issue for us, is what we're

saying. That no one is expected in the --

THE COURT: What you are saying is he will not be there tomorrow, notwithstanding.

MR. OGLETREE: Right.

THE COURT: All right. Thank you.

I'd like to know, are the tapes, the transcripts of which you submitted in camera, covered by Title III?

MR. BIENERT: Well, they are not illegal under Title III.

THE COURT: Beg pardon?

MR. BIENERT: They are clearly not illegal under Title III.

THE COURT: They are not illegal under Title III, but they are -- okay.

MR. BIENERT: And more broadly, I think Title III can be considered as to any tapes to decide whether or not they violate Title III. And in considering these tapes, they clearly don't. And the reason is, Title III makes clear that it's only illegal under federal law if neither party knows about the existence of the recording, and that it's okay when one party willingly records, which is what we have here. There is an exception, and the exception is if it is for the purpose -- and that's the key word -- of violating a state or federal law.

And, Your Honor, I have a case, a District of Columbia

Circuit case, United States versus Dale, which I have copies I'll give to counsel and to the Court, which expressly says -- may I grab it right now?

THE COURT: Absolutely.

MR. BIENERT: I realize I put it in my bag.

May I approach?

THE COURT: Certainly. Thank you.

MR. BIENERT: And, Your Honor, if Your Honor will recall the briefing, counsel did not raise the illegality under Title III issue until their reply briefs, which is why they weren't in our original submission.

THE COURT: Yes.

MR. BIENERT: Bottom line is this: What the Dale case holds, D. C. Circuit, is that in determining whether or not a taping that could violate state law will be considered for the purpose of committing a crime under Title III, the federal law, you must look at the purpose for making the recording. If the purpose for making the recording was to further an independent crime, then it may violate Title III.

And as the case that's cited in counsel for the movant's brief, I think it's called the Uphill case, indicates, that's an example where a tape is done for the purpose of committing a crime: A bookmaking operation, where the person who is running the gambling ring is recording his calls with the persons placing bets so he can then come in and prove that

they owe him money.

Another example would be a drug dealer who is recording calls with his business partners to make sure he knows how many kilos were bought, paid for, etc. The purpose is to commit the crime of drug dealing, bookmaking. It makes very clear, and the Dale case makes clear, that when it's not for an illegal purpose but it only has a potential illegal effect under state law, namely, to record evidence to be used in a case, but there's no other illegality involved, it does not violate Title III. So, on that basis alone, Title III is not violated.

I would also submit to the Court -- and of course we have our Maryland law expert, Mr. Bittman, who, as the Court may know, is a state prosecutor in Maryland law -- that there is a serious issue as to whether or not these recordings by Ms. Tripp even violate Maryland law, because it has to do with intent and whether she knowingly taped these calls after she knew it was illegal to do so in Maryland. But once again, I would submit to the Court, that's certainly an issue for another day on another motion, because it doesn't relate to the motion to quash subpoena today. And even if it did, because under federal law in the Dale case there was no illegal purpose, then it is legal under Title III, it is not violative of Title III, and, the most important inquiry, the tapes can be considered under federal law.

I believe, however, that even assuming that the tapes were somehow illegal, Your Honor makes the most prescient point, which is: It doesn't stop you from considering the words that Linda Tripp would say she heard.

If Your Honor -- as I'm sure you have seen, in the cases that typically talk about violations of Title III, the context is usually, Your Honor and I are talking on the telephone and, unbeknownst to us, someone else recorded us. They then go to the police to talk about the dastardly deed I was doing, and there's an issue over whether the police can use the tape that neither of us knew was existing as the evidence of a crime. And under Title III, you can't. Totally different scenario than when one of us knows it's being recorded and agreed. Permissible under Title III. So, for that reason, there is no Title III violation. And even if it were an issue in relation to the subpoena, we would submit it should be discarded because there's not a violation.

Once again, I would like to emphasize that there is much more evidence that has been presented to the Court than simply what was in the Maryland tapes in the in camera submission. That evidence in and of itself is sufficient for the Court to find crime-fraud. And again, the Court can consider the content of the tapes independent of the fact that the tapes exist.

THE COURT: All right. Let me ask you a question.

I know that there was no evidence to this effect, simply assertions: That Ms. Lewinsky was denied the right to call Mr. Carter on that day, and also, that Mr. Emmick specifically stated that she could not call Mr. Carter. Do you know anything about that?

MR. BIENERT: Well, as to that specific statement, I have not asked Mr. Emmick about that specific statement. As to the facts themselves, I would assert that at no time did the Independent Counsel's Office seek to deprive Ms. Lewinsky from making phone calls to counsel.

And as I believe we did allude to in our responsive motion in this case, Ms. Lewinsky was given unfettered time to go off and make walks on her own; she could call who she wanted. She in fact called her parents, she called her mom and dad; they ultimately called another attorney. So I would submit that it didn't happen.

But there is another point that I believe is worth making on that issue, too.

THE COURT: All right.

MR. BIENERT: It's important to note, Your Honor, that this whole issue as to whether there was some kind of a violation as to Ms. Lewinsky's rights with an attorney back on January 16th is only applicable -- let me state it another way -- is not applicable at all to the attorney-client, crime-fraud exception issue, because, even if she had counsel at the

time, even if her counsel was Mr. Carter, if the Court finds that a crime-fraud exception applies, well, then that relationship is, quote, vanished in the attorney-client meaning, which means he is again like any other witness and he can be called before the grand jury and we can subpoena documents from him.

So, for both of those reasons, I'd submit it is not a basis to quash the subpoena in this case, which, of course, occurred a week later.

THE COURT: All right. I have another question. It had something to do with Ms. Lewinsky on that -- oh, that date in question.

The issue has been raised to me today that your office had no authority to be talking with Ms. Lewinsky because the special panel had not as yet authorized the Independent Counsel, Mr. Starr, to do any type of investigation. Do you want to respond to that?

MR. BIENERT: I just respond in this way, Your Honor. First of all, we believe that we did have the authority to make -- for Ms. Tripp to make that conversation. But I think more appropriately to the issue today, once again, even if you assume that there was no authority for Ms. Tripp to act -- or I should say for Judge Starr's office to conduct that inquiry, as we sit here now, looking at the subpoena, it doesn't bear at all on whether or not Ms. Tripp heard the words that were

stated to her by Monica Lewinsky on that day and whether or not those words stated by Monica Lewinsky that day indicate -- or implicate the crime-fraud exception. So, once again, even if that's an issue, it's not an issue that precludes the Court from focusing on what the evidence is of what was said.

And then finally, that, like many of the points that were raised, we would submit it's sort of an improper sandbagging to even raise it now in the context of this hearing. It wasn't briefed; it wasn't even made the focus of the grand jury subpoena issue, and we would submit for good reason: because it doesn't bear on that issue. But to the degree that that becomes an important component of the Court's consideration, we would submit that it's only appropriate that we do get an opportunity to respond via a written submission.

THE COURT: All right. Thank you.

You want to say something else?

MR. OGLETREE: Just a couple points, Your Honor.

THE COURT: All right.

MR. OGLETREE: I promise this will end today.

THE COURT: Final words. Okay. Please.

MR. OGLETREE: Five quick points.

THE COURT: Please, no, no. Take whatever time you want. Since we're here and I'm not going to give you another hearing, let me hear from you now.

MR. OGLETREE: Let me be clear. The Government made a

couple of misstatements. First of all, we did raise the Title III issue in our initial pleadings at page 17 of our brief, where we point out that the subpoenas should be quashed because of the possible violations of state law and federal law that is cited, Footnote 11, page 17.

Remember, our motion to quash is to quash the subpoena. And we hadn't heard the Government's argument. That is, we were moving to quash for these reasons. And once they responded -- we didn't even make a crime-fraud argument in our initial pleading. It wouldn't make sense until they gave us the basis. That's number one.

Number two, we can't leave here without at least getting material that we know we're entitled to. And the Government concedes that we're entitled to material in their brief. At page 9 of the Government's opposition to the motion to quash, they say clearly, "Consistent with general practice" -- I'm quoting now -- "the OIC is submitting evidence relating to the crime-fraud exception as well as waiver, some of which is covered by Rule 6(e), in camera." It doesn't cover everything. And we haven't received anything. And the Court has received this material. And there is no justification for depriving us of this material that the Court has seen, that they admit is not covered by 6(e), and we haven't seen it. And they're asking the Court to make a decision. So as a threshold matter, there's no -- they have said that we are entitled to

it. We should have it before this hearing is completed. I'm sure they have it available.

And that reinforces the point that not all the materials are secret material. We don't quarrel with the fact that there are some secret materials that can't be turned over. That's the law. But they admit, and the law is clear, and the Court's aware, having received some, that they're not all secret materials. And that material should be available. It's not covered at all by Rule 6(e). More importantly, these materials don't become 6(e) secret material because they intend to put it before the grand jury, unless they provided transcripts of testimony before the grand jury. And they haven't done that.

We have demonstrated, we think, today a need that we think overcomes the general rule of not having this material available. The issue here is confrontation. We have the right to adequately and competently respond to the Government's claims by, as a minimum, seeing the material that's available.

Finally, this might have been a misstatement, but it seemed clear to me from my brother's argument that he did not deny that Ms. Lewinsky asked if she could call Frank Carter. I heard his answer and listened to it very carefully. Perhaps he wants to deny it now, but I didn't hear him say that she did not ask if she could call Frank Carter. If he's prepared to make that representation, I would like to hear it. What he

said was that she was free to go and she was able to make some phone calls. But we're not talking about all the general comfort that they provided her for the eight hours that she was in their custody.

THE COURT: No. I think what he said to me was that he did not call Mr. Emmick to determine whether Mr. Emmick said that she could not call Carter. That's what he said.

MR. OGLETREE: Okay. So that question is still open. That's one of the questions. The other question --

THE COURT: Well, let me just say, it isn't any longer open as far as I'm concerned.

MR. OGLETREE: All right.

THE COURT: I just asked if he knew that, and he said he didn't call Mr. Emmick. So --

MR. OGLETREE: Okay. That sounds fine.

Those are the points I would like to make, Your Honor. Thank you.

THE COURT: Okay. Thank you so much.

You have something else to say, too?

MR. SPEIGHTS: Your Honor, if I could just say one thing.

THE COURT: Absolutely. Say as much as you want, Mr. Speights. I brought you here, so let me hear from you.

MR. SPEIGHTS: We're talking about the Federal Bureau of Investigation, and I spent quite a few years prosecuting

cases for the Federal Bureau of Investigation, and there were special agents there. When they have a person that they are talking with, they have a form, called an Advice of Rights form, they have the person sign it. I think the absence of that form as evidence before this Court speaks volumes.

THE COURT: Oh, let me just say, I don't think so. Now, look, this is a grand jury proceeding. If we were in a trial mode and dealing with some motions, yes, sir. But, no, sir. This is a grand jury proceeding. I would guess I would be halfway insulted if somebody wasted my time with something like that. I really would.

MR. SPEIGHTS: Your Honor, the only reason I bring that up is because of the declaration that Mr. Fallon has filed in this case. And, you know, I think that if the Court --

THE COURT: But still --

MR. SPEIGHTS: Obviously, this case is not going to turn on that declaration.

THE COURT: It certainly is not. And I was very happy -- and as I said, you know I have seen declarations like Fallon's for many, many a year, too. But I wouldn't be at all concerned about that.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: Yes. Thank you. That wouldn't concern me at all.

Counsel, I'm going to take this under advisement. I

knew I was going to have to take it under advisement anyway. What I was going to try to do is be able to rule by tomorrow morning. I don't have to rule by tomorrow morning, but I'm still going to go about the business of trying to rule just as soon as I can. All right?

Now, let me ask something of you. Since we have been in here, an attorney for the Washington Post -- and this is in handwriting, so I hope I'm pronouncing his name correctly. It looks like Ted Boutrous, something like that; I don't know -- has asked me if he may be heard briefly to seek public access to this hearing under Press Enterprises, Johnson, and other cases. I received this when I took the recess around noon. I received this around noon.

Counsel, I don't know what in the world he is talking about. But the reason that I have had these doors closed and the reason that I did not permit even a lawyer who I know is a lawyer, and who I know has an interest in this and filed something in Mr. Carter's behalf, come in, because I take this issue of the sanctity of the grand jury very seriously. And as far as I know, the only thing that we have discussed in here today deals with the grand jury: Do you have to respond to the subpoena? You know.

It is true that I think Ms. Lewinsky had some legitimate concerns with respect to whether or not Mr. Carter could do that. We have even learned from her that she believes

that Mr. Carter was her attorney through January 21st. And if that is true, he was perhaps her counsel the day, you know, that the Independent Counsel talked to her. And all of this, in my view, is strictly a matter before the grand jury and should be held in confidence under Rule 6.

I don't know what's been going on outside, but apparently there have been enough press people around that, to try to just keep the peace, they have even closed some of these doors. So I would say to you that the reason I have kept this proceeding closed is because I honestly and truly believe that it relates to the grand jury and that what is said in here should remain confidential.

I hope counsel will agree with me. If you don't, you do whatever you think, but do it at your own risk.

I'm just being facetious, Mr. Speights. But --

MR. OGLETREE: He brought his toothbrush.

THE COURT: Yes.

MR. SPEIGHTS: I'll bring my toothbrush; that's right.

THE COURT: He knows about bringing your toothbrush to my courtroom. Yes, he does. I have told many a Defendant who I have let go on probation or something like that, or personal bond, read them the riot act about what they have to do, and then I'll tell them when they're getting ready to leave, now, if you don't do as I say, come back with your toothbrush, because you are going straight to jail. Okay? So that's what

Mr. Speights meant when he said that bring your toothbrush.

MR. SPEIGHTS: Absolutely, Your Honor.

THE COURT: But I'm not sending anybody to jail in this case. But I do want you to know of this concern and my views with respect to the nature of this hearing.

I'd like to thank each of you very much for your participation. And we're going to work hard.

MR. OGLETREE: I have one small final matter, Your Honor.

THE COURT: All right.

MR. OGLETREE: And that's just administrative.

THE COURT: All right.

MR. OGLETREE: When the Court does decide to rule -- I know this has happened before with the scheduling of this hearing -- the Independent Counsel will get that the same day and it will be a couple days before I get it. I would just ask as a courtesy for a fax or a phone call that it's being issued.

THE COURT: You know, I don't like to fax these things.

MR. OGLETREE: Okay.

THE COURT: But I can arrange to get it to Mr. Carter immediately.

MR. OGLETREE: That will be fine. As long as we can get it simultaneously.

THE COURT: Or I can get it to Mr. Speights

immediately. And in addition to that, what I would be happy to do is have you called so that in the event Mr. Carter and Mr. Speights might not be in their office, you can let them know, you know.

And what I have done is I have tried also not to depend on the U. S. mail.

MR. OGLETREE: I see.

THE COURT: And we have even called to see if someone can arrange to have somebody pick it up. But I don't like the fax --

MR. OGLETREE: If you prefer, we can give you a Federal Express number, if that would --

THE COURT: -- for sealed matter. Oh, I can do that.

MR. OGLETREE: Would that --

THE COURT: Certainly. I can use Federal Express.

MR. OGLETREE: It's just the idea of maintaining the confidentiality.

THE COURT: Yes.

MR. OGLETREE: Sure.

THE COURT: And I don't mind using Federal Express for this purpose. Maybe we can send you your copy by Federal Express.

MR. OGLETREE: That would be great.

THE COURT: But I will notify them, definitely, so that if they can send somebody to pick it up, fine. If they

can't, then I will put it in the U. S. mail. But it's always two days, sometimes a day or two later before they receive it.

MR. OGLETREE: Great. Thank you very much, Your Honor.

THE COURT: Thank you. Thanks to all of you.

(Proceedings concluded at 1:10 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcription from the record of proceedings in the above-entitled matter.

Official Court Reporter

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	(Filed Under Seal)
AD TESTIFICANDUM #D937	:	
	:	

SUPPLEMENT TO FACTUAL RECORD

The attached declarations are hereby submitted to supplement the factual record in response to the Court's questions at the oral argument on the Motion to Quash Subpoenas. As Francis D. Carter, Esquire and Monica S. Lewinsky explained, in the previously filed pleadings in this case, attorneys for the Office of the Independent Counsel improperly contacted Ms. Lewinsky on January 13 and 16, 1998, while she was represented by Mr. Carter. The contact was prohibited by D.C. Rule of Professional Conduct 4.2 and the Department of Justice Guidelines relating to contact with represented parties as codified at 28 C.F.R. part 77.

The attached declarations demonstrate that Mr. Carter was representing Ms. Lewinsky on January 13, 1998, when she was interrogated by Linda Tripp at the direction of attorneys from the Office of the Independent Counsel as well as on January 16, 1998, when she was detained and interrogated by the attorneys themselves. On the morning of January 16, 1998, Mr. Carter filed, by Federal Express delivery, the Motion for Protective Order in the United States District Court for the Eastern District of Arkansas in Jones v. Clinton and served the parties. He was completely unaware of the contacts between Ms. Lewinsky and the government attorneys or Linda Tripp and he certainly did not consent to those contacts. He continued to represent Ms.

Lewinsky, as far as he knew, through Monday, January 19, 1998. He first learned that she had new counsel on the afternoon of January 19, 1998, when he paged her to discuss her case. The page was returned by her new counsel who informed Mr. Carter, for the very first time, that William Ginsburg and Nathaniel Speights were representing her. Mr. Carter was formally relieved of his responsibilities in Jones v. Clinton by Judge Susan Webber Wright on January 22, 1998.

As Ms. Lewinsky's declaration explains, Mr. Carter was her attorney through January 16, 1998. She wanted to contact him when she was detained by the OIC and law enforcement officers and requested permission to do so. She was told that she could contact an attorney, but not Mr. Carter. But for the government's interference with the relationship, Mr. Carter would have remained Ms. Lewinsky's attorney.

The government did not dispute, either at the hearing or in its pleadings, that Mr. Carter represented Ms. Lewinsky and that the Office of the Independent Counsel was aware of that fact. The government also did not dispute that Ms. Lewinsky sought to contact Mr. Carter on January 16, 1998. The affidavit attached to its Opposition is carefully worded and states only that "[a]t no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter." The affidavit does not dispute that she requested such an opportunity. When asked about the specific assertion by Mr. Speights during oral argument that Associate Independent Counsel Michael Emmick told Ms. Lewinsky that she could contact any attorney she wanted other than Mr. Carter, the government was unable to confirm or deny the allegation.

In short, the government cannot and does not dispute that on January 13 and 16, 1998, Ms. Lewinsky was represented by Mr. Carter, the Independent Counsel knew she was represented by Mr. Carter, she intended to continue to be represented by Mr. Carter and would

still be represented by him but for the actions of the Office of the Independent Counsel. Nor does the government dispute that its attorneys and agents communicated with Ms. Lewinsky, about the affidavit submitted in the Jones v. Clinton lawsuit and prepared by Mr. Carter, and that at no time did the government attorneys seek or obtain Mr. Carter's consent to communicate with her.

Finally, the government did not and cannot dispute that its attorneys and agents sought to negotiate a cooperation agreement with Ms. Lewinsky on January 16, 1998, without Mr. Carter's knowledge, despite the fact that she was represented by Mr. Carter. Engaging in such negotiations are in express violation of the mandates of 28 C.F.R. part 77.8. Compliance with these mandates cannot in any way interfere with the independence of the Office of the Independent Counsel and therefore, the attorneys must be governed, at a minimum, by the guidelines. 28 U.S.C. 594(f).

For the reasons explained in Mr. Carter's Motion to Quash and Reply, Ms. Lewinsky's Response of Real Party in Interest, and the oral arguments before this Court, this conduct by the Office of the Independent Counsel was improper and violated the D.C. Rules of Professional Conduct and the Department of Justice Guidelines.

Respectfully submitted,

Charles J. Ogletree, Jr.
272658

Jamie S. Gardner
#375811
Counsel for Francis D. Carter, Esquire
Harvard Law School
320 Hauser Hall
Cambridge MA 02138
617-495-5097

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement to Factual Record has been served, by first class mail and by hand upon Paul Rosenzweig, Tom Bienert, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and by first class mail and by hand upon Counsel for Monica Lewinsky, Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005 and by first class mail upon William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles CA 90067, this 12th day of March, 1998.

Jamie S. Gardner

DECLARATION OF FRANCIS D. CARTER, ESQUIRE

I, Francis D. Carter, Esquire, do hereby declare:

1. I hereby incorporate by reference the declaration I previously made and submitted as an attachment to the Motion to Quash Subpoenas, Misc. No. 98-068.
2. I filed a Motion for Protective Order on behalf of my client, Monica S. Lewinsky, in Jones v. Clinton, LR-C-94-290, on Friday morning, January 16, 1998, by Federal Express delivery, and served the parties.
3. As far as I was aware, I continued to represent Ms. Lewinsky through January 19, 1998.
4. I had no knowledge that Ms. Lewinsky had been contacted by attorneys from the Office of the Independent Counsel.
5. I paged Ms. Lewinsky on January 19, 1998, and received a telephone call in response to that page from her current attorneys, William Ginsburg and Nathaniel Speights.
6. Mr. Ginsburg informed me that he had been retained to represent Ms. Lewinsky at the request of her father.
7. On January 22, 1998, I was informed that Judge Susan Webber Wright had granted Mr. Speights' appearance and accepted my withdrawal.

I hereby declare that the foregoing is true to the best of my knowledge. Signed under the penalties of perjury this 12th day of March, 1998.

Francis D. Carter, Esquire

DECLARATION OF MONICA S. LEWINSKY

I, Monica Lewinsky, do hereby declare:

1. I hereby incorporate by reference the declaration I previously made and submitted as an attachment to the Motion to Quash Subpoenas filed by Francis D. Carter, Esquire, Misc. No. 98-068.

2. On January 16, 1998, while I was still represented by Francis D. Carter, Esquire, I was confronted by several attorneys from the Office of the Independent Council and several law enforcement officers at the Ritz Carlton hotel in Arlington, Virginia.

3. The OIC attorney, Michael Emmick, offered me an immunity agreement and discussed various terms and conditions with me.

4. I informed the government officials, including Mr. Emmick, that Mr. Carter was my attorney and requested permission to contact him.

5. I was informed that I could contact any other attorney, but I could not contact Mr. Carter.

6. Given those circumstances, my father speaking with Mr. Emmick, by telephone requested William Ginsburg, Esquire to assist me with the immunity agreement.

7. I did not contact Mr. Carter directly after January 16, 1998.

8. Mr. Ginsburg and Mr. Speights informed Mr. Carter, for the first time, that I had new lawyers on Monday, January 19, 1998. Together with Mr. Carter they filed a praecipe with the court in Jones v. Clinton requesting that the appearance of Mr. Carter be withdrawn. The court granted that request on January 22, 1998.

9. I would not have retained new counsel but for the conduct of the government officials on January 16, 1998 at the Ritz Carlton hotel.

I hereby declare theat the foregoing is true to the best of my knowledge. Signed under the penalties of perjury this 12 day of March, 1998.

Monica S. Lewinsky

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	(Filed Under Seal)
AD TESTIFICANDUM #D937	:	
	:	

MOTION FOR PRODUCTION OF EX PARTE SUBMISSION
AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

Francis D. Carter, through undersigned counsel, respectfully moves this Court for production of the ex parte submission by the Office of the Independent Counsel. In support of this Motion, Mr. Carter hereby incorporates by reference all of the arguments previously made in his Motion to Quash Subpoenas, Reply to the Opposition of the United States, as well as the arguments made by Amici (NACDL and DCACDL), Monica Lewinsky and the arguments made by counsel for Mr. Carter and Ms. Lewinsky during the oral argument before this Court on Wednesday, March 5, 1998. In support of this Motion, counsel for Mr. Carter state as follows:

The Office of the Independent Counsel submitted materials to the Court ex parte in support of its contention that Monica Lewinsky waived the attorney client and work product privileges as well as its claim that the crime fraud exception vitiated those privileges. Neither Mr. Carter nor Ms. Lewinsky has been provided access to those materials. The issues before the Court are complicated and fact specific. It is critical to a full and fair resolution of these important issues that the Court have as complete an understanding of the legal and factual issues as possible. Mr. Carter cannot meaningfully address the government's arguments because those contentions have been presented to the Court in secret.

It is undisputed that only a portion of the submitted materials are protected by Rule 6(e). The Independent Counsel conceded as much in its brief and did not even attempt to dispute that claim in oral argument. See Opposition of the United States, at 9 ("some of [the ex parte submission] is covered by Rule 6(e)"). In the absence of a specific countervailing privilege justifying disclosure ex parte, the government may not submit and this Court may not consider information in secret. See In re Taylor, 567 F.2d 1183, 1187-88 (2d Cir. 1977); Morgan v. United States, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one") (emphasis added). Therefore, if the materials submitted are not protected by Rule 6(e), refusal to disclose them to the adverse party violates due process. Haines v. Liggett, 975 F.2d 81, 96-97 (3d Cir. 1992). The government has offered no justification for the refusal to disclose the materials that are not covered by Rule 6(e).

Without access to the materials, or even a description of the materials, it is virtually impossible to explain to the Court why certain materials are not protected by Rule 6(e). However, the parties assumed during the argument that the submission included transcripts of tape recordings made by Linda Tripp and provided to the Independent Counsel. The tapes were created by Ms. Tripp for purposes of her own[1] and they do not become draped in a "veil of secrecy" merely because they have been or will be provided to the grand jury. Securities & Exchange Com'n v. Dresser Indus., 628 F.2d 1368 (D.C. Cir.) (en banc), cert. denied, 449 U.S.

[1] That those purposes were themselves criminal and/or tortious does not affect the analysis.

993 (1980). Accordingly, the transcripts of the tape recordings are not protected by Rule 6(e) and must be ordered disclosed to the parties.[2]

Moreover, even if the remaining materials would otherwise be protected by Rule 6(e), Mr. Carter and Ms. Lewinsky have demonstrated particularized need for disclosure. Rule 6(e)(3)(C)(i) authorizes disclosure "preliminarily to or in connection with a judicial proceeding. Upon an adequate showing of need, such as demonstrated here, this Court should require such disclosure.

The factors relevant to a showing of particularized need are: (1) the material sought is needed to avoid a possible injustice in another judicial proceeding; (2) the need is greater than the need for continued secrecy; and (3) the request is structured to obtain only the material needed. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Mr. Carter and Ms. Lewinsky have demonstrated the particularized need contemplated by the Supreme Court.

This is an unusual criminal investigation in many respects. The usual reasons for maintaining secrecy of grand jury proceedings -- encouraging witnesses to come forward, protecting against retribution, assuring that the targets do not flee and protecting those who may be accused but ultimately exonerated by the grand jury -- are simply inapplicable in this case. The grand jury witnesses who have provided information contained in the submission have undoubtedly been identified. The likelihood that any of the targets in this case would seek retribution is remote at best. Obviously, the targets of this investigation have not and will not flee. And rather than protecting the reputations of the targets who might be exonerated by the

[2] Requesting access to these materials is not intended as a concession that the Court may properly review the materials. For the reasons set forth in Mr. Carter's Motion to Quash and Reply, this Court should not consider any of the materials obtained in violation of state and federal law.

grand jury, this investigation has been one of the most public in recent memory. Therefore, the need for grand jury secrecy in this case is relatively slight.

The need for disclosure of the materials submitted to the Court, on the other hand, is significant. As thoroughly explained in the previously filed pleadings, the action sought by the government is an extraordinary intrusion into a protected relationship. Invading that relationship without an adequate basis would cause an injustice both to the individual attorney and client involved. And the broader implications of that invasion given the conduct of this investigation thus far risks other injustices.

Furthermore, the Court must make a factual determination about the sufficiency of the showing of waiver of or exception to the privileges. An adversarial proceeding will enhance the accuracy of that finding. Even if the Court determines the existence of a waiver or an exception, the Court must make individual determinations about the scope of the disclosure required. See In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (determinations of scope of waiver depend heavily on the factual context). The adversary system depends on the opportunity for an advocate to assist in the interpretation of the evidence. Cf. United States v. Bagley, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) ("[I]t is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence").

Although the Independent Counsel contends that ex parte submissions are the general practice, the reasons that may ordinarily justify such a procedure are simply not applicable in this case. Therefore, Mr. Carter expressly requests access to the documents submitted to the Court to allow for a meaningful response to the issues presented.

Wherefore, for the reasons set forth above, and for any other reasons that may appear to the Court, Mr. Carter respectfully requests that this Court grant the motion and order production of the ex parte submission.

Respectfully submitted,

Charles J. Ogletree, Jr.
272658

Jamie S. Gardner
#375811
Counsel for Francis D. Carter, Esquire

Harvard Law School
320 Hauser Hall
Cambridge MA 02138
617-495-5097

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Production of Ex Parte Submission and Points and Authorities in Support Thereof has been served, by first class mail and by hand upon Paul Rosenzweig, Tom Bienert, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and by first class mail and by hand upon Counsel for Monica Lewinsky, Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005 and by first class mail William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles CA 90067 this 12th day of March, 1998.

Jamie S. Gardner

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	(Filed Under Seal)
AD TESTIFICANDUM #D937	:	

ORDER

Upon consideration of the Motion for Production of Ex Parte Submission and Points and Authorities in Support Thereof, and the arguments by counsel before this Court on Wednesday, March 4, 1998, it is this _____ day of March, 1998,

ORDERED that the Motion is GRANTED and that the Ex Parte Submission be disclosed to counsel for Francis D. Carter, Esquire and counsel for Monica S. Lewinsky.

Norma Holloway Johnson
Chief Judge

cc: Francis D. Carter, Esquire
Carter & Varrone
1341 G Street, N.W.
Suite 510
Washington, D.C. 20005

Charles J. Ogletree, Jr., Esquire
Jamie S. Gardner, Esquire
Counsel for Francis D. Carter
Harvard Law School
320 Hauser Hall
Cambridge MA 02138

Paul Rosenzweig, Esquire
Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 - North
Washington, D.C. 20004

Nathaniel Speights, Esquire
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

William Ginsburg, Esquire
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles CA 90067

Counsel for Monica S. Lewinsky

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	(Under Seal)

OPPOSITION OF THE UNITED STATES
TO MOTION FOR PRODUCTION OF EX PARTE SUBMISSION

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this opposition to the motion of Francis D. Carter, Esq., former counsel to Ms. Monica S. Lewinsky, for an order directing the Office of Independent Counsel ("OIC") to produce the in camera submission it filed with the Court in opposition to Mr. Carter's motion to quash the subpoenas issued to him.

The record on Mr. Carter's motion to quash was closed over a week before he made the instant motion to produce. Given the tardiness of its filing, the motion to produce betrays itself as nothing more than a thinly-veiled attempt to obtain discovery from the OIC of material developed in the course of its criminal investigation. For that reason alone, the motion to produce should be denied.

But that aside, in its February 24, 1998 opposition to Mr. Carter's motion to quash, the OIC cited numerous cases supporting the in camera procedure it followed in this case with respect to

its crime-fraud filing.[1] Mr. Carter brushes those cases aside without explaining why, as he claims, they "are simply not applicable." Mot. to Produce at 4. Instead, he seizes on language from the OIC's opposition -- to the effect that "some of [the material filed ex parte] is covered by Rule 6(e)," United States's Opp. to Mot. to Quash at 9 -- in support of a claim that non-6(e) matter must be disclosed to him consistent with due process. Mot. to Prod. at 2. However, the OIC never purported to justify its in camera submission based solely on Rule 6(e), although that Rule certainly is a factor supporting the procedure followed here. Instead, the procedure the OIC followed in this case has been upheld based on the government's slightly broader, yet legitimate need to maintain the confidentiality of material developed in ongoing criminal investigations. See, e.g., In re Grand Jury Proceedings, 33 F.3d 342, 353 (4th Cir. 1994) (rejecting due process challenge to ex parte submission made to overcome attorney-client privilege; court noted that "the government has the right to preserve the secrecy of its submission because it pertains to an on-going investigation."); In re Grand Jury Proceedings, 708 F.2d 1571, 1576 (11th Cir. 1983) (District Court correctly denied access to government's in

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[1] See In re Grand Jury Subpoena, 884 F.2d 124, 126 (4th Cir. 1989) (citing In re Antitrust Grand Jury, 805 F.2d 155, 168-69 (6th Cir. 1986)); In re Grand Jury Proceedings, 708 F.2d 1571, 1576 (11th Cir. 1983); In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982); In re Berkley & Co., Inc., 629 F.2d 548, 553 (8th Cir. 1980); In re Grand Jury Proceedings, 604 F.2d 798, 800 (3d Cir. 1979); In re September 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1978).

camera privilege submission, as it was of "paramount importance" to preserve the secrecy of ongoing grand jury investigation).[2]

In the Grand Jury context, the District of Columbia Circuit, among many others, approves of in camera submissions to determine whether privileges exist in particular cases, and if so whether relevant exceptions, such as the crime-fraud exception, apply. The Court of Appeals has accepted the minimal loss to adversarial presentation that results from the in camera process -- and thus already has rejected the mainstay of Mr. Carter's argument (see Mot. to Produce at 4) -- in order to spare the Grand Jury the delay that privilege "minitrials" inevitably will cause. The Court has had no difficulty "alter[ing] the balance of costs and benefits that supports the privilege," because ultimate issues such as guilt or innocence (or even indictment), are not at issue, but rather whether a privileged relationship has been abused. In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982). Speaking in the context of a subpoenaed attorney's in camera submission, made in the course of a Grand Jury investigation, the

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[2] Indeed, this rationale is routinely invoked by federal judicial officers in other pre-indictment phases of criminal investigations, such as affidavits in support of criminal complaints, applications for pen registers and trap and trace devices (see 18 U.S.C. § 3122), applications for wiretaps (see 18 U.S.C. § 2518) and applications for search warrants. See, e.g., In the Matter of Eyecare Physicians of America, 100 F.3d 514, 516-17 (7th Cir. 1996) (affirming denial of motion to unseal search warrant application and affidavit; if due process required pre-indictment disclosure of sealed investigative matters, "the hands of law enforcement would be needlessly tied and investigations of criminal activity would be made unduly difficult if not impossible.").

Court of Appeals stated:

> courts will not be able to receive a complete adversary presentation of the issues, since one of the parties will not be privy to the information at issue. Any system that requires courts to make highly refined judgments -- perhaps concerning volumes of documents -- will most likely collapse under its own weight. And it would run afoul of the basic prescription in United States v. Dionisio, 410 U.S. 1, 17 (1973): "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in fair and expeditious administration of the criminal laws."

In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982).

The cases Mr. Carter cites do not call for a different result. Indeed, the Second Circuit case he cites in his favor, In re Taylor, 567 F.2d 1183 (2d Cir. 1977), does not stand for a broad policy against in camera submissions. The Second Circuit made that clear five years later in In re John Doe Corp. v. United States, 675 F.2d 482 (2d Cir. 1982). In line with the many authorities cited above, John Doe Corp. recognized that the policy of maintaining the confidentiality of a client's communications to his attorney sometimes may conflict with the confidentiality necessary to the investigation and prosecution of federal crimes. When that occurs, "the limitations on adversary argument caused by in camera submissions are clearly outweighed by the benefits of obtaining a judicial resolution of a preliminary evidentiary issue while preserving confidentiality." 675 F.2d at 490. And Haines v. Liggett, 975 F.2d 81, 96-97 (3d Cir. 1992), stands for the unremarkable rule that the party

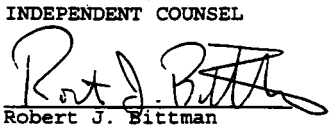
defending the attorney-client privilege be given the opportunity to be heard, by evidence and argument, before the crime-fraud exception is applied. Contrary to Mr. Carter's contention, it does not stand for the rule that the privilege proponent is entitled to the government's in camera filing in order to prepar his argument.

In sum, Mr. Carter's untimely "Motion to Produce" should be denied.

Dated: March 23, 1998

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

By: 
Robert J. Bittman
Deputy Independent Counsel

Stephen Bates
Tom Bienert
Joseph M. Ditkoff
Rodger A. Heaton
Darrell M. Joseph
Associate Independent Counsel

Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of March, 1998, I caused a copy of the forgoing **OPPOSITION OF THE UNITED STATES TO MOTION FOR PRODUCTION OF EX PARTE SUBMISSION** to be served by facsimile and Federal Express, next business morning delivery service, on:

Charles J. Ogletree, Jr., Esq.
Jamie S. Gardner
Counsel for Francis D. Carter, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138;

and by hand delivery, on:

Nathaniel H. Speights, Esq.
Speights & Mitchell
Counsel for Monica S. Lewinsky
1511 K Street, N.W., Suite 811
Washington, D.C. 20005-1419;

and by facsimile and Federal Express, next business morning delivery service, on:

William H. Ginsburg, Esq.
Ginsburg, Stephan, Oringher & Richman
Counsel for Monica S. Lewinsky
10100 Santa Monica Boulevard
Los Angeles, CA 90067

J. Forrest Norman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED

MAR 3 1 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the motion of Francis D. Carter to quash grand jury subpoenas, supporting and opposing memoranda, and the oral argument of counsel thereon, it is this 31st day of March 1998,

ORDERED that the motion of Francis Carter for production of the ex parte submission of the Office of the Independent Counsel be, and hereby is, denied; it is further

ORDERED that the motion of Francis D. Carter to quash grand jury subpoenas be, and hereby is, granted in part and denied in part; and it is further

ORDERED that Mr. Carter must comply with the two subpoenas at issue except for those portions of the subpoenas that call for him to disclose materials in his possession that may not be revealed without violating Monica Lewinsky's Fifth Amendment rights.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MEMORANDUM OPINION

Attorney Frank Carter was retained by Monica Lewinsky to represent her in connection with the Jones v. Clinton civil action pending in the Eastern District of Arkansas. Mr. Carter drafted an affidavit for Ms. Lewinsky's signature stating that she did not have a sexual relationship with the President of the United States. She signed that affidavit under penalty of perjury. Mr. Carter has been served with two subpoenas: one calling for documents and the other seeking his testimony. He seeks to quash those subpoenas.

Before the Court is Mr. Carter's motion to quash, a brief from amici curiae the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers in support of the motion to quash, and Ms. Lewinsky's "Response of the Real Party in Interest" in support of the motion to quash, as well as an opposition from the Office of the Independent Counsel ("OIC").

Mr. Carter makes several arguments in support of his motion to quash the subpoenas: (1) the subpoenas are overbroad; (2) the subpoenas improperly seek to pierce Ms. Lewinsky's attorney-client privilege and work product protection; (3) compliance with the subpoenas would violate Ms. Lewinsky's Fifth Amendment privilege against self-incrimination; (4) issuance of the subpoenas violates Department of Justice policy; and (5) the OIC improperly communicated with Ms. Lewinsky while she was represented by Mr. Carter and prevented her from calling Mr.

Carter when she asked to do so.

A. Overbreadth

Mr. Carter first argues that the subpoenas are too broad. The subpoena duces tecum requests all documents and things relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, as well as all documents relating to any communications with a list of seventeen people. The Court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. 17(c). The law presumes that, "absent a strong showing to the contrary, . . . a grand jury acts within the legitimate scope of its authority." United States v. R. Enterprises, 498 U.S. 292, 301 (1991). Moreover, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." Id.

The Court finds that Mr. Carter has not met that burden. The subpoena duces tecum limits much of its inquiry to documents created after January 1, 1997. The brevity of Mr. Carter's representation of Ms. Lewinsky, no more than a three-month period, also weighs in favor of the reasonableness of the subpoena. The Court finds that the subpoenas are not overbroad or unduly oppressive.

B. The Attorney-Client Privilege and Work Product Doctrine

There is no dispute among the parties that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to documents prepared by Mr. Carter during his representation of Ms. Lewinsky. At issue is whether the crime-fraud exception applies and overcomes the asserted privileges.

1. *The Crime-Fraud Exception*

Mr. Carter asserts that the attorney-client privilege and the work product doctrine bar disclosure of the documents and testimony sought by the subpoena. The OIC claims that the crime-fraud exception to those privileges applies and the Independent Counsel is entitled to production of the documents and testimony. The Court notes that Mr. Carter's papers and that of amici express great concern that the subpoena "impinges on the long-honored respect of the adversarial system for the confidentiality of the attorney-client relationship." Mot. to Quash at 2. However, it is settled law in this Circuit that, where the relationship between attorney and client is abused and the client uses the attorney's legal services to further a crime or fraud, the privileges' protections are overcome. In re Sealed Case, 107 F.3d 46, 49, 51 (D.C. Cir. 1997).

Two conditions must be met for the crime-fraud exception to apply. First, "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." Id. at 49. Second, "the client must have carried out the crime or fraud." Id. The Independent Counsel carries the burden of showing that the crime-fraud exception applies. Id. The attorney does not need to know about his client's potential wrongdoing for the exception to apply, In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982), and there is no suggestion that Mr. Carter knew about any alleged wrongdoing.

This Circuit appears to hold to the following standard for the application of the crime-fraud exception: the proponent must bring forward "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 107 F.3d at 50 (quoting In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985)). The Court of Appeals also notes that the Second Circuit follows a different standard: the proponent must

demonstrate "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." Id. at 50 (quoting In re John Doe Corp., 675 F.2d 482, 491 & n.7 (2d Cir. 1982)). There is some confusion over which of these standards the D.C. Circuit finds controlling.

Nevertheless, the Court finds that, under either of those standards, the OIC has amply demonstrated that the crime-fraud exception applies and overrules the attorney-client privilege. The OIC's in camera submission shows that Ms. Lewinsky made the privileged communications with the intent and the express purpose to further unlawful acts and that she in fact carried out those unlawful acts. The unlawful acts were perjury and obstruction of justice.[1] See 18 U.S.C. §§ 1621 (perjury), 1623 (false declarations), 1503 (obstruction of justice).

The OIC has demonstrated in its in camera materials that there is probable cause to believe that these crimes were committed and that the communications furthered those crimes. If the trier of fact believed the evidence in the submission, that evidence would establish the elements of perjury and obstruction of justice. The OIC's evidence shows that Ms. Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice.[2]

As for the work product doctrine, "the crime-fraud exception calls for a somewhat different inquiry than with the attorney-client privilege. The focus is . . . on the client's intent in consulting the lawyer or in using the materials the lawyer prepared. The question is: Did the

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[1] The Court is not persuaded that the OIC has shown that Ms. Lewinsky used Mr. Carter's legal services to suborn perjury. See 18 U.S.C. § 1622 (subornation of perjury).

[2] The Court finds here that the OIC has met its burden under the crime-fraud exception. It expressly does not find, however, that Ms. Lewinsky in fact committed these crimes.

client consult the lawyer or use the material for the purpose of committing a crime or fraud?" In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). The evidence submitted by the OIC in camera meets the burden of showing an affirmative answer to this question. The Court finds that the OIC's in camera submission shows that Ms. Lewinsky consulted Mr. Carter for the purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice. The OIC has established that the crime-fraud exception applies to the work product subpoenaed in this case.

Because the Court finds that the crime-fraud exception applies, it need not address the issue of whether Ms. Lewinsky waived the attorney-client privilege by disclosing privileged material.

2. *Should the Court extend the crime-fraud exception to this case?*

Amici argue vigorously that the Court should not extend the crime-fraud exception to this case. They express concern that what is at issue here is simply an individual's prior inconsistent statement which should be used at trial to impeach, not to pierce the attorney-client privilege and work product protection. This is not a case, however, where the Court finds mere inconsistencies. It is a case where the OIC's in camera submission shows that Ms. Lewinsky deliberately intended to commit perjury and used her attorney to help her do so.

Amici suggest that perjury is not sufficiently serious to merit the application of the crime-fraud exception. They cite cases stating that the government must make a prima facie case of "a violation sufficiently serious to defeat the privilege." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982). The violation must, amici state, "be of sufficient weight to warrant abridging the privilege." Id. at 815 n.85. Perjury is

plainly of "sufficient weight" to warrant abridging the attorney-client privilege in this instance. "[P]erjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." Nix v. Whiteside, 475 U.S. 157, 169 (1986). This Court takes perjury very seriously and believes it to be a sufficiently weighty offense. It is a felony. Moreover, the evidence suggests that obstruction of justice has also taken place, another plainly weighty offense.

Moreover, case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply. The language in In re Sealed Case, 754 F.2d at 399, states that there must be "a violation" serious enough to defeat the privileges. There need not be "widespread criminal activity," Amici Br. at 18, in order to find that the client has eviscerated her attorney-client privilege and work product protection.

Contrary to amici's suggestions, this is not a situation in which a client confided in an attorney that she committed a crime. Here, the OIC's in camera submission demonstrates that the client utilized the attorney's legal services with the specific purpose of committing a crime, a crime she could not have committed without his services. Thus, it is merely alarmist for amici to warn that "[e]xtending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship." Amici Br. at 3.

The Court finds that the OIC has met its burden under the crime-fraud exception; its in camera submission demonstrates that Ms. Lewinsky consulted Mr. Carter and used his services

to commit perjury, not merely that her statements were inconsistent. There is probable cause to find not only that her testimony in the Jones v. Clinton affidavit was false, but also that Ms. Lewinsky purposefully and actively used Mr. Carter to commit the crimes of perjury and obstruction of justice. The Court does not believe that, by denying Mr. Carter's motion to quash, it will be "sending a message to every client and potential client that embarrassing or even incriminating information confided to their attorneys might, without warning, be disclosed to federal prosecutors." Amici Br. at 14. If this Court does send a message with this decision, that message would be that clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged.

3. *Does the OIC's ex parte in camera submission violate due process and must it be released to movant?*

Mr. Carter argues that the Independent Counsel's ex parte in camera submission violates due process. "[C]ommunications between a judge and one party are not per se deprivations of the due process rights of the opposing party." Clifford v. United States, ___ F.3d ___, 1998 WL 61165, *5 (D.C. Cir. 1998). The Independent Counsel was required to meet its burden of showing that the crime-fraud exception applies and properly did so with its submission to the Court. The Court's in camera inspection of materials upon which the OIC based its showing of the crime-fraud exception does not violate due process. Review of ex parte in camera materials to establish the crime-fraud exception does not violate due process. In re Grand Jury Proceedings, 33 F.3d 342, 351-53 (4th Cir. 1994); In re John Doe, Inc., 13 F.3d 633, 635-37 (2d Cir. 1994); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1989).

Mr. Carter also wants the OIC to disclose the ex parte submission to him.[3] Before the Court is the motion of Francis Carter for production of the ex parte submission. The Court finds that the ex parte submission is properly confidential and the practice of submitting such materials to the Court in camera is well recognized. See, e.g., In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982).

4. *Can this Court properly consider Linda Tripp's tapes in deciding whether the crime-fraud exception applies?*

As part of its in camera submission, the Independent Counsel provided the Court with transcripts of tape recordings made by Linda Tripp of conversations she had with Monica Lewinsky. Mr. Carter argues that federal law prohibits the use of Ms. Tripp's tape recordings in all judicial proceedings, including those before this Court, and therefore prevents the Court from relying on them to establish the crime-fraud exception. The Court finds that it may properly rely upon the tapes in making its determination of whether the crime-fraud exception applies.

The burden is on Mr. Carter to prove that the tapes are inadmissible. United States v. Dale, 991 F.2d 819, 840 (D.C. Cir.), cert. denied, 510 U.S. 1030 (1993). First, Mr. Carter argues that Ms. Tripp intercepted the communications in order to commit a criminal or tortious act, in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III") and that the tapes are thus inadmissible.

Title III provides that whenever any communication has been intercepted, the communication and any evidence derived therefrom may not be received in evidence in any

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[3] The Court strongly disagrees with movant's suggestion that "[t]he traditional reasons for grand jury secrecy are completely inapplicable in this, the most public of investigations." Reply Br. at 13.

proceeding before any court or before a grand jury "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The federal law also provides that it is lawful for a private party to intercept a communication

> where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Because Ms. Tripp was a party to the conversation, it was lawful for her to tape the conversation unless the communication was intercepted for the purpose of committing a criminal or tortious act as described in the statute.

This Circuit has held that "a violation of Title III is established when 'it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act.'" Dale, 991 F.2d at 841 (quoting United States v. Vest, 639 F. Supp. 899, 904 (D. Mass. 1986), aff'd, 813 F.2d 477 (1st Cir. 1987), cert. denied, 488 U.S. 965 (1988)). Mr. Carter has not sustained his burden of proving that Ms. Tripp acted with an impermissible purpose. In fact, he has not suggested that Ms. Tripp was motivated by a desire to commit an act that was criminal or tortious.

Under Title III, the relevant inquiry is whether the communication was intercepted for the purpose of committing a criminal or tortious act, not whether the interception itself constituted a criminal or tortious act. 18 U.S.C. § 2511(2)(d). Assuming that Ms. Tripp's recordings violated Maryland law, that fact by itself does not establish that she intercepted the conversations "for the purpose of committing [a] criminal or tortious act in violation of the . . . laws of . . . any State."

See United States v. DiFelice, 837 F. Supp. 81, 82 (S.D.N.Y. 1993). If Ms. Tripp had made the tapes in order to blackmail Ms. Lewinsky, for example, then that would have been for the purpose of committing a crime. Instead, she intercepted the communications for the purpose of bringing her conversations with Ms. Lewinsky to light, which Mr. Carter does not allege is a criminal or tortious act. The D.C. Circuit has found that "[t]aping phone calls to make an accurate record of a conversation 'in order to prevent future distortions by a participant' is not illegal, even when the recording is made in the hopes of producing evidence of an illegal conspiracy." Dale, 991 F.2d at 841 (citations omitted).

Mr. Carter does not allege that Ms. Tripp made these tapes for the purpose of violating Maryland's law against taping without both parties' consent. "[T]he legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communications intercepted." United States v. Underhill, 813 F.2d 105, 110 (6th Cir.), cert. denied, 482 U.S. 906 (1987). The Court finds that Title III does not prohibit it from considering the tapes in ruling on this motion.

Second, Mr. Carter argues that the taping was illegal under Maryland law and therefore the Court should apply the more stringent state standards and prevent disclosure of the tapes. Maryland law governing the interception of communications is more stringent than federal law. Even if one party consents, taping of wire communications is illegal under Maryland law. Md. Code Ann., Cts. & Jud. Proc. §§ 10-402 & 10-410 (1997). Mr. Carter argues that federal courts must respect the more stringent state law protection of privacy rights.

The Court need not decide whether the taping was illegal under Maryland law because federal law, in the form of Title III, governs. Federal law governs the admissibility of evidence

in a federal criminal case. United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir.), cert. denied, 118 S. Ct. 78 (1997). Evidence obtained from a consensual wiretap conforming to Title III is admissible in federal court proceedings without regard to state law. United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983). Several circuits have held that a more restrictive state law, such as Maryland's, would not affect the admissibility of wiretap evidence in a federal court. See, e.g., Leitman v. McAusland, 934 F.2d 46, 50 (4th Cir. 1991); United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Horton, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Nelligan, 573 F.2d 251, 253 (5th Cir. 1978); United States v. Turner, 558 F.2d 46, 49 (2d Cir. 1977).

Whether or not Maryland law would prohibit the use of these tape recordings in a Maryland court does not affect this Court's determination. Title III controls and the Court may properly consider Ms. Tripp's tapes.

C. Monica Lewinsky's Fifth Amendment Right Against Self-Incrimination

Mr. Carter claims that materials in his possession may not be revealed without violating Ms. Lewinsky's Fifth Amendment rights. The subpoena to Ms. Lewinsky in Jones v. Clinton demanded specific items that she allegedly possessed and allegedly gave to Mr. Carter. Mr. Carter argues that production of those items or documents reflecting their existence would be incriminatory.

The privilege protects against "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972). The Supreme Court has found that the act

of producing a document may fall within the Fifth Amendment privilege. "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." United States v. Doe, 465 U.S. 605, 612 (1984).

The standard set out by the Supreme Court is the following: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Kastigar, 406 U.S. at 486-87. The privilege includes "answers that would in themselves support a conviction under a federal criminal statute" and also included answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Id.

Regarding the particular items specified by Mr. Carter, enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items.

D. Allegations of Prosecutorial Misconduct

Mr. Carter claims that OIC attorneys engaged in various types of misconduct in their handling of this matter.

a. *Department of Justice policy on issuing subpoenas*

Mr. Carter argues that the subpoenas issued to him violate a Department of Justice policy that limits the circumstances under which an attorney may be subpoenaed. See DOJ Manual at § 9-2.161(2). The guidelines provide that, first, before an attorney can be subpoenaed, all

reasonable attempts should have been made to obtain information from alternative sources. Second, there should be an independent evaluation of whether the subpoena is narrowly drawn and directed at material information regarding a limited subject matter. Third, there should also be an evaluation of whether the subpoena seeks information protected by a valid claim of privilege.

The DOJ guidelines do not confer enforceable rights on those who receive subpoenas, as movant concedes. The DOJ Manual "is a publication which, by its own terms, provides 'internal Department of Justice guidance,' and is 'not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.'" Nichols v. Reno, 124 F.3d 1376, 1377 (10th Cir. 1997) (quoting D.O.J. Manual, at § 1-1.00). The government's violation of its internal operating procedures, on its own, does not create a basis for suppressing Carter's subpoena. See United States v. Myers, 123 F.3d 350, 355-56 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997).

Most importantly, the Court has no reason, other than the allegations in Mr. Carter's papers, to believe that the Independent Counsel did not undertake the applicable balancing. Mr. Carter's attempt to apply the DOJ guidelines in this instance must fail.

b. *Contact with represented persons*

Mr. Carter claims that OIC attorneys communicated with Ms. Lewinsky, and sent Ms. Tripp to record her conversations with Ms. Lewinsky, when they knew Ms. Lewinsky was represented by Mr. Carter. Rule 4.2 of the D.C. Rules of Professional Conduct provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the

> prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2(a) (emphasis added). The Comment to the Model Rule states:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Model Rule 4.2 cmt. 2.

The D.C. Circuit has found that non-custodial communications with represented criminal suspects during the investigatory stage are not subject to the anti-contact rule. United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973). In Sutton, government informants recorded inculpatory conversations with the defendant prior to indictment and after the government became aware that the defendant was represented by counsel. The Court of Appeals stated that the disciplinary rule against contact "was never meant to apply to situations like this one" and refused to exclude the taped conversations. Sutton, 801 F.2d at 1366. A similar factual situation occurred in Lemonakis and the D.C. Circuit there stated: "we nevertheless find the actions of the U.S. Attorneys to be consistent with the current ethical standards demanded of the legal profession." Lemonakis, 485 F.2d at 955.

With the exception of the Second Circuit, every court of appeals that has considered a similar case has held that ethical rules such as Rule 4.2 do not apply to pre-indictment criminal investigations by government attorneys or their agents. See United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990); United

States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981). These courts have held that the anti-contact rule "is inapplicable to contacts made by prosecutors or their agents with criminal suspects in the course of a pre-indictment investigation." United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983).

Only the Second Circuit has found a prosecutor's conduct to violate the ethical rule against contact with a represented person in a non-custodial, pre-indictment setting. See United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). Even that court held that "the use of informants by government prosecutors in a pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the disciplinary rule] and therefore will not be subject to sanctions." Id. at 839.

The interview with Ms. Lewinsky occurred prior to any indictment and in a non-custodial setting; Mr. Carter has not alleged otherwise. Even if Ms. Tripp did act as an agent of the prosecutors, her undercover recording of Ms. Lewinsky also does not violate the ethical prohibition on contact with a represented party. The Court finds that attorneys from the OIC acted within the ethical rules in questioning Ms. Lewinsky without her attorney present.

However, Department of Justice regulations provide: "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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the

attorney representing such person or party." 28 C.F.R. § 77.8 (1998). The Independent Counsel statute provides: "An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1).

Department of Justice regulations explicitly provide that 28 C.F.R. Part 77 "does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States." 28 C.F.R. § 77.11(b) (1998). Moreover, the regulations provide that "[a]llegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice . . . ." 28 C.F.R. § 77.11(a) (1998).

This Court's supervisory power to control prosecutorial misconduct before the grand jury is quite limited. See United States v. Williams, 504 U.S. 36 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Supreme Court in Williams in essence removed all general supervisory authority over the grand jury from the federal courts. In that case, the district court had dismissed an indictment because the government failed to disclose substantial exculpatory evidence to the grand jury, in violation of a Tenth Circuit rule and provisions in the DOJ manual to the contrary. 504 U.S. at 47. The Supreme Court held that the district court had improperly used its supervisory powers, stating: "[W]e think it clear that, as a general matter at

least, no such 'supervisory' judicial authority [over grand jury functioning] exists . . . ." Id. at 50. It went on to state that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id.

The First, Sixth, and Seventh Circuits have addressed situations in which prosecutors who violated the Department of Justice Manual by failing to provide warnings to targets of a grand jury's investigation where such warnings were not constitutionally mandated. See Myers, 123 F.3d at 355; United States v. Gillespie, 974 F.2d 796, 799 (7th Cir. 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989). In each case, the courts found that they were faced with "the violation of a policy which does not justify a case-related judicial sanction and yet which appears immune to expressions of judicial satisfaction." Myers, 123 F.3d at 357; Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 310-11. The First and Seventh Circuits explicitly warned prosecutors that, in appropriate circumstances, they would consider referring such internal policy violations to the Department of Justice's Office of Professional Responsibility. Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 311.

The Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas. Myers, 123 F.3d at 358. However, as the First Circuit said, "[w]e assume that these policies are meant to be enforced. . . ." Pacheco-Ortiz, 889 F.2d at 311. The Court expresses its concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel but declines to take further action on this particular matter.

c. *Disruption of the attorney-client relationship*

Mr. Carter also claims that Ms. Lewinsky was not permitted to contact him while the Independent Counsel was questioning her. Monica Lewinsky states in her declaration: "I informed the government officials, including Mr. Emmick, that Mr. Carter was my attorney and requested permission to contact him. I was informed that I could contact any other attorney, but I could not contact Mr. Carter." Lewinsky Decl. at ¶¶ 4-5. Ms. Lewinsky's counsel proffered at oral argument that Mr. Emmick told Ms. Lewinsky not to call Mr. Carter because he might "tip off" Vernon Jordan, but that allegation does not appear in Ms. Lewinsky's subsequent declaration. The Independent Counsel has submitted a declaration from an FBI Special Agent who states: "At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter." Fallon Decl. at ¶ 3. The OIC submitted no declaration from Mr. Emmick.

This conduct, if it occurred, did not violate Ms. Lewinsky's Sixth Amendment right to counsel because that right had not yet attached at the time of the interview. Sixth Amendment rights do not "attach until after the initiation of formal charges." Moran v. Burbine, 475 U.S. 412, 431 (1986); see also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) (holding that Sixth Amendment rights do not attach until "the time that adversary judicial proceedings have been initiated" against the suspect). A right Ms. Lewinsky did not possess could not have been violated. This situation also does not appear to be covered by the Rules of Professional Conduct. See Rule 4.2 of the D.C. Rules of Professional Conduct.

Department of Justice regulations, however, state that "An attorney for the government, or anyone acting at his or her direction, may not, when communicating with a represented person or represented party . . . improperly seek to disrupt the relationship between the represented

person or represented party and counsel." 28 C.F.R. § 77.9 (1998). As the Court has found, Department of Justice regulations do not provide a basis for quashing the subpoenas. However, the Court is extremely disturbed by the sworn allegation that an attorney from the Office of Independent Counsel disrupted an existing attorney-client relationship in this fashion. The Court will consider referring this matter to the Department of Justice Office of Professional Responsibility for investigation.

An appropriate Order will issue this date.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: March 31, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	**Misc. No. 98-68 (NHJ)**
	)	
	)	**(Under Seal)**

MOTION OF THE UNITED STATES OF AMERICA TO RECONSIDER PORTION OF MEMORANDUM OPINION AND TO ISSUE A SUPPLEMENTAL OPINION

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Motion to reconsider a portion of this Court's March 31, 1998, memorandum opinion in this miscellaneous action and to issue a supplemental opinion. The attached declarations and other evidence establish that neither Michael Emmick nor any other attorney employed by the Office of Independent Counsel ("OIC") refused Monica S. Lewinsky permission to contact any attorney of her choosing. In particular, the attached evidence demonstrates that an OIC agent actually called Mr. Carter's office on Ms. Lewinsky's behalf. We respectfully request that, in the light of this evidence and, if necessary, after an evidentiary hearing, the Court issue a supplemental opinion explaining that the OIC did not disrupt an existing attorney-client relationship and stating that the Court will not refer this matter to the Department of Justice Office of Professional Responsibility.

I. PROCEDURAL HISTORY

On February 17, 1998, Mr. Carter filed a motion to quash two grand jury subpoenas. Among his myriad arguments, which largely have been rejected by this Court, Mr. Carter stated that "[w]hen Ms. Lewinsky requested an opportunity to call her lawyer, Mr. Carter, she was told she could not contact him." Mem. in Support of Mot. at 2. The only factual basis given for this was a Time magazine article. See id. at n.2.

The United States filed its Opposition on February 24, 1998. The United States unambiguously denied Mr. Carter's allegation:

> As his source, Movant cites a magazine article written by Ms. Lewinsky's criminal defense counsel. (Mem. at 4 & n.2, 15 n.10) Noticeably absent from Ms. Lewinsky's affidavit, this allegation is completely false. No one prevented Ms. Lewinsky from calling anyone. In fact, Ms. Lewinsky left the hotel room without supervision, made unsupervised telephone calls at will, and returned voluntarily.

Opp. at 19. In support, the United States offered an affidavit by Special Agent Patrick F. Fallon, Jr., which is attached as Exhibit G.

On February 27, 1998, Mr. Carter sent the OIC a reply to the United States's Opposition. This reply did not re-urge the earlier allegation, although it continued to argue that the OIC had engaged in other prosecutorial misconduct.

The Court held a hearing on March 4, 1998. More than a week later, on March 12, 1998, Mr. Carter filed a "Supplement to Factual Record," raising no new issues but adding new argument

and affidavits executed by Mr. Carter and intervenor Ms. Lewinsky.

The United States did not respond to this "Factual Supplement" because it concerned only a collateral issue and, more importantly, because it was filed in contravention of the local rules.[1] Because this Court's rules do not authorize a response to such an unlawful filing, the United States felt it improper to respond.

On March 31, 1998, this Court issued an Order and an accompanying Memorandum Opinion in this matter. The Court stated that it "is extremely disturbed by the sworn allegation that an attorney from the Office of Independent Counsel disrupted an existing attorney-client relationship in this fashion. The Court will consider referring this matter to the Department of Justice

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[1] Local Rule 108(d) allows a movant to file a reply memorandum no later than five days after an opposing party files an opposition memorandum. The local rules do not allow any other filings in support of a motion, other than the statement filed with the motion itself. See Avianca, Inc. v. Corriea, Civ. A. No. 85-3277, 1995 WL 631784, at *9 (D.D.C. June 3, 1991), judgment aff'd sub nom. Avianca, Inc. v. Harrison, No. 94-7053, 1995 WL 650232 (D.C. Cir. Oct. 24, 1995).

The universal rule is that a supplemental filing will be allowed only with the permission of the Court. See Boustead v. Barancik, 151 F.R.D. 102, 106 (E.D. Wis. 1993). This Court has considered authorized filings under special circumstances, such as when the Court had ordered supplemental memoranda on other issues. See Brown v. Pro Football, Inc., 846 F. Supp. 108, 113 (D.D.C. 1994), rev'd on other grounds, 50 F.3d 1041 (D.C. Cir. 1995), aff'd, 518 U.S. 231 (1996). The Court, however, cautioned that "[a]bsent such very exceptional circumstances, such piecemeal litigation will not be tolerated." Id. at 113-14.

Office of Professional Responsibility for investigation." Mem. Op. at 19. The Court apparently based its statement on an affidavit by Monica Lewinsky and the lack of a counter-affidavit by Mr. Emmick. See id. at 18.[2]

II. LEGAL AUTHORITY

Department of Justice regulations prohibit an attorney for the United States from "improperly seek[ing] to disrupt the relationship between the represented person . . . and counsel." 28 C.F.R. § 77.9 (1998). The quintessential example of disrupting the attorney-client relationship is disparaging counsel in the presence of the client. See 59 Fed. Reg. 39,910, 39,923 (Aug. 4, 1994).

III. FACTUAL HISTORY

At about 1 p.m. on January 16, 1998, attorneys and agents from the OIC contacted Ms. Lewinsky at the Ritz-Carlton Hotel in Pentagon City, Virginia. See Fallon Aff. ¶ 3 (attached as Exhibit B); Irons Aff. ¶ 2 (attached as Exhibit D). The OIC intended to obtain Ms. Lewinsky's cooperation in its investigation. The OIC hoped to enlist Ms. Lewinsky in an

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[2] Should any party file a notice of appeal in this action, the Court will retain jurisdiction over the issues relating to Mr. Emmick's alleged wrongdoing. The filing of a notice of appeal does not divest a district court of jurisdiction over collateral matters, such as possible sanctions against an attorney or party. See Alberti v. Klevenhagen, 46 F.3d 1347, 1358 (5th Cir. 1995); Langham-Hill Petroleum Inc. v. Southern Fuels Co., 813 F.2d 1327, 1330-31 (4th Cir. 1987).

undercover effort to obtain information about other suspects. Specifically, the OIC wanted Ms. Lewinsky to make recorded telephone calls to certain other persons. See Emmick Decl. ¶ 8 (attached as Exhibit A).

The OIC originally hoped that Ms. Lewinsky would be willing to cooperate without a grant of immunity. The OIC told Ms. Lewinsky that any cooperation she provided would be considered by the OIC in deciding whether to prosecute. The OIC also promised Ms. Lewinsky that it would make her cooperation known to any sentencing court. See Emmick Decl. ¶ 9.

OIC attorneys repeatedly informed Ms. Lewinsky that she was not under arrest and that she was free to leave at any time. See Fallon Aff. ¶ 4. At one point, Ms. Lewinsky asked what would happen if she wanted to contact an attorney. Mr. Emmick told her that her effectiveness as a cooperating agent would be greater if she limited the number of persons she contacted. He also told her that her effectiveness as a cooperating agent most likely would affect her benefit from cooperating. See Emmick Decl. ¶ 10; Binhak Aff. ¶ 6 (attached as Exhibit E). Mr. Emmick, however, stressed that she was free to call whomever she wished.

At this point, Supervisory Special Agent Steven Irons spoke to Ms. Lewinsky for several minutes. At one point, he mentioned the possibility that Mr. Carter, if contacted, might call other persons in the investigation. Mr. Emmick felt that this line of

conversation might lead to comments that could be interpreted as critical of Mr. Carter and immediately broke into the conversation and reaffirmed that Ms. Lewinsky could call whomever she wished. See Emmick Decl. ¶ 11; Udolf Aff. ¶ 4 (attached as Exhibit C).

In this regard, the exact wording of Ms. Lewinsky's rather sparse affidavit is interesting. Although Mr. Emmick's name is liberally used in her affidavit, the key paragraph does not identify any actor. Ms. Lewinsky instead uses the passive tense: "I was informed that I could contact any other attorney, but I could not contact Mr. Carter." Decl. of Monica S. Lewinsky, ¶ 5 (attached as Exhibit F).

Our point is this: Ms. Lewinsky understood her freedom to contact whomever she wished and availed herself of it several times. See Emmick Decl. ¶ 14. With the OIC's permission, she made unsupervised phone calls (1) in the bathroom of the hotel room; (2) in the lobby of the hotel; and (3) from the pay phones in the Pentagon Mall. See Binhak Aff. ¶ 8.

Shortly before 5:30 p.m., Ms. Lewinsky asked how she could contact Mr. Carter if she decided she wanted to do so.[3] Apparently she was concerned that he had left his law offices for the day. On her behalf, Special Agent Fallon called Mr. Carter's

[3] By this point, Mr. Emmick had offered to grant Ms. Lewinsky immunity if she agreed to cooperate that day. See Emmick Decl. ¶ 12.

office from the Ritz-Carlton room. Someone at Mr. Carter's law offices informed Special Agent Fallon that Mr. Carter had left town; the person was either unable or unwilling to provide a forwarding number. Special Agent Fallon reported this information to Ms. Lewinsky. See Fallon Aff. ¶ 5, and attached phone bill;[4] Emmick Decl. ¶ 15; Udolf Aff. ¶ 5.

By this point, Ms. Lewinsky was waiting for her mother to arrive from New York City to assist her in deciding what to do. See Emmick Decl. ¶ 14. Mr. Emmick and Special Agent Fallon accompanied Ms. Lewinsky on a walk around the Pentagon Mall that included dinner. See Fallon Aff. ¶ 7; Udolf Aff. ¶ 6; Binhak Aff. ¶ 9. At one point, she was out of the presence of OIC members for about twenty minutes. See Emmick Decl. ¶ 16.

After Ms. Lewinsky's mother arrived, she asked whether she could contact Ms. Lewinsky's father, and Mr. Emmick said that would be fine. At approximately 11 p.m., Ms. Lewinsky's father suggested contacting an attorney to assist Ms. Lewinsky in deciding whether to cooperate. The OIC voiced no objection to this proposal other than fear of delay, again stressing that Ms. Lewinsky was free to consult any person she desired. Shortly thereafter, William Ginsburg called the hotel room from Los

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[4] The hotel phone bill contains the home phone numbers of several OIC members and may contain the phone numbers of confidential informants. Consequently, it has been redacted to remove the mention of all phone calls other than the one to Mr. Carter.

Angeles and began his representation of Ms. Lewinsky. See Emmick Decl. ¶ 17; Udolf Aff. ¶ 7.[5]

The factual record, we believe, is clear beyond doubt: Mr. Emmick conducted himself in an entirely appropriate and professional manner. At the same time, if the Court has further concerns, the United States would welcome an evidentiary hearing on this matter. The United States is willing to submit all of its witnesses to cross-examination by any party to this action, provided that the person making this allegation is willing to testify and submit to cross-examination. Cf. Doe v. United States, 132 F.3d 1430, 1437 (Fed. Cir. 1997) ("The greatest engine for truth, it has been written, is the opportunity to confront one's accusers and to cross-examine them.") (citing California v. Green, 399 U.S. 149, 158 (1970)); Ritz v. O'Donnell, 566 F.2d 731, 736 (D.C. Cir. 1977) ("What is frequently characterized as 'the right to confront one's accusers' is, in essence, the right to cross-examine the pertinent witnesses.") (citing Pointer v. Texas, 380 U.S. 400 (1965)).

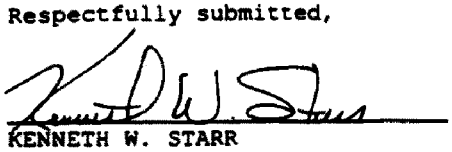
[5] The Court is well aware of the subsequent immunity negotiations between the OIC and Mr. Ginsburg.

IV. CONCLUSION

The United States respectfully submits that the attached evidence conclusively proves that no OIC attorney ever informed Ms. Lewinsky that she could not contact Mr. Carter and that Ms. Lewinsky fully understood that she could call Mr. Carter if she so desired. At her request, Special Agent Patrick Fallon called Mr. Carter's office to determine whether he would be available to talk to her. The documented fact of the phone call to Mr. Carter is absolutely inconsistent with Ms. Lewinsky's statement in her declaration.

As a result of Mr. Carter's belated filing, Mr. Emmick's reputation has been unfairly and inaccurately sullied. In light of the evidence herein provided, we respectfully urge this Court to issue a supplemental opinion explaining that the Court now does not believe that Mr. Emmick improperly interfered with Ms. Lewinsky's attorney-client relationship in violation of Department of Justice regulations. We also respectfully request that the Court state that it no longer is considering referring this matter to the Department of Justice Office of Professional Responsibility.

Respectfully submitted,



KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

Julie A. Corcoran
Joseph M. Ditkoff
Rodger A. Heaton
Bruce Udolf
Associate Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	**Misc. No. 98-68 (NHJ)**
	)	
	)	**(Under Seal)**

ORDER

Upon consideration of the Motion of the United States of America to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion, IT IS HEREBY ORDERED that the Motion is GRANTED. The Court hereby issues the attached Supplemental Opinion in this matter.

April ___, 1998

NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

EXHIBIT A

DECLARATION OF MICHAEL W. EMMICK

I, Michael W. Emmick, hereby declare as follows:

1. I am an Associate in the Office of the Independent Counsel (Starr). I am on detail from the United States Attorneys Office in Los Angeles, where I have been an Assistant United States Attorney for 15 years and a supervisor for 11 years. I have been with OIC since June 1997.

2. This declaration is made in support of the OIC's motion to reconsider a portion of this Court's March 31, 1998 Order, which denied in part and granted in part a motion by Frank Carter to quash a grand jury subpoena. More specifically, this declaration seeks to address the portion of the Order pertaining to whether I told Monica Lewinsky on January 16 that she could not call Mr. Carter, who was representing her in connection with the Paula Jones civil litigation.

3. As described in more detail below, I never told Ms. Lewinsky she could not contact Mr. Carter. To the contrary, I told her a number of times that she could contact Mr. Carter if she wished. Indeed, our Office called Mr. Carter's office that afternoon in order to determine if Mr. Carter would be available if Ms. Lewinsky decided to call him.

4. On January 16, 1998, our Office planned to approach Monica Lewinsky and ask her to cooperate in our investigation. My role was to be the principal speaker with Ms. Lewinsky.

5. I traveled to the Ritz Carlton hotel shortly after noon. Earlier that day I had had a discussion with Bruce Udolf, another Associate in our Office who planned to participate in our approach to Monica. Mr. Udolf and I discussed the fact that Ms. Lewinsky might decide not to cooperate and, in that event, later mischaracterize our statements or actions. 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. For example, we discussed and agreed that we should not make any statements that could be construed as disparaging Mr. Carter in any way, even though we had some concerns that Mr. Carter might be a witness to some of the events we were investigating.

6. After arriving at the Ritz Carlton I proceeded to the 10th floor, where our Office had rented two adjoining rooms. The plan was for Ms. Lewinsky to be in one room, where two FBI agents, Patrick Fallon and Steve Irons, and I would ask for her cooperation. There were several other lawyers and agents from the OIC in the adjoining room, and they (and I) frequently walked back and forth between those rooms. Later in the evening we took a third room as well.

7. Ms. Lewinsky entered the room at about 1:00 pm. I began to explain to her the fact that she was being investigated by the FBI and our Office. She began crying. For the next hour or so Ms. Lewinsky was nearly hysterical with tears. She would sob,

then cry out, then stare into space, then cry for long periods. We did all we could to try to calm her down by bringing her water and tissues and coffee.

8. Sometime around 2:00 pm Ms. Lewinsky had collected herself to the point where she was able to communicate reasonably well, although she would occasionally begin sobbing again. I told her that Linda Tripp had been taping Ms. Lewinsky's telephone calls, and I explained the nature of our investigation. I explained that we were interested in having her cooperate in our investigation, and I discussed the kinds of cooperation we were looking for: agreeing to an interview, making telephone calls that would be tape recorded, participating in meetings where she would be wearing a tape recorder, and possibly testifying before a grand jury or at trial. Ms. Lewinsky would occasionally ask questions, and I would answer them. She would also occasionally cry or stare off into space for periods of time. I told her several times that she was free to leave if she wanted to.

9. During these initial discussions I did not offer Ms. Lewinsky immunity. As our Office had planned, I initially offered only that we would take her cooperation into account in making any prosecutive decisions, and that we would make her cooperation known to whatever courts might have occasion to examine her case later.

10. Sometime around 3:00 pm, I believe, Ms. Lewinsky asked a question about her attorney. My best recollection is that she said, "What if I want to call my attorney?" I immediately told Ms. Lewinsky that she was free to call her attorney if she wanted. However, I recommended that she finish hearing us out before making any decisions. I

began to explain the fact that ideally, her cooperation would be kept completely confidential, so that she could continue to place undercover calls without concern that the people she was calling would know or suspect she was working with the authorities. That way, Ms. Lewinsky would be able to get the greatest benefit from her cooperation because it would be undetected. Thus, I explained, although she was free to call anyone, our hope was that she call as few people as possible -- and preferably nobody -- since that course of action would maximize her usefulness to the investigation.

11. At this point someone (and I believe it was Special Agent Irons) began to discuss the operation of such undercover calls and the importance of secrecy. He spoke for several minutes, and at one point he returned to the subject of Mr. Carter. He mentioned that if Mr. Carter were to call other people (including, for example, the subjects of our investigation or their attorneys), then Ms. Lewinsky might be unable to engage in any successful undercover calls or meetings, and she might therefore get little credit for her cooperation. At this point I became a little worried that Agent Irons might say some things that could be interpreted as being critical of Mr. Carter -- and this would be, in my view, too "close to the line" -- so I broke into the conversation and steered the discussion in another direction. The subject of Mr. Carter did not come up again until later in the afternoon.

12. As the discussions with Ms. Lewinsky progressed, I began to be concerned that she was not making much progress in her decision about whether to cooperate. We felt that she was probably concerned about being prosecuted, so we decided to simply

offer her outright immunity from prosecution. We also felt that she might be concerned about a possible prosecution of her mother, because on the tape-recordings Ms. Lewinsky had described her mother's participation in her activities, so we also decided to offer not to prosecute her mother. I proceeded to make that offer and to explain what immunity meant.

13. Later in the afternoon, Ms. Lewinsky asked if she could telephone her mother. She explained that she was extremely close to her mother, and she could not imagine making a decision of this magnitude without consulting her. I explained again our preference that nobody know about Ms. Lewinsky's cooperation, but I also repeated that such a decision was up to Ms. Lewinsky; she was free to leave and to make whatever calls she wanted.

14. At some point Ms. Lewinsky asked if she could make a few phone calls. I said she could. My recollection is that she left for a fairly long time and called a friend and perhaps someone from the White House. I believe she also left to call her mother, as she kept saying that she could not make a decision like this without talking to her mother. Ms. Lewinsky returned to the hotel room and said that she really needed to speak to her mother in person. She asked if we would keep our immunity offer open while she traveled to New York to discuss the matter there. We had a lengthy discussion about the workability of such a plan. We considered some alternative plans. Eventually we decided to wait while Ms. Lewinsky's mother took the train from New York to Washington. D.C. I even spoke to Ms. Lewinsky's mother, Marcia Lewis, on the

telephone to explain the situation to her. Ms. Lewis thanked us for how decently we were treating her daughter and for our willingness to let the two of them meet before making such an important decision.

15. I recall that at some point in the late afternoon, while we were all waiting around the hotel rooms, Ms. Lewinsky raised the subject of her lawyer again. This time she expressed concern that she might not be able to contact her lawyer even if she wanted to, because Mr. Carter might leave the office early because it was a Friday. We told her that we would try to find out if her attorney was still in his office, and if not, how he might be reached if Monica wanted to call him later. I remained with Ms. Lewinsky while others called her attorney's office. My recollection is that Mr. Carter was not in his office, but that he might be reachable through his answering service. We reported that fact to Ms. Lewinsky.

16. For reasons beyond her control, Ms. Lewis did not arrive in Washington until about 10:00 pm, and didn't arrive at the hotel until some time later. While we were waiting, Ms. Lewinsky, Agent Fallon and I took a long walk around the Pentagon Mall, looking at shops, talking, and eventually having dinner. At one point Ms. Lewinsky walked off to use the restroom in a department store and was gone for about 20 minutes. I do not know if she made any calls to Mr. Carter or to anyone else, but she certainly could have done so. After dinner, we returned to the hotel room to wait for Ms. Lewis.

17. When Ms. Lewis arrived, I explained the situation to her for about an hour. Ms. Lewis asked if she could speak to Monica's father. I said fine. She spoke on the

telephone with Bernard Lewinsky, and she asked if I would speak to Bernard. I said fine. Sometime after 11:00 pm, I believe, I explained the situation to Bernard Lewinsky in two phone calls. At one point Mr. Lewinsky asked whether it would be better if Ms. Lewinsky spoke with an attorney. I said that was fine, but we needed a decision quite soon, and I wasn't sure if an attorney could be contacted that soon. Mr. Lewinsky said he would call someone, and he asked if I would wait a few minutes. I said fine. After about 15 minutes, I got a call from Mr. William Ginsburg. I explained the situation to him, including the immunity offer. We had a relatively brief discussion, the bottom line of which was that Mr. Ginsburg said he was not in a position to advise his client properly on such an important decision without speaking to her (and to me) in more detail. He said he would take the first flight to Washington, where he would speak to Monica in more detail and then contact me.

18. In February 1998, I was given a copy of Mr. Carter's motion to quash our grand jury subpoena. (In our Office, most motions are handled by a Litigation Team of lawyers who specialize in writing and research. I am not on the Litigation Team.) I read a very brief description of alleged misconduct by me and others in the OIC. However, the description was wrong on the facts, was completely unsupported, and seemed to be unconnected to any legal grounds for quashing the subpoena. I trusted the Litigation Team to respond appropriately to the motion and to ask me for a declaration if they thought it was important. Based on my reading of the motion, I also assumed they would feel no need to respond to the misconduct allegations.

19. Sometime after the hearing on Mr. Carter's motion, Joseph Ditkoff, one of the attorneys on our Litigation Team, brought me a recently-filed affidavit by Monica Lewinsky. I read the affidavit, including Ms. Lewinsky's statement that I had told her she could not call Mr. Carter. I told Mr. Ditkoff that the statement was false and that there were plenty of witnesses who could say so. Sometime later I learned that the Litigation Team had determined that we did not need to respond to the supplemental filing of Ms. Lewinsky's affidavit because the filing was itself unauthorized under the law, and because the filing was largely irrelevant to the underlying motion. Consequently I was not asked to file a declaration responding to the allegation.

20. On March 31, 1998, when I returned from the grand jury, I was given a copy of the Court's March 31 Order. I was surprised and upset to see that the Order appeared to criticize me for alleged misconduct in supposedly telling Ms. Lewinsky she could not call Mr. Carter, and to suggest that a referral to DOJ OPR might be forthcoming. In addition, the Order appeared to question why I had not filed a declaration to rebut Ms. Lewinsky's declaration, yet the actual reason I had never filed a declaration was that the Litigation Team had determined that no response from me was necessary. I was upset because, without saying so explicitly, the Order could be interpreted as being critical of me, and I was sure that some version of the Order would be leaked to the press and would damage my professional reputation. I immediately told Ken Starr and the Deputy Independent Counsels about my concerns. We discussed the issue and ultimately decided to file this motion to reconsider the Order insofar as it

involved that allegation about me.

I declare under penalty of perjury that foregoing is true and correct to the best of my knowledge and belief.

Date: April 2, 1998

MICHAEL W. EMMICK

EXHIBIT B

AFFIDAVIT OF PATRICK F. FALLON, JR.
SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION

I, Patrick F. Fallon, Jr., declare under penalty of perjury as follows:

1. I am a Special Agent with the Federal Bureau of Investigation and I have been so for six years. I am detailed to the Office of Independent Counsel ("OIC"). I am the case agent responsible for managing the investigative aspects of this matter.

2. I have prepared this affidavit to address Monica Lewinsky's allegation that Associate Independent Counsel Michael Emmick refused her permission to call Frank Carter during her January 16, 1998, meeting with OIC attorneys and agents. Because I have prepared this affidavit for a limited purpose, I have not included everything I know about matters concerning Monica Lewinsky.

3. I was present on January 16, 1998, when Monica Lewinsky was interviewed by attorneys and agents from the OIC in a hotel room at the Ritz-Carlton Hotel in Pentagon City, Virginia. I was present when the OIC agents originally contacted Ms. Lewinsky at approximately 1 p.m. My duties required me to leave the hotel room several times during the day, so I did not personally witness or hear everything that occurred.

4. In my presence, OIC attorneys repeatedly advised

Ms. Lewinsky that she was free to leave at any time and she did so.

5. Shortly after 5:00 p.m., again in my presence, Ms. Lewinsky expressed concern that she would not be able to reach Frank Carter if she decided that she wished to contact him. On her behalf, I called Mr. Carter at 202-393-4330 from the hotel room. I was informed by a person at that number that Mr. Carter had left the office. I requested a forwarding number, but this person was either unable or unwilling to give me one. I informed Ms. Lewinsky of the results of my conversation. The attached hotel bill is a true and accurate redacted copy of the one provided at check-out by the Ritz-Carlton staff. Also included is a detail call report subsequently provided by the Ritz-Carlton staff, which documents the time of the call.

6. At no point in my presence did Mr. Emmick or any other person tell Ms. Lewinsky that she could not contact Mr. Carter or any other person.

7. Ms. Lewinsky spent several hours in the Pentagon City mall in my presence, at which time she shopped and ate dinner.

Pursuant to 28 U.S.C. § 1746, under penalty of perjury, I declare the forgoing to be true and correct.

Date: April 2, 1998.

Patrick F. Fallon, Jr.
Special Agent

THE RITZ-CARLTON

GUEST ACCOUNT

THE RITZ-CARLTON

ROOM	RATE	ARRIVE	DEPART	GUEST NO.	[illegible]	AFFILIATION	PI	ID	PAGE
1016	139.00	01/16/98	01/17/98	373399	2 CAMEY	DI20	11	BRU	2

04:52 LAT 1/0

1001 PENN AVE ** DEPARTED **
SUITE 490 NORTH
WASHINGTON DC 20004 US Reservation: CR-490576-1

DATE	CODE	REFERENCE	ID	DESCRIPTION	CHARGES	PAYMENTS	BALANCE
0116	411	428	XXX	202-393-4330	.95		41.93

REDACTED

APR. -01' 98(WED) 13:19 RITZ CARLTON PENT TEL:703 415 5217 P.004

XL-Series Ver 4.08 Single Extension Report Wed Apr 01 13:18:40 1998
9368
From 01/16/98 00:00 to 01/16/98 23:59
RITZ CARLTON

Extension: 1016 Name:

01/16/98 17:23 0.8 202-393-4330 WASZ 1. DC $ 0.95 Local

REDACTED

EXHIBIT C

AFFIDAVIT OF BRUCE L. UDOLF

1. I am an Assistant U.S. Attorney for the Southern District of Florida, having served in that capacity since March, 1987, where I served as Chief of the Public Corruption Section for 5 years. I am currently assigned on a detail to the Office of Independent Counsel ("OIC") in Washington D.C. under Kenneth W. Starr. I have been working on that detail as an Associate Independent Counsel since July, 1997. This affidavit is based on information derived either from personal knowledge or from information received from others who witnessed the events described.

2. I was present at various times in a suite of rooms at the Ritz-Carlton Hotel at Pentagon City, Virginia on January 16, 1998, when representatives of the OIC met with Monica Lewinsky in an attempt to secure her cooperation in an investigation into allegations of obstruction of justice, perjury and subornation of perjury.

3. I have read the affidavit of Monica Lewinsky given in connection with a motion to quash a grand jury subpoena, filed on behalf of her former attorney, Frank Carter. In that affidavit, Ms. Lewinsky makes certain statements regarding events which took place at the Ritz-Carlton Hotel on that date. Specifically, she states that she requested permission to contact Mr. Carter and that "[she] was informed that [she] could contact any other attorney, but [she] could not contact Carter". While I was not present during much of the period referred to at the Ritz-Carlton that day, I was present for brief periods in the hotel room where the meetings took place and I had the opportunity to listen to much of what was discussed with Ms. Lewinsky in the hotel room that day through a doorway which led to an adjoining room. My memory of a discussion

regarding her contacting Mr. Carter varies with Ms. Lewinsky's account in a few respects as set forth below.

4. During the discussion, Ms. Lewinsky was solicited to begin to cooperate immediately in the investigation because, it was explained, events were taking place which were going to limit the window of opportunity during which covert investigations could take place. At some point during this discussion, Ms. Lewinsky asked if she could speak to her lawyer, and Mr. Emmick indicated she could do so at any time. He suggested, however, that prior to contacting anyone, she first listen, without saying anything, to the proposal being made to her. She assented and Messrs. Emmick, Fallon and Irons began to make their presentation to her. At some other point, I am not sure when, I believe one of the agents present in the room suggested if she were to call Mr. Carter, there might be a risk that her cooperation would be disclosed to others, thereby limiting her effectiveness in any investigative plan. As soon as this comment was made, AIC Emmick intervened and stated words to the effect that, notwithstanding any concerns about limiting the universe of people with knowledge of her proposed cooperation, she was free to contact any lawyer she desired.

5. Later on, Ms. Lewinsky stated she was not sure she would be able to reach Mr. Carter, given the fact it was a Friday afternoon, if she wanted to speak with him prior to making her decision whether to cooperate. FBI Agent Fallon offered to place a call to Mr. Carter's office to determine if he were reachable, so that Ms. Lewinsky could consult with him, if she decided to do so. Thereafter, Agent Fallon reported back that he had called Mr. Carter's office, that he was out of town, but reachable through his answering service.

6. I am aware of no further requests or attempts by Ms. Lewinsky to contact Mr. Carter. I am aware of other requests by her to contact others, including her mother and father. Indeed, at one point, she requested to leave the hotel to use a pay phone because she believed all the telephones in the suite of rooms at the Ritz-Carlton were "bugged". She was assured that this was not the case but nevertheless was allowed to go to the Pentagon City Mall to make unmonitored telephone calls. She returned some time later. Subsequently, after contacting her mother in New York, she again went to the mall, this time in the company of representatives of the OIC, to eat and shop, while she awaited the arrival of her mother, who was traveling from New York by train.

7. Also during the evening, Ms. Lewinsky talked to her father in California, who arranged for her to be represented by a family friend, William Ginsburg, who subsequently called the room at the Ritz-Carlton and spoke with Mr. Emmick.

I declare under penalties of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 2nd day of April, 1998.

Bruce L. Udolf
Associate Independent Counsel

EXHIBIT D

AFFIDAVIT OF STEVEN D. IRONS

1. I, Steven D. Irons, am a Supervisory Special Agent with the Federal Bureau of Investigation ("FBI") and have been employed by the FBI for approximately 18 years. I have been assigned on a detail to the Office of Independent Counsel ("OIC") under Kenneth W. Starr since August, 1994.

2. On January 16, 1998, Special Agent Patrick F. Fallon, Jr. and I approached Monica Lewinsky in the food court area of the Pentagon City Mall in Arlington, Virginia. She was advised that she was not under arrest and was free to leave, but that representatives of the OIC were waiting upstairs in a room of the Ritz-Carlton Hotel and were prepared to make a presentation to her in an effort to convince her to cooperate in an investigation into allegations of obstruction of justice in connection with the case of Jones v. Clinton. Ms. Lewinsky told me that I could speak to her attorney. I told her the invitation to hear the OIC presentation was being made to *her*, not her attorney, and that she was free to leave if she did not want to hear what our representatives had to say. She voluntarily accompanied us to Room No. 1012 of the hotel.

3. Participating in the initial meeting with Ms. Lewinsky were Associate Independent Counsel Michael Emmick, Agent Fallon and myself. Also present in an adjoining room and, at times, the same room, were AICs Bruce Udolf and Stephen Binhak. There were also other OIC attorneys and agents present at various times, mostly in the adjoining rom.

4. At no time did I or anyone else ever tell Ms. Lewinsky that she could not contact her

attorney, Frank Carter, or any other attorney or person. I do recall a discussion about the need to limit the circle of individuals who were aware of her cooperation, if a successful undercover scenario were to be developed. In this regard, I believe it was suggested that whoever she might contact in deciding whether or not to cooperate, that she assess whether that person would maintain the confidentiality of any cooperation agreement that might be reached.

5. Ms. Lewinsky was advised that she was free to leave at all times. She was permitted to go down to the mall in order to use a pay telephone - - she claimed she did not trust the telephones in the hotel room.

6. I left the room Ms. Lewinsky was in after the first 1 ½ to 2 hours, but remained mostly in the adjoining room. I do not know if she ever contacted Mr. Carter or not that evening, but she definitely was not prevented from doing so by any of the agents or attorneys of the OIC while I was present or that I am aware of.

I declare under penalties of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 2nd day of April, 1998.

Steven D. Irons
Supervisory Special Agent

EXHIBIT E

AFFIDAVIT OF STEPHEN JAMES BINHAK
ASSOCIATE INDEPENDENT COUNSEL

I, Stephen James Binhak, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am an Assistant United States Attorney in the Southern District of Florida. Since October, 1997, I have been assigned to the Office of Independent Counsel, Kenneth W. Starr (OIC), where I am an Associate Independent Counsel.

2. I have learned that Monica S. Lewinsky has alleged that, during a meeting on January 16, 1998, Associate Independent Counsel Michael Emmick prohibited her from calling her lawyer, Frank Carter. I have prepared this affidavit to address this allegation. Because I have prepared this affidavit for a limited purpose, I have not included everything I know about matters concerning Monica S. Lewinsky.

3. As part of my duties as an Associate Independent Counsel, on January 16, 1998, I was present at the Ritz Carlton Hotel in Pentagon City, Virginia, when other OIC personnel conducted discussions with Monica S. Lewinsky in a hotel room. Monica S. Lewinsky came to the hotel room at the invitation of Special Agents of the Federal Bureau of Investigation.

4. For most of the meeting, I was in an adjacent hotel room. When I listened at the door that connected the two rooms, I could hear the discussions Monica S. Lewinsky was having

with OIC personnel. The people principally responsible for these discussions were Michael Emmick, Associate Independent Counsel Bruce Udolf, and Federal Bureau of Investigation (FBI) Special Agents Steven Irons and Patrick Fallon. I and others came in and out of the room to listen, participate, or bring materials as necessary.

5. At no time when I was in the room or when I was listening to the conversation with Monica S. Lewinsky did anyone tell Monica S. Lewinsky that she could not call Frank Carter or any other attorney.

6. During the January 16, 1998, meeting, Mike Emmick and other OIC prosecutors did not forbid Monica S. Lewinsky from making any telephone calls she desired. In response to Monica S. Lewinsky's questions, though, Mike Emmick, other OIC prosecutors, and FBI Special Agents explained that any telephone calls she made could undermine the effectiveness of any cooperation she might decide to provide.

7. When Monica S. Lewinsky raised the prospect of making telephone calls, she was concerned that the FBI had connected recording devices to the hotel room telephones. OIC personnel assured Monica S. Lewinsky that there was no monitoring equipment connected to the hotel telephones. OIC personnel offered Monica S. Lewinsky the chance to place telephone calls from any telephone she wanted. During this discussion, Mike Emmick specifically suggested that Monica S. Lewinsky walk unsupervised to the adjacent mall and use

any public telephone she could find. Monica Lewinsky then raised the possibility that the FBI could record all of the telephones in the mall. OIC personnel and FBI Special Agents assured Monica S. Lewinsky all of the telephones in the area were free of monitoring equipment.

8. Monica S. Lewinsky made unsupervised telephone calls on at least three occasions during the January 16, 1998, meeting. She used the telephone in the hotel room bathroom (the door was closed); she walked unsupervised to the mall to use a public telephone; and I accompanied her to the hotel lobby where she used a public telephone in a small telephone room (the door was closed).

9. Monica S. Lewinsky also spent several hours in the mall with Special Agent Patrick Fallon and Mike Emmick. During this time, while she shopped and ate dinner, she had access to any number of public telephones.

Signed this day
of April, 1998

Stephen James Binhak
Associate Independent Counsel

EXHIBIT F

DECLARATION OF MONICA S. LEWINSKY

I, Monica Lewinsky, do hereby declare:

1. I hereby incorporate by reference the declaration I previously made and submitted as an attachment to the Motion to Quash Subpoenas filed by Francis D. Carter, Esquire, Misc. No. 98-068.

2. On January 16, 1998, while I was still represented by Francis D. Carter, Esquire, I was confronted by several attorneys from the Office of the Independent Council and several law enforcement officers at the Ritz Carlton hotel in Arlington, Virginia.

3. The OIC attorney, Michael Emmick, offered me an immunity agreement and discussed various terms and conditions with me.

4. I informed the government officials, including Mr. Emmick, that Mr. Carter was my attorney and requested permission to contact him.

5. I was informed that I could contact any other attorney, but I could not contact Mr. Carter.

6. Given those circumstances, my father speaking with Mr. Emmick, by telephone requested William Ginsburg, Esquire to assist me with the immunity agreement.

7. I did not contact Mr. Carter directly after January 16, 1998.

8. Mr. Ginsburg and Mr. Speights informed Mr. Carter, for the first time, that I had new lawyers on Monday, January 19, 1998. Together with Mr. Carter they filed a praecipe with the court in Jones v. Clinton requesting that the appearance of Mr. Carter be withdrawn. The court granted that request on January 22, 1998.

9. I would not have retained new counsel but for the conduct of the government officials on January 16, 1998 at the Ritz Carlton hotel.

I hereby declare theat the foregoing is true to the best of my knowledge. Signed under the penalties of perjury this 12 day of March, 1998.

Monica S. Lewinsky

EXHIBIT G

DECLARATION

I, Patrick F. Fallon, Jr., make the following Declaration:

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and I have been so for six years. I am detailed to the Office of the Independent Counsel ("OIC"). This declaration contains information I have collected myself and information I have learned from other investigators and attorneys on the OIC staff.

2. I was present on January 16, 1998 when Monica Lewinsky was interviewed by agents and attorneys from OIC in a hotel room at the Ritz Carlton Hotel in Pentagon City, Virginia. Ms. Lewinsky was repeatedly advised that she was free to leave at any time and did so on numerous occasions. During the evening Ms. Lewinsky left the hotel room unaccompanied and placed unmonitored phone calls. Ms. Lewinsky was accompanied by Agents and investigators to the Pentagon City Mall where she went shopping and ate dinner.

3. At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter. Ms. Lewinsky advised OIC staff that she placed an unmonitored call to a friend. She also made unmonitored calls to her mother, her father and her attorney William Ginsburg.

Pursuant to 28 U.S.C. §1746, under penalty of perjury, I declare the forgoing to be true and correct.

Dated: February 23, 1998.

Patrick F. Fallon, Jr.
Special Agent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Motion of the United States of America to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion, was served via hand delivery or facsimile and Federal Express next business day delivery on this the 3rd day of April, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

J. Forrest Norman

NOTICE OF APPEAL, CRIMINAL

United States District Court for the District of Columbia

IN RE GRAND JURY SUBPOENA	Misc. No. 98-068 (NHJ)
	UNDER SEAL

NOTICE OF APPEAL

Name and address of appellant

Monica Lewinsky

Name and address of appellant's attorney

Nathaniel H. Speights, 1511 K Street N.W., Ste 811, Washinton D.C. 20005

SPEIGHTS & MITCHELL 202 783 6300

Offense Motion to Quash.

Concise statement of judgment or order, giving date, and any sentence

Order dated March 31, 1998 allowing partial intrusion on the attorney client relationship as to work product and permitting ex parte communication. The order also violated Title III.

Name of institution where now confined, if not on bail

Not Applicable

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Monica Lewinsky

APPELLANT

Nathaniel H. Speights

ATTORNEY FOR APPELLANT.

DATE 09 April 1998

CJA, NO FEE_____

PAID USDC FEE_____

PAID USCA FEE_____

FEE PD. 4/9/98 105.00

Does counsel wish to appear on appeal? (Yes)/No

Has counsel ordered transcripts? (Yes)/No

Is this appeal pursuant to the 1984 Sentencing Reform Act? Yes/(No)

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

CRIMINAL APPEAL DOCKETING STATEMENT

Part I

UNDER SEAL

1. Criminal Docket Number Misc. Action No. 98-068 (NHJ)
2. Case Name IN RE GRAND JURY SUBPOENA
3. Appellant's Name Monica Lewinsky
3a. Appellant's Defendant No. N/A
4. Date of Conviction N/A
4a. Date of Sentence N/A
5. Name of District Court Judge Norma Holloway Johnson, Chief Judge
6. Date Notice of Appeal Filed 09 April 1998
7. of what offense(s) was defendant convicted? N/A
Appeal taken pursuant to U.S. v. Ryan 402 U.S. 530, 532 (1971) and Perlman v. U.S. 247 U.S. 7 (1928) See also In re Sealed Case 754 F.2d 395 (D.C. Cir 1985) and In re Sealed Case 737 F.2d 94, 97-98 (D.C. Cir 1984)
8. Did defendant plead guilty? N/A
9. What sentence was imposed? N/A
10. How much of the sentence has defendant already served? N/A
11. Is appellant challenging the conviction? N/A
12. Is appellant challenging the sentence? N/A
13. Is defendant currently incarcerated? N/A
If yes, place of incarceration
If no, address and phone number

PART III - Sentencing Appeals

Appellant should only complete the following if appellant intends to challenge the sentence imposed.

1. Appellant Intends to Challenge District Court's Findings of Relevant Fact

2. Appellant Intends to Challenge the District Court's Specific Application of the Guidelines

3. Appellant Contends District Court Should Have Applied the following Sentencing Range (from sentencing table; include also a statement as to which Offense Level and Criminal History Category are correct).

4. Appellant Intends to Challenge the Validity of the Statute or Guidelines

Signature [signature] Date 09 April 1998

Name of Counsel or Pro Se Litigant (Print) Nathaniel H. Speights

Firm SPEIGHTS & MITCHELL 202 783 6300 Fax 202 783 8090

Address 1511 K Street N.W. Ste 811

Washington D.C. 20005-1419

Counsel for Appellant (Name of Party) Monica Lewinsky

14. Has defendant moved for release pending appeal? _____

If yes, date filed and disposition. _____

_____

If no, does defendant intend to file such a motion in the District Court?

_____

15. Will appellant file a motion for release pending appeal in court of appeals?

N/A

16. Did appellant have court-appointed trial counsel? No.

17. Does appointed trial counsel wish to petition for appointment as appellate counsel pursuant to the Circuit Plan to Implement the Criminal Justice Act?[1] (A "no" indication requires a statement of reason).

YES_____ NO_____

If NO, Reason: _____

_____

_____

18. Did defendant have retained counsel? Yes

If yes, will case proceed on appeal with retained counsel? Yes

If no, will defendant seek appointment of counsel on appeal and has defendant filed a motion to proceed in forma pauperis? _____

PART II - Transcripts:

1. Has counsel ordered transcripts? [ ] CJA [x] PAID Yes.

a. For appeal from conviction? _____

b. For sentencing appeal? _____

c. Other From Order denying motion to quash subpoena to Attorney

2. If Yes, when will transcripts be completed? Two weeks

_____

3. Did counsel seek expedited preparation of sentencing transcripts?

N/A

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[1] In all appeals of sentences of 8 months or less trial counsel is required to prosecute the appeal of the sentence.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	(UNDER SEAL)

OPPOSITION OF MONICA LEWINSKY TO THE MOTION OF THE UNITED STATES TO RECONSIDER PORTION OF MEMORANDUM OPINION AND TO ISSUE A SUPPLEMENTAL OPINION

The motion filed by the United States for this court to reconsider its prior ruling regarding the putative misconduct of counsel is devious, disingenuous and duplicitous.

This motion is a labile attempt to deflect any scrutiny from the door of the Office of Independent Counsel (OIC) and shows an arrogance that demonstrates the dangerous belief that the office is immune from rules, checks, balances or scrutiny. The OIC is part of the Department of Justice and is subject to investigation by the *Office Of Professional Responsibility* as indicated by the Code of Federal Regulations at 28 CFR Part 77, at 77.11, 77.12 and the court should assure that a thorough investigation of the conduct of counsel is undertaken!

In addition, as is pointed out hereinbelow there is PERJURY in the OIC's Motion To Reconsider. The Court should refer the matter for investigation on this additional ground.

The United States ADMITS IT KNEW OF THE ATTORNEY CLIENT RELATIONSHIP BETWEEN MS. LEWINSKY AND FRANCIS CARTER, ESQ.[1]

They deign to falsely tell this court that they even called Mr. Carter at approximately 5:23 P.M. and were unable to get him on the phone because he was out of the office, and the person who answered was unable or unwilling to tell Special Agent Fallon a forwarding number![2] The United States also admits it negotiated the immunity agreement at the heart of this whole matter, with Ms. Lewinsky without her counsel at the Ritz Carlton Hotel on January 16, 1998.[3] "By this point, Mr. Emmick had offered to grant Ms. Lewinsky immunity if she agreed to cooperate that day. See Emmick Decl. ¶ 12." OIC Motion at footnote 3 (emphasis added.)

The United States argues blithely and falsely at page 2 of their argument, that the only evidence presented that Ms. Lewinsky was told she could not call Mr. Carter was an article from Time Magazine.

This ignores Ms. Lewinsky's affidavit/declaration also attached to the Motion of the United States, wherein it is stated

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[1] See Declaration of Michael Emmick and FBI Special Agent Patrick Fallon as well as the body of the Motion itself.

[2] Per Agent Fallon's Declaration - but CF. Michael Emmick's Declaration which directly contradicts agent Fallon perjurious assertion. Agent Fallon reported to Emmick & Udolf in the presence of Ms. Lewinsky that the person who answered the phone informed Agent Fallon that Mr. Carter could be reached through his answering service.

[3] See Emmick Declaration at page 5 - see also constant allusions to the effort to get her "cooperation" to "enlist her cooperation", etc. The consideration was always an immunity arrangement or a promise not to prosecute.

at Item 5 that "I was informed that I could contact any other attorney, but that I could not contact Mr. Carter." It also ignores the declaration of Special Agent Steven Irons which states in pertinent part at item 2, "...I told her the invitation to hear the OIC presentation was being made to *her*, not her attorney..." (Emphasis in original.) Agent Irons also confirmed OIC's thinking when he stated, "...if Mr. Carter were to call other people (including for example the subjects of our investigation or their attorneys), then Ms. Lewinsky might be unable to engage in any successful undercover calls or meetings...", (See Emmick Declaration at item 11).

Ms. Lewinsky also makes it clear in her declaration, that she was offered an immunity agreement at the time of her detention and the terms and conditions of that agreement were discussed between her and participating OIC Attorneys and agents.

The essence of the problem, recognized by the court, that requires investigation, is that the OIC Attorneys, as well as the FBI agents involved in this matter, KNEW THAT MS. LEWINSKY WAS REPRESENTED BY COUNSEL and OIC knew specifically that she was represented by Francis Carter, Esq.

OIC protests that Monica Lewinsky could make calls at will and was free to leave at any time - they say they conveyed to her that she was not under arrest! They do not deny, however, that they were <u>persuasive</u> in keeping her at the Ritz Carlton for over 10 hours. Surely this was either because of strong behavior or

words, or because they were trying to convince her to enter into an agreement with the government to cooperate. The argument ignores the fact that OIC had the duty not to contact Ms. Lewinsky with knowledge that she was a "represented person". The essence of the court's ruling and finding is that an OPR investigation must be conducted.

Knowing that Ms. Lewinsky was represented by Mr. Carter, the United States continued to urge her to enter into an immunity agreement without Mr. Carter's presence. The OIC admits they had already offered Ms. Lewinsky immunity by the time of the 5:23 PM call to Mr. Carter's office.[4]

The alleged call to Mr. Carter's office was finally made by the government some 4-5 hours after they detained Ms. Lewinsky at the Ritz Carlton Hotel in Pentagon City. After the call, they kept her at least another 5-6 hours. OIC has made a perjurious representation to this Court, to wit: that Mr. Carter was not available and there was no way to contact him.

It is interesting to compare and contrast the Declarations of Agent Fallon, Bruce Udolf and Michael Emmick:

Agent Fallon says in his declaration:

> ...
> "5. Shortly after 5:00 p.m., again in my presence. Ms. Lewinsky expressed concern that she would not be able to reach Frank Carter if she decided that she wished to contact him. On her behalf, I called Mr. Carter at 202-393-4330 from the hotel room. I was informed by a person at that number that Mr. Carter had left the office. I requested a forwarding number, but this person was unable or unwilling to give me one. I

[4] See Emmick Declaration, paragraph 12;

informed Ms. Lewinsky of the results of my conversation..." (Emphasis added)

Compare and contrast the above with the Declaration of Mr. Emmick:

...

"15. I recall that at some point in the afternoon, while we were all waiting around the hotel room, Ms. Lewinsky raised the subject of her lawyer **again**. This time she expressed concern that she might not be able to contact her lawyer even if she wanted to, because Mr. Carter might leave the office early because it was a Friday. We told her that we would try to find out if her attorney was still in his office, and if not, how he might be reached if Monica wanted to call him later. I remained with Ms. Lewinsky while others called her attorney's office. My recollection is that Mr. Carter was not in his office, but that he might be **reachable through his answering service**. We reported that fact to Ms. Lewinsky". (Emphasis added)

Also compare and contrast with the declaration of Bruce Udolf at page 2 section 5:

"5. .....FBI Agent Fallon offered to place a call to Mr. Carter's office to determine if he were (sic) reachable, so that Ms. Lewinsky could consult with him, if she decided to do so. Thereafter, Agent Fallon reported back that he had called Mr. Carter's office, that he was out of town, but **reachable through his answering service.**" (Emphasis added)

Something is awry here - someone is not telling the truth!

The three declarations are under penalty of perjury and they differ as to the material fact concerning Mr. Carter's availability.

A rudimentary investigation will disclose that Mr. Carter was in his office on January 16, 1998 until 5:00 PM and available through his answering service after office hours. He could have been reached by OIC at any time, including the first time Ms. Lewinsky mentioned her attorney to Special Agent Irons shortly after 1:00 PM.

The perjurious representations by Agent Fallon and the subornation of perjury by the OIC demonstrated in these papers to the effect that Mr. Carter was not available, is an issue that should also be investigated, since it appears that the OIC is "footloose and fancy free" with declarations made under penalty of perjury, in the interest of covering up their misconduct.

One is reminded of Kenneth Starr's often quoted driveway press conference mantra, "We cannot tolerate white lies, blue lies or any lies". This, as well as his oft spoken commitment to the "Temple of Justice". Perhaps there is a double standard at work here. He should hold himself and his staff to the same standard he wishes to hold the President of the United States. A double standard, obviously condoned by the OIC, is evidence of an OIC out of control, believing they are above the law and Justice Department Regulations.

Monica Lewinsky intends to refer and respectfully requests that the Court join the referral of this matter of potential perjury to the *Office of Professional Responsibility* for investigation along with the egregious denial of counsel and

interference with the attorney client relationship already at issue! OIC attorneys have admitted negotiating the terms of a cooperation agreement without Mr. Carter present.

OIC, not Ms. Lewinsky, had the duty to call Mr. Carter. Her freedom was not as unfettered and complete as the United States would have the court believe.

The OIC Attorneys and FBI agents involved in this matter, not just Mr. Emmick, made it clear to Ms. Lewinsky that if she called Mr. Carter, the dynamics of the whole discussion regarding immunity would change. They did not want Ms. Lewinsky to call Mr. Carter because they thought it might thwart their plan to intervene with wires and telephone recordings with Mr. Vernon Jordan and the President of the United States. They placed their interests above Ms. Lewinsky's legal rights and are now perjuriously lying about whether Mr. Carter was available or not, to cover up their misdeeds.

Monica Lewinsky's "cooperation" was obviously being bargained for, and the "carrot" which was the intended consideration for the cooperation sought, was immunity. That was implied and expressed as was her immediate indictment and arrest if she failed to cooperate. She was neither free nor predisposed to resist a total of 10 persons including armed agents and OIC Attorneys.

Faced with the Hobson's choice of calling her attorney, Mr. Carter, and losing immunity for charges that were unspecified and

for which she was not yet under arrest, she elected to stand by and not make the call. The duty to make that call to Mr. Carter, as stated above, was OIC's, not Ms. Lewinsky's. As to her freedom to leave, this 24 year old young woman faced with five OIC Attorneys, 5 FBI agents, her "Benedict Arnold friend", Linda Tripp and threats that if she left the hotel, the United States would immediately indict her and arrest her, chose to stay - rather involuntarily, as it were, given the picture she was painted.

AT A MINIMUM, ALL DISCUSSIONS SHOULD HAVE BEEN SUSPENDED UNTIL MR. CARTER COULD BE REACHED.

As matter of law, no discussions should have been initiated since the OIC Attorneys knew that Mr. Carter was Ms. Lewinsky's lawyer at all times before they detained her into the Ritz Carlton Hotel on January 16, 1998.

The United States dwells on their concern about the reputation of Mr. Michael Emmick and seems to want to request the sympathy of the court on his behalf in terms of his reputation and status at the Bar.

Respondent Monica Lewinsky is not charging Mr. Emmick alone with improper conduct. She is stating no more or less against Mr. Emmick than against all of the other agents and OIC ATTORNEYS present who were privy to the planning and execution of this ill conceived illegal negotiation.

Mr. Emmick was assigned the task of charming and convincing Ms. Lewinsky that the path to truth was cooperation with the OIC, in exchange for an immunity agreement. Any calls to Mr. Carter, which she was allegedly free to make, would derail the immunity agreement and interfere with the train that would carry her to the path of truth, and indeed, he is the principle actor in this horrendous error in ethical judgment. However, Respondent Monica Lewinsky acknowledges that Mr. Emmick is only an Assistant US Attorney in the OIC and that this whole unethical and shabby plan to subvert legal process was created by, ratified and supervised by Deputy Assistant Independent Counsel and perhaps the Independent Counsel himself. Consider that Mr. Starr, himself, signed the present motion as officer of this Court falsely proffering that Mr. Carter was unavailable.

In any case, Mr. Emmick is no more entitled to sympathy for his misdeeds than any other agent of the OIC for anything he may have done or not done. Sympathy is not the issue here, as Ms. Lewinsky's rights were clearly violated. The Court's concern must lie with Ms. Lewinsky.

The United States recites at Page 4 of their motion that "...the quintessential example of disrupting the attorney client relationship is disparaging counsel in the presence of the client" (Citations omitted). They act as though they were not thoroughly trained professionals and lawyers with great experience.

THEY ARE EXPERIENCED AND SHOULD KNOW THAT ONE DOES NOT NEGOTIATE ANY AGREEMENT, MUCH LESS A SOPHISTICATED AND CRITICAL IMMUNITY AGREEMENT WITH A PARTY WHO IS A TARGET OF AN INVESTIGATION AND IS KNOWN TO THEM TO BE REPRESENTED BY COUNSEL.

The real quintessential example of disrupting the attorney client relationship is well illustrated in this case although not addressed by OIC - attempting to negotiate a sophisticated Immunity/Promise Not to Prosecute agreement in the absence of counsel who the government well knew existed and who had vast criminal law experience as the former Federal Public Defender for the District of Columbia.[5]

This Court has properly found that it should join Ms. Lewinsky in referring this matter to the *Office Of Professional Responsibility* for investigation. Nine or ten hours of "captivity" occasioned by no less than 5 US Attorneys and 5 FBI agents during which they cajoled a targeted suspect to enter into an immunity agreement, wear a wire, intervene in the phone calls of Mr. Vernon Jordan and the President of the United States,

[5] The United States would have this court believe that the issue here is the innocuous potential for disparagement of counsel representing a party or person. Mr. Emmick takes great pains at page 4 section 11 of his declaration to state he was concerned that Agent Irons would "...say some things that could be interpreted as being critical of Mr. Carter - and this would be in my view, too 'close to the line' -- so I broke into the conversation and steered the discussion in another direction. The subject of Mr. Carter did not come up until later in the afternoon."

It is truly a shame that Mr. Emmick and his office does not know the policy about negotiating serious legal agreements with represented persons. OIC does not seem to understand the nature of this court's concern.

during which time she was told if she called her counsel (which OIC had an ethical obligation to do) the immunity deal would be off the table, and during which time she was told if she left she would be indicted and arrested, is not exactly a "typical day at the mall", as the United States would have this court believe occurred.

The United States, in its Motion To Reconsider, cites 59 Fed. Reg. 39,910, and 39,923 (August 4, 1994) under the category labeled "II. Legal Authority" at Page 4 of its brief. They cite those sections of the Department of Justice Rules and Regulations regarding communications with represented persons piecemeal and without any analysis or depth. A careful reading of 59 Fed. Reg. 39910 turns up the following with regard to the Department of Justice comments, by, among others, Attorney General Janet Reno. These comments, definitions and clarifications are set forth in the promulgated Rules:

Section 77.3: Represented Party; Represented Person;

> An individual is considered to be a "represented party "under paragraph 77.3(a) if: (1) the person is represented by counsel; (2) the representation is current and concerns the subject matter in question; and (3) the person...is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation. If the person is currently represented in fact regarding the subject matter in question, but has not been charged or arrested, that person is considered a" represented person."

Section 77.8: Represented Persons and Represented Parties; Pleas Negotiations and Other Legal Agreements

> This section prohibits government attorneys from initiating or engaging in negotiations of certain specified legal agreements with any individual whom the government attorney knows is represented by counsel, without the counsel's consent. Even when the regulation permits substantive discussions with a represented party or represented person, it ordinarily would be improper for a government attorney to initiate or negotiate a plea agreement, settlement, **immunity agreement**...without the consent of the individual's counsel...
>
> The Department believes this section is important for the preservation of the attorney client relationship. One of the primary purposes of DR 7-104 and Model Rule 4.2 [ABA Model Rules of Ethics] is to protect a party represented by counsel from overreaching by an attorney for an adversary. The Department believes that the risk and the consequences of such overreaching are at their greatest during negotiations over plea agreements, settlements, and other key legal agreements. The training, experience, and knowledge of the law possessed by an attorney is particularly valuable in such situations. (Emphasis added).

The simplest reading of the Rule cited by the United States as "Legal Authority" provides more than enough justification for this court's concern about the behavior of the OIC on January 16, 1998, at the Ritz Carlton Hotel in Pentagon City. The OIC ignored the fundamental ethical rules for dealing with a person known to them to be represented. Here, in addition, they have suborned perjury in an attempt to cover their misdeeds.

A careful reading of the Declaration of Mr. Emmick shows that he was talking to Ms. Lewinsky about "Cooperation". In fact on Page 5 thereof he finally uses the word "immunity". He is careful to point out that he never disparaged Mr. Carter, which

is consistent with the misguided thought in the Motion of The United States To Reconsider, that this is all about "disparagement" of counsel as opposed to a violation of Department Rules and Regulations and generally accepted ethics about negotiating a sensitive and important agreement with "Represented Persons".

The OIC's focus on the disparagement prohibition under the rules, misses the point as enunciated by this court in its underlying order. The question at Bar is whether the OIC attempted to negotiate an immunity agreement with a person known to them to be represented.

It is, again, most interesting that the eventual call to Mr. Carter as alleged, if it occurred, did not occur until 4-5 hours after the Ritz Carlton travail began.

It is inconceivable that agents and attorneys were merely, up until the call to Mr. Carter, just talking about the weather - and then after the call, they continued to talk about the weather for another 6-7 hours before Mr. Ginsburg came into the picture.

In fact, Mr. Emmick and the other declarants admit they were trying to negotiate "cooperation" and "immunity" for both Ms. Lewinsky and her mother before the call to Mr. Carter, a person they were aware was representing Ms. Lewinsky at all times with respect to her declaration/affidavit in the Paula Jones case, around which their entire investigation was centered.

All of the above conduct requires and demands investigation and, perhaps, prosecution! Even after Mr. Ginsburg was involved, the government enigmatically refused to fax their intent and their offer, though treating this matter as if it were one of National Security or life and death. Mr. Ginsburg was prepared to accept the offer of immunity as negotiated by OIC with Ms. Lewinsky. His only condition was that the offer of immunity be in writing.

The behavior of the OIC and the FBI agents assigned to assist them was outrageous and egregious in terms of recognition of the status of retained counsel and their knowledge thereof.

If the people of the United States are to have any confidence in the investigatory processes foisted on them by government in the name of justice, they have to understand that alleged acts of renegade attorneys and FBI agents are subject to review and THAT NOT ONE IS ABOVE THE LAW, not even the Office of the Independent Counsel.

The referral to the Justice Department Inspector General (*Office Of Professional Responsibility*) for a thorough investigation is essential to the integrity of the system.

For all of the above reasons, the Motion of the United States for the court to Reconsider its prior ruling should be denied.

On a collateral matter of the District Court's Jurisdiction, the United States glibly cites Alberti v. Klevenhagen, 46 F.3d

1347, 1358 (5th Cir. 1995) for the proposition that this court retains jurisdiction in the event of an appeal. Monica Lewinsky agrees and disagrees and cites the court to the actual language that counsel is attempting to invoke so that their attempt to subvert the meaning of the case can be assessed:

> Although Notice of Appeal typically divests the district court of jurisdiction, "...a district court maintains jurisdiction as to matters not involved in the appeal..." [citations omitted]. Additionally, we have stated that "[t]he district court maintains jurisdiction for other matters, such as ordering stays or modifying injunctive relief"...Finally, "we have recognized the continuing jurisdiction of the district court in support of its judgment, as long as that judgment has not been superseded." Accordingly, "[u]ntil the judgment has been properly stayed or superseded, the district court may enforce it through contempt sanctions [citations omitted].

The above case involves a Judgment by the lower court that the conditions in county jails were abominable. The court refused to grant a stay of the order/judgment pending appeal. The appellate court found that the trial court retained its contempt power to enforce the Judgment.

In the instant case, referral of this matter to the *Office of Professional Responsibility* for a thorough investigation, which is warranted is mandatory: Section 77.11 of 28 CFR Part 77 referred to above as 59 Fed. Reg. 39910, et. seq., states rather unequivocally:

> "77.11 -- Enforcement of this part.
>
> (a) Exclusive enforcement by Attorney General. The Attorney General shall have exclusive authority over

> this part and any violations of it...Allegations of violations of this part shall be reviewed exclusively by the *Office of Professional Responsibility* of the Department of Justice and shall be addressed when appropriate as matters of attorney discipline by the Department. The *Office of Professional Responsibility* shall review any complaint alleging a violation of this part made by a State or Federal Judge..." (emphasis added)

"77.12 -- Relationship to state and local regulation.

> "...this part s intended to preempt the entire field of rules concerning such contacts [with represented parties]. When the Attorney General finds a willful violation of any of the rules in this part, however, sanctions for the conduct that constituted a willful violation of this part may be applied, if warranted, by the appropriate state disciplinary authority."

It is of significant note, that despite the rule prohibiting negotiation with a person known to be represented, the United States makes a disingenuous offer in its Motion For Reconsideration, calling for an evidentiary hearing to allow Mr. Emmick and his cohorts to be cross examined. The offer is disingenuous because it is conditioned upon Ms. Lewinsky waiving her Fifth Amendment rights and submitting herself to cross examination. They cite the case of Doe v. United States 132 F.3d 1430 (Fed. Cir 1997) citing California v. Green 399 US 149, 158 (1970), among others.

This is not a matter for an evidentiary hearing - the court has already decided this may be a matter for investigation by the OPR. The ploy by the OIC of offering disingenuously to conduct an evidentiary hearing in derogation of Ms. Lewinsky's rights in

order to avoid jurisdiction is in and of itself a fraud on this court that should not be condoned. The law as set forth in the Code Of Federal Regulations states that the OPR shall have exclusive jurisdiction over this type of investigation. This is also a part of the DOJ manual as set forth directly by General Reno!

There seems to be no end to the arrogance of the OIC - bringing in represented parties without their counsel, negotiating immunity agreements and agreements for cooperation, incorrectly citing regulations and cases to the court, misleading the court by using perjury as a tool. OIC is wreaking havoc in a well defined system for the fair administration of Justice.[6]

The Moving Party, the United States, represented by the OIC, in this Motion for Reconsideration has intentionally ignored the clearly stated exclusive jurisdiction of the OPR and suggested that this court should conduct an investigation despite the Attorney General's ruling and policy that preempts the field and assigns responsibility to the Federal Judge or party in this case to determine if an investigation is necessary and if so to refer it to the OPR.

Suggesting to a court that it retains jurisdiction over an ethical matter within the exclusive jurisdiction of OPR shows

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[6] "We all must play by the Rules" and even "white lies" cannot be tolerated. "You cannot defile the temple of justice." This principle was correctly enunciated by Kenneth W. Starr in his press conference reported in U.S. News & World Report April 13, 1998 page 21.

that the OIC feels it is special and not subject to DOJ rules and regulations. Such conduct, is in and of itself a willful violation of court rules, ethics and canons of practice and should be investigated. The issue in these pleadings involving OIC's subornation of perjury is a serious matter and might even be Obstruction of Justice. This Court should immediately make a referral to the United States Department of Justice. The declarations and pleadings submitted here, under seal, can be forwarded *in camera* for confidential review by the OPR. That office has the staff and the resources to conduct a proper investigation and report its findings, if any, to this Court in addition to its exclusive jurisdiction under the Code of Federal Regulations.

Dated: 4/9/98

Respectfully Submitted,

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, ORINGHER & RICHMAN
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067-4012
(310) 557-2009

Nathaniel H. Speights
D.C. Bar No. 952036
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-1419
(202) 783-6300

Counsel for Monica Lewinsky

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Monica Lewinsky to the Motion of the United States to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion was mailed, first-class postage prepaid or hand-delivered this 10th day of April, 1998 to:

Kenneth W. Starr, Esq.
Independent Counsel
J. Forrest Norman, Esq.
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 North
Washington, D.C. 20004
(Hand Delivery)

and

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
(Mailed)

Nathaniel H. Speights

DECLARATION OF WILLIAM H. GINSBURG

I, William H. Ginsburg, declare and say under penalty of perjury that I am over the age of 18 years and if called upon to testify I could and would testify competently to the following facts:

1. That this declaration is given in support of Respondent, Monica Lewinsky's opposition to the Motion of the United States to Reconsider Portion of Memorandum Opinion and To Issue A Supplemental Opinion.
2. That on January 16, 1998 I spoke on the telephone from Los Angeles, with Mr. Mike Emmick at the Ritz Carlton Hotel in Pentagon City, Va., where he was located, and I was told that Ms. Lewinsky had been told she was free to leave at any time, was not under arrest and that she could have called her attorney, Francis Carter at any time, but that if she did, the immunity offer would be off the table and she would no longer be able to discuss that aspect of the deal that had been proposed.
3. I was made aware in that same January 16, 1998 telephone conversation alluded to above that Ms. Lewinsky had been in the company of the US Attorneys and FBI agents who were present with Mr. Emmick for over 8 hours and that Immunity Agreements and "Promises

not to prosecute akin to Transactional Immunity" had been discussed.

4. I was advised that she had approximately 30 additional minutes to make up her mind reference to an immunity agreement and that the OIC Attorneys investigating would not put the proposed immunity agreement in writing in any form.

5. Monica Lewinsky told me on the telephone after I was permitted to talk to her that she did not feel free to leave and had not all day and evening because she was told that if she left, she would be immediately indicted and arrested.

6. My client Monica Lewinsky also told me she was approached innumerable times all day and evening about an immunity agreement in exchange for her cooperation including being wired and intervening in conversations and telephone conversations with Vernon Jordan and the President of the United States. She said she had asked the agents and attorneys to let her speak with Frank Carter.

7. I specifically discussed Mr. Frank Carter with Mr. Emmick who made me aware of his knowledge of Mr. Carter's existence and relationship with Ms. Lewinsky after I asked him if she had been allowed to call counsel. I was advised by Mr. Emmick that his office

did not want her to call Mr. Carter because she had been referred to Mr. Carter by Vernon Jordan and they felt that such a call would endanger their investigatory effort. At no time did he advise me that a call had ever been made to Mr. Carter, the results of that call or any other information. He reiterated to me at that point that if I called Mr. Carter the deal was off the table, thus I did not feel free to call Mr. Carter because such a call clearly would have endangered my client's position.

8. Mr. Emmick made it clear to me at all times on the telephone that he had been discussing immunity with Ms. Lewinsky in exchange for her cooperation and in fact he was very explanatory to me, undoubtedly to assure himself that I understood what he was proposing - he bent over backwards to try to explain to me that a promise not to prosecute was the same thing as Transactional Immunity. Nevertheless, he continued to refuse to write anything down for me despite my continued exhortations that we would cooperate if we got an agreement in writing. It is of note that I recall that each time I made a point or had a request that he would muffle the phone and have a discussion with what sounded like a committee. Only after a delay and a conference along those lines, would he respond.

9. Despite my repeated attempts to talk to my client, Mr. Emmick resisted me and continued to ask how he could be sure I was retained by her and was actually her counsel. After approximately 30 - 45 seconds of this rather uncomfortable discussion about whether I really was her family lawyer, I stated rather emphatically that I was her counsel and he should ask her if she knows me and let's stop playing games. She confirmed that I was her counsel and I spoke to her for the first time. Agent Fallon's second declaration, under penalty of perjury, attached to the Government's Motion To Reconsider is fraught with a lie - that Ms. Lewinsky made unmonitored calls to me. That is not true - all calls to her were made by me to her since she had no idea where I was that evening or how to reach me and she was always in the presence of FBI agents and/or OIC Attorneys since they always answered the phone when I called.

I declare that the foregoing is true to the best of my knowledge and belief.

Signed this 7th Day of April, 1998 at Washington, DC.

WILLIAM H. GINSBURG
ATTORNEY FOR MONICA LEWINSKY

NOTICE OF APPEAL, CRIMINAL — New 12/71

United States District Court for the District of Columbia

UNITED STATES OF AMERICA vs. In Re: Grand Jury Subpoenas to FRANCIS D. CARTER	Misc. Action No. 98-068 (NHJ) UNDER SEAL

NOTICE OF APPEAL

Name and address of appellant Francis D. Carter, 1341 G Street, N.W. Suite 510, Washington, D.C. 20005

Name and address of appellant's attorney Charles J. Ogletree, Esq. and Jamie S. Gardner, Esq., Harvard Law School, 320 Hauser Hall, Cambridge, MA 02138

Offense None

Concise statement of judgment or order, giving date, and any sentence
Motion to Quash Grand Jury Subpoena denied 3-31-98.
Motion for Production of Ex Parte Submission denied 3-31-98.

Name of institution where now confined, if not on bail N/A

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

4-10-98 — Francis D. Carter
Date — Appellant

CJA, NO FEE
PAID USDC FEE
PAID USCA FEE

Does counsel wish to appear on appeal? (Yes)/No — Charles J. Ogletree, Jr.
Has counsel ordered transcripts? Yes/(No) — Attorney for Appellant.

Transcript has been ordered by counsel for Monica S. Lewinsky.

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

CRIMINAL APPEAL DOCKETING STATEMENT

Part I

1. Criminal Docket Number Misc. Action No. 98-068 (NHJ)
2. Case Name In Re: Grand Jury Subpoenas to Francis D. Carter
3. Appellant's Name Francis D. Carter
3a. Appellant's Defendant No. N/A
4. Date of Conviction N/A
4a. Date of Sentence N/A
5. Name of District Court Judge Chief Judge Norma Holloway Johnson
6. Date Notice of Appeal Filed 4-10-98
7. of what offense(s) was defendant convicted? N/A
8. Did defendant plead guilty? N/A
9. What sentence was imposed? N/A
10. How much of the sentence has defendant already served? N/A
11. Is appellant challenging the conviction? N/A
12. Is appellant challenging the sentence? N/A
13. Is defendant currently incarcerated? No

If yes, place of incarceration _____

If no, address and phone number 1341 G Street, N.W., #510
Washington, D.C. 20005
(202) 393-4330

14. Has defendant moved for release pending appeal? N/A

If yes, date filed and disposition.

If no, does defendant intend to file such a motion in the District Court?

15. Will appellant file a motion for release pending appeal in court of appeals? N/A

16. Did appellant have court-appointed trial counsel? No

17. Does appointed trial counsel wish to petition for appointment as appellate counsel pursuant to the Circuit Plan to Implement the Criminal Justice Act?[1] (A "no" indication requires a statement of reason).

YES_____ NO X

If NO, Reason:

18. Did defendant have retained counsel? Yes

If yes, will case proceed on appeal with retained counsel? Yes

If no, will defendant seek appointment of counsel on appeal and has defendant filed a motion to proceed in forma pauperis?

PART II - Transcripts

1. Has counsel ordered transcripts? [ ] CJA [ ] PAID

   a. For appeal from conviction?

   b. For sentencing appeal?

   c. Other Transcript of 3-4-98, hearing before Chief Judge Johnson ordered by counsel for Monica S. Lewinsky.

2. If Yes, when will transcripts be completed?

3. Did counsel seek expedited preparation of sentencing transcripts?

[1] In all appeals of sentences of 8 months or less trial counsel is required to prosecute the appeal of the sentence.

PART III - Sentencing Appeals

Appellant should only complete the following if appellant intends to challenge the sentence imposed.

1. Appellant Intends to Challenge District Court's Findings of Relevant Fact

2. Appellant Intends to Challenge the District Court's Specific Application of the Guidelines

3. Appellant Contends District Court Should Have Applied the following Sentencing Range (from sentencing table; include also a statement as to which Offense Level and Criminal History Category are correct).

4. Appellant Intends to Challenge the Validity of the Statute or Guidelines

Signature Charles J. Ogletree, Jr. Date 4-10-98

Name of Counsel (Print) Charles J. Ogletree, Jr. and Jamie S. Gardner

Firm

Address Harvard Law School, 320 Hauser Hall

Cambridge, MA 02138

Counsel for Appellant (Name of Party) Francis D. Carter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

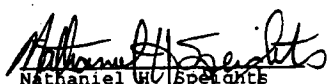
IN RE:	:	
	:	**Misc Action No. 97-068 (NHJ)**
GRAND JURY SUBPOENA	:	
	:	**UNDER SEAL**
	:	

APPLICATION/MOTION FOR TRANSCRIPT UNDER SEAL FOR APPEAL

Moving party, MONICA S. LEWINSKY, ("Movant") hereby moves this Court for an order releasing transcript UNDER SEAL for appeal, and Movant shows to the Court as follows:

1. A notice of appeal was filed herein on the 9th of April 1998. An order was placed with the Court Reporter for said Transcript preparation.

2. Subsequently, Movant here moves this Court for an order pursuant to Circuit Rule 41 directing release of the transcript under seal to the Court of Appeals and for use by the parties.



Nathaniel H. Speights
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-1419
(202) 783-6300

Counsel for Monica Lewinsky

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing, Motion was hand delivered or mailed, United States Postage first class prepaid and telecopied this 14 day of April, 1998 to:

Kenneth W. Starr, Esquire
Michael W. Emmick, Esquire
Office of the Independent Counsel
1001 Pennsylvania Ave, N.W. 490N
Washington DC 20004

(202 514-8688)

Charles Ogletree, Professor
Harvard Law School
320 Hauser Hall
Cambridge Mass 02183

(617) 496 3936

Nathaniel H. Speights

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	
	:	**Misc Action No. 97-068 (NHJ)**
GRAND JURY SUBPOENA	:	
	:	**UNDER SEAL**
	:	

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION/MOTION FOR TRANSCRIPT UNDER SEAL FOR APPEAL

Moving party, MONICA S. LEWINSKY, ("Movant") hereby moves this Court for an order releasing transcript UNDER SEAL for appeal, and Movant shows to the Court as follows:

1. A notice of appeal was filed herein on the 9th of April 1998. An order was placed with the Court Reporter for said Transcript preparation.

2. Circuit Rule 41 requires release of the transcript under seal to the Court of Appeals and for use by the parties.

Wherefore, Monica Lewinsky prays that this Court issue an order releasing the transcript under seal for appellate review.

Respectfully Submitted,

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, WEINGHER & RICHMAN
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067
(310) 557-2009

Wherefore, Monica Lewinsky prays that this Court issue an order releasing the transcript under seal for appellate review.

Respectfully Submitted,

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, ORINGHER & RICHMAN
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067
(310) 557-2009

Nathaniel H. Speights
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-1419
(202) 783-6300

Counsel for Monica Lewinsky

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	
	:	Misc Action No. 98-068 (NHJ)
GRAND JURY SUBPOENA	:	
	:	UNDER SEAL
	:	

ORDER GRANTING RELEASE OF TRANSCRIPT UNDER SEAL FOR APPEAL

Movant having moved for an order permitting release of the transcript under seal to the Court of Appeals and for use by the parties in prosecuting said appeal, it is hereby,

ORDERED that said motion be granted.

_____
UNITED STATES DISTRICT JUDGE

Dated: _____

Copies to:

Kenneth W. Starr, Esquire
Michael W. Emmick, Esquire
Office of the Independent Counsel
1001 Pennsylvania Ave, N.W. 490N
Washington DC 20004

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, ORINGHER & RICHMAN
10100 Santa Monica Boulevard, 8th Floor
Los Angeles, California 90067

Nathaniel H. Speights
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-1419

Charles Ogletree
Harvard Law School
320 Hauser Hall
Cambridge Mass 02183

RECEIVED
APR 15 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	**Filed Under Seal**
AD TESTIFICANDUM #D937	:	

OPPOSITION TO MOTION OF THE UNITED STATES OF AMERICA TO RECONSIDER PORTION OF MEMORANDUM OPINION AND TO ISSUE A SUPPLEMENTAL OPINION AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

Francis D. Carter, Esquire, through undersigned counsel, respectfully opposes the Motion of the United States to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion. The Office of the Independent Counsel (OIC) requested that this Court reconsider the portion of its March 31, 1998, order criticizing the government conduct for interfering with the attorney client relationship between Mr. Carter and his client Monica Lewinsky. Specifically, the OIC objects to this Court's suggestion that a referral to the Office of Professional Responsibility might be appropriate for the conduct of the government attorneys in interrogating Ms. Lewinsky on January 16, 1998. Far from justifying the conduct or exonerating the attorneys involved, the affidavits attached to the OIC's motion demonstrate without question that the government lawyers interfered with the attorney client relationship between Francis D. Carter, Esquire and Monica S. Lewinsky, and communicated with a represented person about the subject matter of the representation in violation of Rule 4.2 of the D.C. Rules of Professional Conduct. Furthermore,

the affidavits demonstrate unequivocally that the government attorneys negotiated with a represented person about a cooperation agreement in direct contravention of the Justice Department regulations. See 28 C.F.R. pt. 77. Rather than issuing a modified opinion approving the conduct of the government based on these affidavits, this Court should reconsider its decision denying Mr. Cater's Motion to Quash and should quash the subpoena for a deliberate interference with the attorney client relationship and violations of the ethical rules and Justice Department guidelines. The subpoena is unreasonable and this Court should not authorize its enforcement.

I. The Government Concedes that the OIC Attorneys Knew that Ms. Lewinsky was Represented by Mr. Carter.

The affidavits submitted in support of its request for reconsideration demonstrate that the OIC attorneys knew, before the encounter with Ms. Lewinsky on January 16, 1998, that she was represented by Frank Carter. Virtually every affidavit makes reference to the fact that Mr. Carter was Ms. Lewinsky's attorney. For example, Michael Emmick's affidavit describes OIC the attorneys' advance planning about how to deal with Ms. Lewinsky's questions about her attorney. Declaration of Michael W. Emmick ¶5. Similarly, Special Agent Steven Irons' affidavit admits that when he approached Mr. Lewinsky, she "told me I could speak to her attorney. I told her the invitation to hear the OIC

presentation was being made to *her*, not her attorney. . . ." Affidavit of Steven D. Irons ¶2 (emphasis in original). The government's concession that Ms. Lewinsky was represented by counsel and that the OIC attorneys knew that counsel to be Francis D. Carter supports this Court's conclusion that the government intentionally sought to interfere with that attorney client relationship.

II. The Government Conduct in Negotiating Cooperation and Immunity Agreements with Ms. Lewinsky Unreasonably Interfered with the Attorney Client Relationship and was in Violation of the Department of Justice Regulations.

The government offers no justification for its failure to obtain the consent of Ms. Lewinsky's lawyer, Mr. Carter, before attempting to negotiate a cooperation and/or immunity agreement with her. See 28 C.F.R. pt. 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.... with a represented person ....without the consent of the attorney"); 59 Fed. Reg. 39910, 39912 ("[T]his regulation provides that federal attorneys may not negotiate plea bargains, settlement agreements, immunity agreements, or similar arrangements without the consent of the individual's attorney") (August 4 1994) (emphasis added). Nor does the government challenge that the primary purpose of this contact with Ms. Lewinsky was to obtain a cooperation agreement

with her and, when it became necessary, to negotiate an immunity agreement. See, e.g., Emmick Declaration ¶4 ("On January 16, 1998, our Office planned to approach Monica Lewinsky and ask her to cooperate in our investigation."); id. ¶12 ("[W]e decided to simply offer her outright immunity from prosecution.....[W]e also decided to offer not to prosecute her mother. I proceeded to make that offer and to explain what immunity meant.") The rules prohibiting government lawyers from engaging in this type of negotiation are designed to prevent "the prosecutor's superior legal training and specialized knowledge being used to the detriment of' the untutored layperson." 59 Fed. Reg. 39910, 39912. It was not the role of the prosecutor to explain the potential impact of an offer of immunity to Ms. Lewinsky. That duty belongs to her lawyer. Nothing in the OIC's Motion to Reconsider authorizes the negotiations conducted here.

III. The Government Attorneys Communicated to Ms. Lewinsky that She Could Not and Should Not Contact Mr. Carter.

The crux of the government's argument is the contention that Ms. Lewinsky, a 24 year old women surrounded by at least three or more experienced attorneys and numerous special agents of the FBI, who "was nearly hysterical with tears" Emmick Declaration ¶7, "understood her freedom to contact whomever she wished ...." Motion to Reconsider, at 6. That argument fails to appreciate the reality of the situation facing Ms. Lewinsky. She is not an

attorney and the government does not dispute that the situation was enormously stressful and emotional for Ms. Lewinsky. The message that was clearly communicated to Ms. Lewinsky, even on the version submitted in the government affidavits[1], is that she could not and should not contact Mr. Carter. Mr. Emmick was the "principal speaker" with Ms. Lewinsky. Emmick Declaration ¶4. Therefore, that communication, again even on the government's version of these events, obviously came from him. However, the accuracy of Ms. Lewinsky's version of the events is supported by the fact that she was ultimately permitted to talk to another attorney, not Mr. Carter.

It is also apparent from the affidavits and the government's motion that the OIC's ultimate goal was to keep her from talking to Mr. Carter. For example, Mr. Emmick says he explained to Ms. Lewinsky that "our hope was that she call as few people as possible -- and preferably nobody. . . . Id. ¶10 (emphasis added). Special Agent Irons told her that if she contacted Mr. Carter and he called other people, ''she might therefore get little credit for her cooperation." Emmick Declaration, ¶11. Although Mr. Emmick admits he was concerned about Mr. Irons comments at that

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[1]Mr. Carter was obviously not present during the events at the Ritz-Carlton in Virginia on January 16, 1998 and therefore has no personal knowledge of what occurred. Ms. Lewinsky's affidavit clearly demonstrated that she understood that she could not contact Mr. Carter. That understanding is completely consistent with the government's admitted intention that she not contact Mr. Carter to avoid his notifying "other persons in the investigation." Motion to Reconsider at 5, Affidavit of Steven D. Irons, ¶4. Declaration of Michael W, Emmick, ¶10.

point, he did not clarify that Ms. Lewinsky could or should contact Mr. Carter, but instead "steered the discussion in another direction." Id. Therefore, in evaluating the words and actions of the numerous attorneys and agents, this Court should consider their ultimate intent.

IV. The Government Conduct Intentionally Interfered with Ms. Lewinsky's Stated Desire to Deal with the Government through Counsel.

Even assuming the factual allegations are correct, the government's motion explicitly acknowledges that the attorneys and agents intentionally contacted and interrogated Ms. Lewinsky, knowing that she was represented by Mr. Carter and knowing that she wanted to deal with the government through her attorney. See Affidavit of Steven D. Irons, ¶2 ("Ms. Lewinsky told me [when initially approached] that I could speak to her attorney"). Whether she could have contacted her attorney is beside the point. The government lawyers should not have been communicating with her without her attorney's consent. See Rule 4.2. This interference with her attorney client relationship was knowing and intentional.

The OIC contends, however, that it did not interfere with the attorney client relationship because the attorneys and agents were careful not to disparage Ms. Lewinsky's counsel. First, at the government has repeatedly admitted, it has never had any basis to disparage Mr. Carter. Instead, the government has consistently

acknowledged that Mr. Carter's conduct in representing Ms. Lewinsky vas completely legal and ethical. Second, there are many ways to interfere with the attorney client relationship other than by disparaging counsel. The relevant relations, for example, specifically forbid government attorneys "to induce the [represented] person to forgo representation" or "[o]therwise improperly seek to disrupt the relationship between the represented person .... and counsel." 28 C.F.R. pt. 77.9. The OIC attorneys did both, by their own admission.

V. The OIC Made No Effort to Actually Contact Mr. Carter.

The government contends that it did not improperly interfere with Mr. Carter and Ms. Lewinsky's attorney client relationship because an agent placed a call to Mr. Carter's office, after more than 4 hours of interrogation and negotiation with Ms. Lewinsky, and not surprisingly learned that Mr. Carter was not in the office at 5:30 p.m. None of the affidavits suggests that the agents left a message for Mr. Carter or sought to have his staff or his answering service contact him. Indeed, Mr. Carter's attached declaration verifies that no messages were left and no attempt was made to locate or contact him. Declaration of Francis D. Carter, Esquire, ¶¶3 and 4. Although Agent Fallon and the OIC motion try to suggest that Mr. Carter' s staff was uncooperative, "I requested a forwarding number, but this person was either unable

or unwilling to give me one." Affidavit of Patrick F. Fallon, Jr., ¶5, Motion to Reconsider at 7, Mr. Udolf admits the unremarkable proposition that although Mr. Carter was not present when Agent Fallon called, he was reachable through his answering service." Affidavit of Bruce L. Udolf, ¶5. Although there is dispute among the various affidavits, Agent Fallon's affidavit states that the information he conveyed to Ms. Lewinsky about this telephone call was that Mr. Carter was not available and that the person who answered the telephone did not provide any way of reaching him. Fallon affidavit ¶5. There is no dispute that the agents and attorneys made absolutely no effort to actually reach Mr. Carter through his answering service.

Rather than supporting the propriety of the government's conduct, these factual allegations demonstrate that the conduct violated the applicable standards. The agents clearly had no intention of speaking with Mr. Carter and seeking his consent as required by the Rules of Professional Conduct and the regulations applicable to government attorneys. See Rule 4.2, 28 C.F.R. pt. 77, 59 Fed. Reg. 39910. They waited until late on a Friday afternoon preceding a long weekend before even attempting to contact Mr. Carter, even though Ms. Lewinsky requested that they speak with her lawyer when she was initially contacted at 1:00 in the afternoon. Affidavit of Steven D. Irons, ¶2. No message was left and no effort was made to have Mr. Carter contacted by his

answering service. It is hard to imagine what the agent would have said or done if Mr. Carter had answered the telephone in his office because the government concedes the agent was just trying to ascertain whether Mr. Carter was in his office. The agent was definitely not, in fact, trying to reach Mr. Carter. Therefore, the allegation that the agent placed a telephone call to Mr. Carter's office number proves nothing about the propriety of the government conduct here.

VI. Conclusion.

For all the reasons articulated in Mr. Carter's previous pleadings in this case as well as the arguments articulated above, this Court should reconsider its denial of Mr. Carter's Motion to Quash and grant the motion. As the government's most recent submission demonstrates with mistakable clarity, the purpose of the encounter on January 16, 1998, was to force Ms. Lewinsky's participation in the OIC investigation and, in the eyes of the government attorneys involved, that goal could not and would not allow her to contact her attorney. Therefore, the OIC intentionally and knowingly interfered with Ms. Lewinsky's legitimate attorney client relationship with Mr. Carter. Accordingly, this Court's order recognizing that the OIC intentionally disrupted this relationship should stand.

Respectfully submitted,

Charles J. Ogletree, Jr.
#272658

Jamie S. Gardner
#375811
Counsel for
Francis D. Carter, Esquire
Harvard Law School
320 Hauser Hall
Cambridge MA 02138
617-495-5097

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1998, the foregoing Opposition to Motion of the United States of America to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion and Points and Authorities in Support Thereof was served by:

hand delivery upon the following:

Paul Rosenzweig
Tom Bienert
Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004

Nathaniel H. Speights, Esquire
Counsel for Monica Lewinsky
Speights & Mitchell
1511 K Street, N.W., Suite 811
Washington, D.C. 20005

and First Class Mail upon:

William Ginsburg, Esquire
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles CA 90067

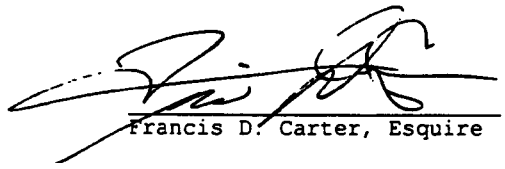
Jamie S. Gardner

DECLARATION OF FRANCIS D. CARTER, ESQUIRE

I, Francis D. Carter, Esquire, do hereby declare:

1. I hereby incorporate by reference the declarations I previously made and submitted as attachments to the Motion to Quash Subpoenas, and the Supplement to Factual Record, Misc. No. 98-068.
2. I have reviewed all messages taken by my staff and my answering service at my office for January 16, 1998.
3. I received no messages from Special Agent Patrick F. Fallon, Jr., or any other Special Agent of the FBI, nor did I receive any messages from Michael Emmick or any other attorney for the Office of the Independent Counsel.
4. My answering service operates 24 hours a day and always has an emergency number to reach me. Neither my answering service nor my office staff was requested to contact me the afternoon or evening of January 16, 1998.

I hereby declare that the foregoing is true to the best of my knowledge. Signed under the penalties of perjury this 15th day of April, 1998.



Francis D. Carter, Esquire

RECEIVED
APR 22 1998
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

REPLY MEMORANDUM OF THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO RECONSIDER PORTION OF MEMORANDUM OPINION AND TO ISSUE A SUPPLEMENTAL OPINION

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Reply Memorandum to the Opposition Memoranda filed by Monica Lewinsky and Francis Carter and in support of its motion to reconsider a portion of this Court's March 31, 1998, memorandum opinion.

The events of January 16, 1998, are no longer seriously in dispute. The Office of Independent Counsel ("OIC") has stated at all times that it attempted to negotiate an immunity agreement with Ms. Lewinsky without Mr. Carter's permission but never forbade her from contacting Mr. Carter if she so desired.

The six declarations and the phone record submitted with the United States's motion unambiguously demonstrate that the OIC never forbade Ms. Lewinsky from contacting Mr. Carter. Ms. Lewinsky no longer argues that the OIC did forbid her, and Mr. Carter's argument is reduced to the hypothesis that, although the OIC told Ms. Lewinsky at every point that she was free to contact whomever she wished, her fragile emotional state

prevented her from comprehending this freedom. Although Mr. Carter's theory offers a plausible explanation for the falsity of Ms. Lewinsky's declaration, it does not change the uncontested fact that no OIC staff member ever forbade Ms. Lewinsky from contacting Mr. Carter. Consequently, the United States respectfully submits that a supplemental opinion clearly stating that no OIC staff member refused Ms. Lewinsky permission to contact Mr. Carter would be appropriate.

I. THE OPPOSITION APPEARS TO HAVE DROPPED ITS ASSERTION THAT MS. LEWINSKY WAS TOLD SHE COULD NOT CONTACT MR. CARTER.

It is important to separate two distinct ethical issues raised in the Court's March 31, 1998, opinion. First, in part D.b of the Court's Memorandum Opinion, the Court considered whether OIC attorneys violated rule 4.2 of the D.C. Rules of Professional Conduct by contacting Ms. Lewinsky without Mr. Carter's permission or violated 28 C.F.R. § 77.8 by attempting to negotiate an immunity agreement without Mr. Carter's consent. In addressing this issue, the Court "expresse[d] its concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel but decline[d] to take further action on this particular matter." Mem. Op. at 17 (emphasis added).

In part D.c, the Court considered allegations that OIC attorneys disrupted Mr. Carter's attorney-client relationship

with Ms. Lewinsky, thereby violating 28 C.F.R. § 77.9, by forbidding her to contact Mr. Carter. It was this allegation that the Court was "extremely concerned by" and was "consider[ing] referring" to the Office of Professional Responsibility ("OPR"). Mem. Op. at 19. The United States, of course, asked the Court to reconsider part D.c but not part D.b.[1]

In responding to the Court's concern, the United States submitted detailed declarations, under penalties of perjury, by two Federal Bureau of Investigation special agents and three career prosecutors. These declarations unambiguously state that no OIC staff member ever refused Ms. Lewinsky permission to contact any person she wished, specifically including Mr. Carter. The United States also submitted phone records showing that Special Agent Patrick Fallon contacted Mr. Carter's office at Ms. Lewinsky's request to determine whether and how Mr. Carter could be contacted if Ms. Lewinsky decided that she wanted to talk to him.

Both Opposition Memoranda vigorously argue that the Court was incorrect in not finding that the OIC acted unethically by contacting Ms. Lewinsky without Mr. Carter's permission, but

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[1] Ms. Lewinsky appears to be under the mistaken impression that the Court has decided to refer certain actions by the OIC to OPR. See Lewinsky Opp. at 10 ("This Court properly found that it should join Ms. Lewinsky in referring this matter to the *Office of Professional Responsibility* for investigation."); id. at 4 ("The essence of the court's ruling and finding is that an OPR investigation must be conducted.").

neither reurges the earlier argument that OIC staff members told Ms. Lewinsky that she was not allowed to call Mr. Carter. Although Mr. Carter's argument heading states that "Government Attorneys Communicated to Ms. Lewinsky that She Could Not and Should Not Contact Mr. Carter," Carter Opp. at 4, this section of his brief is limited to speculation about Ms. Lewinsky's subjective understanding. Mr. Carter notes Ms. Lewinsky's fragile emotional state, the fact that the OIC wanted Ms. Lewinsky to contact as few persons as possible, and the fact that she ultimately asked to contact William Ginsburg instead of Mr. Carter. See Carter Opp. at 4-5. With a few gigantic leaps of logic, he assembles these facts into the conclusion that Ms. Lewinsky somehow failed to comprehend the fact that she was free to contact Mr. Carter.

On its own terms, this argument merely presents a benign explanation for Ms. Lewinsky's false declaration--that is, that her fragile emotional state caused her to misunderstand what was happening. The assertions in no way rebut the declarations, made under penalties of perjury, of two Federal Bureau of Investigation agents and three career prosecutors that OIC members repeatedly told Ms. Lewinsky that she was free to contact any person at any time. See Emmick Decl. ¶¶ 3, 10, 13; Fallon Decl., Apr. 2, 1998, ¶¶ 4, 6; Udolf Decl. ¶¶ 4, 6; Irons Decl. ¶ 4; Binhak Decl. ¶¶ 5-6; Fallon Decl., Feb. 23, 1998, ¶ 3. The

possibility that Ms. Lewinsky misunderstood the obvious does not change the fact that no OIC staff member ever forbade her from contacting any attorney, whether Mr. Carter or Mr. Ginsburg.

In any event, Mr. Carter's hypothesis is belied by the uncontested evidence that is now before the Court. Ms. Lewinsky made unsupervised phone calls at least three times. See Binhak Decl. ¶ 8. In the late afternoon, she spent about twenty minutes in the Pentagon City Mall and outside the presence of OIC staff members. See Emmick Decl. ¶ 16. She requested that Special Agent Fallon call Mr. Carter's office to determine whether he could be reached, and Special Agent Fallon complied. See Fallon Decl., Apr. 2, 1998, ¶ 5; Emmick Decl. ¶ 15; Udolf Decl. ¶ 5. All of these actions are utterly inconsistent with Mr. Carter's theory that Ms. Lewinsky did not understand the repeated advice of OIC attorneys and agents.

Mr. Carter makes much of the fact that Special Agent Fallon did not leave a message for Mr. Carter when he called Mr. Carter's office. See Carter Opp. at 7-8. It appears that Mr. Carter misunderstands the importance of this evidence. At all times, OIC staff members told Ms. Lewinsky she could contact Mr. Carter, and Ms. Lewinsky had every opportunity to call him if she so desired. By late afternoon, Ms. Lewinsky wondered whether and how she might contact him. She had not decided, however, whether she wanted to contact him. Special Agent Fallon was not

trying to contact Mr. Carter; he was simply trying to discover how Ms. Lewinsky could contact Mr. Carter if she decided to do so.

Special Agent Fallon's call to Mr. Carter's office shows, contrary to Ms. Lewinsky's declaration, that the OIC had every intention of allowing her to contact Mr. Carter if she so desired. The phone record establishes conclusively that Ms. Lewinsky's declaration is incorrect. Special Agent Fallon called Mr. Carter's office that afternoon to facilitate Ms. Lewinsky's contacting Mr. Carter if she decided that she wanted to do so. This is the only possible explanation for the phone call, and it flatly rebuts any claim that she was not permitted to contact Mr. Carter.

Ms. Lewinsky's Opposition implicitly concedes the falsity of her earlier declaration. Although it contains considerable argument that the OIC engaged in improper contacts, it does not repeat the allegation that OIC staff prevented her from contacting Mr. Carter. The United States respectfully submits that the conspicuous silence of Ms. Lewinsky--who knows the facts firsthand--is far more powerful than Mr. Carter's conjectures, see Carter Opp. at 5 n.1.

II. THIS COURT HAS JURISDICTION TO DECIDE WHETHER TO REFER THIS MATTER TO OPR AND TO CONDUCT ANY FACT-FINDING NEEDED TO MAKE THAT DECISION.

Ms. Lewinsky appears to agree with the OIC that her filing

of a notice of appeal does not divest this Court of jurisdiction to reconsider its March 31 Memorandum Opinion insofar as it considers referring alleged attorney wrongdoing to OPR. See Lewinsky Opp. at 15. Ms. Lewinsky, however, states that referral to OPR "is mandatory," id., and that this Court has no discretion to decide whether to make a referral. She is in error.

Nothing in the regulations suggests that this Court is required to make a complaint alleging ethical violations without being satisfied that the facts justify such a complaint. This Court retains full power to refer a complaint to OPR or not, guided by the facts and this Court's informed judgment and discretion.

Ms. Lewinsky also states that this Court is without power to conduct an evidentiary hearing, see Lewinsky Opp. at 16, and that the very suggestion "is in and of itself a fraud on this court," id. at 17 (emphasis omitted). The United States respectfully submits that the Court retains at all times inherent power to hold a necessary evidentiary hearing. See United States v. Woolard, 981 F.2d 756, 759 (5th Cir. 1993). The Court's ability to make factual determinations is why Ms. Lewinsky and Mr. Ginsburg presented the Court with signed declarations. Ms. Lewinsky's claim that a hearing is inappropriate because it would require her to waive her Fifth Amendment privilege is a red herring, as she already has waived those rights regarding the

events of January 16, 1998, by filing her declaration. See Edmond v. Consumer Protection Div., 934 F.2d 1304, 1308-09 (4th Cir. 1991) (holding that a party filing an affidavit must either submit to a deposition or have the affidavit struck); United States v. Parcels of Land, 903 F.2d 36, 43 (1st Cir. 1990) (same).

III. THIS COURT ALREADY HAS DECIDED CORRECTLY NOT TO TAKE ACTION REGARDING THE ALLEGATION OF IMPROPER CONTACTS.

Mr. Carter renews his argument that OIC attorneys violated rule 4.2 by contacting Ms. Lewinsky without Mr. Carter's permission. See Carter Opp. at 1, 6. This Court, the D.C. Circuit, and every other circuit court to consider the issue (other than the Second Circuit) have held that rule 4.2 and its equivalents do not apply to pre-indictment, non-custodial contacts. See Mem. Op. at 14-15 and cases cited therein; United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986); United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973).[2]

Mr. Carter and Ms. Lewinsky both reurge their earlier arguments that the OIC violated 28 C.F.R. § 77.8. The OIC continues to believe that its actions were consistent with

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[2] Mr. Carter's statement that OIC attorneys have "by their own admission" stated that they induced Ms. Lewinsky to forego representation and improperly disrupted Mr. Carter's relationship with Ms. Lewinsky, Carter Opp. at 7, is fallacious. No OIC attorney has ever admitted this, and it is not true. Mr. Carter's only support for this statement is his theory, inconsistent with binding D.C. Circuit precedent, that the OIC violated rule 4.2.

applicable Department of Justice ethical requirements. "An attorney for the government may not initiate or engage in negotiations of a[n] . . . immunity agreement . . . with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney . . . ." 28 C.F.R. § 77.8. "Represented person" is a defined term. A person is not "represented" for purposes of this rule unless he or she "has retained counsel" and "[t]he representation is ongoing and concerns the subject matter in question." 28 C.F.R. § 77.3 (emphasis added). For example, a lawyer retained to represent a client in a contract negotiation, securities offering, or labor dispute--or even a lawyer representing a witness or a party in a civil or bankruptcy action--would be shocked to think that, by virtue of the earlier retainer, he or she is also deemed to represent that client in connection with a related criminal investigation about which that lawyer knew nothing at the time of retention, and for which that lawyer may be completed unqualified.

Ms. Lewinsky retained Mr. Carter to represent her as a witness in a civil sexual harassment suit. Specifically, she retained him to prepare a motion to quash a subpoena issued by lawyers for Paula Jones. This fact is why Mr. Carter had to receive Judge Susan Webber Wright's permission to withdraw. See Carter Decl. ¶ 7 (attached to "Supplement to Factual Record"

(Mar. 12, 1998)). The OIC, by contrast, was investigating criminal violations--obstruction of justice, subornation of perjury, and witness tampering. Ms. Lewinsky adduces no evidence, and indeed there is none, that she hired Mr. Carter to represent her in any criminal matter or investigation. Thus, Mr. Carter was not representing Ms. Lewinsky concerning the subject matter of the immunity agreement.

The United States, therefore, believes that the conduct of OIC staff comported with all ethical requirements. The United States respectfully submits that the Court's decision not to refer this matter to OPR was correct and should not be altered.[3]

IV. THE OIC NEITHER SUBORNED PERJURY NOR TOLD MS. LEWINSKY THAT SHE WOULD IMMEDIATELY BE ARRESTED IF SHE DID NOT COOPERATE.

Ms. Lewinsky appears to have misread Special Agent Patrick Fallon's declaration of April 2, 1998, which may explain her erroneous claim that it contradicts the declarations of Michael Emmick and Bruce Udolf. Ms. Lewinsky appears to be under the mistaken impression that Special Agent Fallon declared that

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[3] In addition, Mr. Carter argues that the Court should quash the subpoena on the basis of improper contacts. As the Court found, violations of 28 C.F.R. part 77 are not a basis for quashing a subpoena. See Mem. Op. at 16-17 (citing 28 C.F.R. § 77.11(b)); United States v. Myers, 123 F.3d 350, 357 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997); United States v. Gillespie, 974 F.2d 796, 802 (7th Cir. 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 310-11 (1st Cir. 1989)). Furthermore, because Ms. Lewinsky has appealed the denial of the motion to quash, this Court no longer has jurisdiction to grant the motion. See Princz v. Federal Republic of Germany, 998 F.2d 1 (D.C. Cir. 1993) (per curiam).

Mr. Carter was unreachable. See Lewinsky Opp. at 4 ("OIC has made a perjurious representation to this Court, to wit: that Mr. Carter was not available and there was no way to contact him.") (emphasis omitted); id. at 9 ("Consider that Mr. Starr, himself, signed the present motion as officer of this Court falsely proffering that Mr. Carter was unavailable.").

Neither the United States's filing nor the attached declarations stated that Mr. Carter was unreachable. Special Agent Fallon declared that Mr. Carter's office did not give him a forwarding number. See Fallon Decl., Apr. 2, 1998, ¶ 5. Messrs. Emmick and Udolf declared that Mr. Carter might have been reachable through his answering service. See Emmick Decl. ¶ 15; Udolf Decl. ¶ 5. Obviously, the fact that Ms. Lewinsky could not contact Mr. Carter directly, but rather would have to leave an emergency message with his answering service, may have had an impact on Ms. Lewinsky's decision.

The three declarations are not inconsistent, although they emphasize different events. No party has suggested that Mr. Carter was at his office or that his office gave out his forwarding number on January 16. The United States never has contended that Mr. Carter could not have been reached through his answering service, if Ms. Lewinsky ultimately had decided to contact him instead of Mr. Ginsburg.

For the first time in her Opposition, Ms. Lewinsky claims

that she was told she would be arrested immediately if she did not cooperate. See Lewinsky Opp. at 7 ("[An offer of immunity] was implied and expressed as was her immediate indictment and arrest if she failed to cooperate."); id. at 10 (referring to Ms. Lewinsky's "captivity"); id. at 11 ("during which time she was told if she left she would be indicted and arrested"); Ginsburg Decl. ¶ 5 ("Monica Lewinsky told me . . . she was told that if she left, she would be immediately indicted and arrested.").

This claim is simply not true. First, the United States now has submitted four declarations stating that Mr. Emmick repeatedly told Ms. Lewinsky that she was free to leave at any time. See Emmick Decl. ¶¶ 8, 13; Fallon Decl., Apr. 2, 1998, ¶ 4; Irons ¶¶ 2, 5; Fallon Decl., Feb. 23, 1998, ¶ 2. Second, an immediate indictment is an impossibility on a Friday afternoon when no grand jury is sitting. Third, it is uncontested that Ms. Lewinsky left the presence of OIC members for periods of time during the day, see Emmick Decl. ¶ 16, and that she was not arrested when she left without agreeing to cooperate.

Moreover, the United States calls the Court's attention to the fact that Ms. Lewinsky has not made this allegation under penalties of perjury, but instead has relied on Mr. Ginsburg's hearsay declaration. This declaration resorts to the passive voice: "[S]he was told that if she left, she would be

immediately indicted and arrested." Ginsburg Decl. ¶ 5. The Court will remember that Ms. Lewinsky's declaration similarly utilized the passive voice: "I was informed that I could contact any other attorney, but I could not contact Mr. Carter." Lewinsky Decl., Mar. 12, 1998, ¶ 5. The OIC continues to find it puzzling that Ms. Lewinsky is unwilling to reveal the identity of the alleged wrongdoers.[4]

It is reasonable to assume that an actual victim would identify a wrongdoer rather than use grammatical sleight-of-hand to disguise his or her identity. Certainly, Ms. Lewinsky's failure to state a name puts both the Court and the OIC at a disadvantage. The United States respectfully suggests that the statements of two career FBI agents and one career prosecutor, all made under penalties of perjury, are substantially more credible than Mr. Ginsburg's hearsay declaration.

V. CONCLUSION

The United States respectfully submits that it has amply demonstrated that no OIC staff member told Ms. Lewinsky that she could not contact Mr. Carter. Ms. Lewinsky has dropped any argument to the contrary and Mr. Carter has resorted to fanciful conjectures about Ms. Lewinsky's emotional state. The United States, on the other hand, has submitted six declarations under

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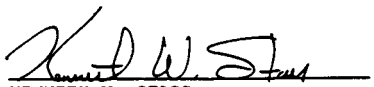
[4] Ms. Lewinsky does not even expressly allege that an OIC staff member made either of these statements.

penalty of perjury, none of which has been rebutted. Consequently, the United States respectfully renews its request that this Court issue a supplemental opinion explaining that the Court now believes that Mr. Emmick did not improperly interfere with Ms. Lewinsky's attorney-client relationship in violation of Department of Justice regulations. We also respectfully request that the Court state that it no longer is considering referring this matter to OPR.

Respectfully submitted,



KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

Joseph M. Ditkoff
Rodger A. Heaton
Associate Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Reply Memorandum of the United States of America in Support of Motion to Reconsider Portion of Memorandum Opinion and to Issue a Supplemental Opinion, was served via hand delivery or facsimile and Federal Express overnight delivery on this the 22nd day of April, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

J. Forrest Norman

(UNDER SEAL (

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
APR 2 6 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the Office of Independent Counsel ("OIC") for the Court to reconsider a portion of its Memorandum Opinion of March 31, 1998, along with oppositions from Monica Lewinsky and Francis Carter. In its Memorandum Opinion, the Court expressed concern that the OIC had improperly disrupted the attorney-client relationship between Ms. Lewinsky and Mr. Carter and suggested that it might refer this matter to the Department of Justice Office of Professional Responsibility ("OPR"). The OIC requests that the Court reconsider that portion of its Memorandum Opinion.

The Court notes first that notices of appeal from that Memorandum Opinion have been filed. The Supreme Court has found that "[t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam) (emphasis added). However, the issue of whether the Court should refer this matter to the OPR is wholly collateral to the issue on appeal: whether the subpoena to Frank Carter should be quashed. In its Memorandum Opinion, the Court held that "[t]he Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas." Mem. Op. at 17. Later, the Court reiterated: "As the Court has found,

Department of Justice regulations do not provide a basis for quashing the subpoenas." Mem. Op. at 18. Reconsideration of what the Court stated in dicta after ruling on the motion to quash is distinct from those aspects of the case involved in the appeal. The Court finds that it retains jurisdiction to reconsider the portion of its Opinion to which the OIC objects.

Along with its motion for reconsideration, the OIC submits several affidavits stating that no attorney from the OIC informed Ms. Lewinsky that she could not contact Mr. Carter and that Ms. Lewinsky was given unsupervised opportunities to contact anyone she chose. Moreover, the OIC submitted a telephone record showing that it attempted to contact Mr. Carter in order to determine whether he would be reachable in the event Ms. Lewinsky decided to discuss the matter with him. In addition, the OIC correctly points out that Ms. Lewinsky's affidavit was submitted along with a supplemental brief that was filed in contravention of the local rules, which do not allow filings in support of a motion other than a reply which may be filed no later than five days after any opposition. See Local Rule 108(d).

In light of the additional evidence presented and the tardiness of Ms. Lewinsky's affidavit, the Court will grant the OIC's motion for reconsideration.

Accordingly, it is this 28th day of April 1998,

ORDERED that the motion of the OIC for the Court to reconsider a portion of its Memorandum Opinion of March 31, 1998, be, and hereby is, granted; and it is further

ORDERED that the Clerk of Court file the attached Amended Memorandum Opinion in this matter.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO
FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
APR 28 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

AMENDED MEMORANDUM OPINION

Attorney Frank Carter was retained by Monica Lewinsky to represent her in connection with the Jones v. Clinton civil action pending in the Eastern District of Arkansas. Mr. Carter drafted an affidavit for Ms. Lewinsky's signature stating that she did not have a sexual relationship with the President of the United States. She signed that affidavit under penalty of perjury. Mr. Carter has been served with two subpoenas: one calling for documents and the other seeking his testimony. He seeks to quash those subpoenas.

Before the Court is Mr. Carter's motion to quash, a brief from amici curiae the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers in support of the motion to quash, and Ms. Lewinsky's "Response of the Real Party in Interest" in support of the motion to quash, as well as an opposition from the Office of the Independent Counsel ("OIC").

Mr. Carter makes several arguments in support of his motion to quash the subpoenas: (1) the subpoenas are overbroad; (2) the subpoenas improperly seek to pierce Ms. Lewinsky's attorney-client privilege and work product protection; (3) compliance with the subpoenas would violate Ms. Lewinsky's Fifth Amendment privilege against self-incrimination; (4) issuance of the subpoenas violates Department of Justice policy; and (5) the OIC improperly communicated with Ms. Lewinsky while she was represented by Mr. Carter and prevented her from calling Mr.

Carter when she asked to do so.

A. Overbreadth

Mr. Carter first argues that the subpoenas are too broad. The subpoena duces tecum requests all documents and things relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, as well as all documents relating to any communications with a list of seventeen people. The Court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. 17(c). The law presumes that, "absent a strong showing to the contrary, . . . a grand jury acts within the legitimate scope of its authority." United States v. R. Enterprises, 498 U.S. 292, 301 (1991). Moreover, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." Id.

The Court finds that Mr. Carter has not met that burden. The subpoena duces tecum limits much of its inquiry to documents created after January 1, 1997. The brevity of Mr. Carter's representation of Ms. Lewinsky, no more than a three-month period, also weighs in favor of the reasonableness of the subpoena. The Court finds that the subpoenas are not overbroad or unduly oppressive.

B. The Attorney-Client Privilege and Work Product Doctrine

There is no dispute among the parties that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to documents prepared by Mr. Carter during his representation of Ms. Lewinsky. At issue is whether the crime-fraud exception applies and overcomes the asserted privileges.

1. *The Crime-Fraud Exception*

Mr. Carter asserts that the attorney-client privilege and the work product doctrine bar disclosure of the documents and testimony sought by the subpoena. The OIC claims that the crime-fraud exception to those privileges applies and the Independent Counsel is entitled to production of the documents and testimony. The Court notes that Mr. Carter's papers and that of amici express great concern that the subpoena "impinges on the long-honored respect of the adversarial system for the confidentiality of the attorney-client relationship." Mot. to Quash at 2. However, it is settled law in this Circuit that, where the relationship between attorney and client is abused and the client uses the attorney's legal services to further a crime or fraud, the privileges' protections are overcome. In re Sealed Case, 107 F.3d 46, 49, 51 (D.C. Cir. 1997).

Two conditions must be met for the crime-fraud exception to apply. First, "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." Id. at 49. Second, "the client must have carried out the crime or fraud." Id. The Independent Counsel carries the burden of showing that the crime-fraud exception applies. Id. The attorney does not need to know about his client's potential wrongdoing for the exception to apply, In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982), and there is no suggestion that Mr. Carter knew about any alleged wrongdoing.

This Circuit appears to hold to the following standard for the application of the crime-fraud exception: the proponent must bring forward "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 107 F.3d at 50 (quoting In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985)). The Court of Appeals also notes that the Second Circuit follows a different standard: the proponent must

demonstrate "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." Id. at 50 (quoting In re John Doe Corp., 675 F.2d 482, 491 & n.7 (2d Cir. 1982)). There is some confusion over which of these standards the D.C. Circuit finds controlling.

Nevertheless, the Court finds that, under either of those standards, the OIC has amply demonstrated that the crime-fraud exception applies and overrules the attorney-client privilege. The OIC's in camera submission shows that Ms. Lewinsky made the privileged communications with the intent and the express purpose to further unlawful acts and that she in fact carried out those unlawful acts. The unlawful acts were perjury and obstruction of justice.[1] See 18 U.S.C. §§ 1621 (perjury), 1623 (false declarations), 1503 (obstruction of justice).

The OIC has demonstrated in its in camera materials that there is probable cause to believe that these crimes were committed and that the communications furthered those crimes. If the trier of fact believed the evidence in the submission, that evidence would establish the elements of perjury and obstruction of justice. The OIC's evidence shows that Ms. Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice.[2]

As for the work product doctrine, "the crime-fraud exception calls for a somewhat different inquiry than with the attorney-client privilege. The focus is . . . on the client's intent in consulting the lawyer or in using the materials the lawyer prepared. The question is: Did the

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[1] The Court is not persuaded that the OIC has shown that Ms. Lewinsky used Mr. Carter's legal services to subom perjury. See 18 U.S.C. § 1622 (subornation of perjury).

[2] The Court finds here that the OIC has met its burden under the crime-fraud exception. It expressly does not find, however, that Ms. Lewinsky in fact committed these crimes.

client consult the lawyer or use the material for the purpose of committing a crime or fraud?" In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). The evidence submitted by the OIC in camera meets the burden of showing an affirmative answer to this question. The Court finds that the OIC's in camera submission shows that Ms. Lewinsky consulted Mr. Carter for the purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice. The OIC has established that the crime-fraud exception applies to the work product subpoenaed in this case.

Because the Court finds that the crime-fraud exception applies, it need not address the issue of whether Ms. Lewinsky waived the attorney-client privilege by disclosing privileged material.

2. *Should the Court extend the crime-fraud exception to this case?*

Amici argue vigorously that the Court should not extend the crime-fraud exception to this case. They express concern that what is at issue here is simply an individual's prior inconsistent statement which should be used at trial to impeach, not to pierce the attorney-client privilege and work product protection. This is not a case, however, where the Court finds mere inconsistencies. It is a case where the OIC's in camera submission shows that Ms. Lewinsky deliberately intended to commit perjury and used her attorney to help her do so.

Amici suggest that perjury is not sufficiently serious to merit the application of the crime-fraud exception. They cite cases stating that the government must make a prima facie case of "a violation sufficiently serious to defeat the privilege." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982). The violation must, amici state, "be of sufficient weight to warrant abridging the privilege." Id. at 815 n.85. Perjury is

plainly of "sufficient weight" to warrant abridging the attorney-client privilege in this instance. "[P]erjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." Nix v. Whiteside, 475 U.S. 157, 169 (1986). This Court takes perjury very seriously and believes it to be a sufficiently weighty offense. It is a felony. Moreover, the evidence suggests that obstruction of justice has also taken place, another plainly weighty offense.

Moreover, case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply. The language in In re Sealed Case, 754 F.2d at 399, states that there must be "a violation" serious enough to defeat the privileges. There need not be "widespread criminal activity," Amici Br. at 18, in order to find that the client has eviscerated her attorney-client privilege and work product protection.

Contrary to amici's suggestions, this is not a situation in which a client confided in an attorney that she committed a crime. Here, the OIC's in camera submission demonstrates that the client utilized the attorney's legal services with the specific purpose of committing a crime, a crime she could not have committed without his services. Thus, it is merely alarmist for amici to warn that "[e]xtending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship." Amici Br. at 3.

The Court finds that the OIC has met its burden under the crime-fraud exception; its in camera submission demonstrates that Ms. Lewinsky consulted Mr. Carter and used his services

to commit perjury, not merely that her statements were inconsistent. There is probable cause to find not only that her testimony in the Jones v. Clinton affidavit was false, but also that Ms. Lewinsky purposefully and actively used Mr. Carter to commit the crimes of perjury and obstruction of justice. The Court does not believe that, by denying Mr. Carter's motion to quash, it will be "sending a message to every client and potential client that embarrassing or even incriminating information confided to their attorneys might, without warning, be disclosed to federal prosecutors." Amici Br. at 14. If this Court does send a message with this decision, that message would be that clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged.

3. *Does the OIC's ex parte in camera submission violate due process and must it be released to movant?*

Mr. Carter argues that the Independent Counsel's ex parte in camera submission violates due process. "[C]ommunications between a judge and one party are not per se deprivations of the due process rights of the opposing party." Clifford v. United States, ___ F.3d ___, 1998 WL 61165, *5 (D.C. Cir. 1998). The Independent Counsel was required to meet its burden of showing that the crime-fraud exception applies and properly did so with its submission to the Court. The Court's in camera inspection of materials upon which the OIC based its showing of the crime-fraud exception does not violate due process. Review of ex parte in camera materials to establish the crime-fraud exception does not violate due process. In re Grand Jury Proceedings, 33 F.3d 342, 351-53 (4th Cir. 1994); In re John Doe, Inc., 13 F.3d 633, 635-37 (2d Cir. 1994); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1989).

Mr. Carter also wants the OIC to disclose the ex parte submission to him.[3] Before the Court is the motion of Francis Carter for production of the ex parte submission. The Court finds that the ex parte submission is properly confidential and the practice of submitting such materials to the Court in camera is well recognized. See, e.g., In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982).

4. *Can this Court properly consider Linda Tripp's tapes in deciding whether the crime-fraud exception applies?*

As part of its in camera submission, the Independent Counsel provided the Court with transcripts of tape recordings made by Linda Tripp of conversations she had with Monica Lewinsky. Mr. Carter argues that federal law prohibits the use of Ms. Tripp's tape recordings in all judicial proceedings, including those before this Court, and therefore prevents the Court from relying on them to establish the crime-fraud exception. The Court finds that it may properly rely upon the tapes in making its determination of whether the crime-fraud exception applies.

The burden is on Mr. Carter to prove that the tapes are inadmissible. United States v. Dale, 991 F.2d 819, 840 (D.C. Cir.), cert. denied, 510 U.S. 1030 (1993). First, Mr. Carter argues that Ms. Tripp intercepted the communications in order to commit a criminal or tortious act, in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III") and that the tapes are thus inadmissible.

Title III provides that whenever any communication has been intercepted, the communication and any evidence derived therefrom may not be received in evidence in any

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[3] The Court strongly disagrees with movant's suggestion that "[t]he traditional reasons for grand jury secrecy are completely inapplicable in this, the most public of investigations." Reply Br. at 13.

proceeding before any court or before a grand jury "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The federal law also provides that it is lawful for a private party to intercept a communication

> where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Because Ms. Tripp was a party to the conversation, it was lawful for her to tape the conversation unless the communication was intercepted for the purpose of committing a criminal or tortious act as described in the statute.

This Circuit has held that "a violation of Title III is established when 'it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act.'" Dale, 991 F.2d at 841 (quoting United States v. Vest, 639 F. Supp. 899, 904 (D. Mass. 1986), aff'd, 813 F.2d 477 (1st Cir. 1987), cert. denied, 488 U.S. 965 (1988)). Mr. Carter has not sustained his burden of proving that Ms. Tripp acted with an impermissible purpose. In fact, he has not suggested that Ms. Tripp was motivated by a desire to commit an act that was criminal or tortious.

Under Title III, the relevant inquiry is whether the communication was intercepted for the purpose of committing a criminal or tortious act, not whether the interception itself constituted a criminal or tortious act. 18 U.S.C. § 2511(2)(d). Assuming that Ms. Tripp's recordings violated Maryland law, that fact by itself does not establish that she intercepted the conversations "for the purpose of committing [a] criminal or tortious act in violation of the . . . laws of . . . any State."

See United States v. DiFelice, 837 F. Supp. 81, 82 (S.D.N.Y. 1993). If Ms. Tripp had made the tapes in order to blackmail Ms. Lewinsky, for example, then that would have been for the purpose of committing a crime. Instead, she intercepted the communications for the purpose of bringing her conversations with Ms. Lewinsky to light, which Mr. Carter does not allege is a criminal or tortious act. The D.C. Circuit has found that "[t]aping phone calls to make an accurate record of a conversation 'in order to prevent future distortions by a participant' is not illegal, even when the recording is made in the hopes of producing evidence of an illegal conspiracy." Dale, 991 F.2d at 841 (citations omitted).

Mr. Carter does not allege that Ms. Tripp made these tapes for the purpose of violating Maryland's law against taping without both parties' consent. "[T]he legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communications intercepted." United States v. Underhill, 813 F.2d 105, 110 (6th Cir.), cert. denied, 482 U.S. 906 (1987). The Court finds that Title III does not prohibit it from considering the tapes in ruling on this motion.

Second, Mr. Carter argues that the taping was illegal under Maryland law and therefore the Court should apply the more stringent state standards and prevent disclosure of the tapes. Maryland law governing the interception of communications is more stringent than federal law. Even if one party consents, taping of wire communications is illegal under Maryland law. Md. Code Ann., Cts. & Jud. Proc. §§ 10-402 & 10-410 (1997). Mr. Carter argues that federal courts must respect the more stringent state law protection of privacy rights.

The Court need not decide whether the taping was illegal under Maryland law because federal law, in the form of Title III, governs. Federal law governs the admissibility of evidence

in a federal criminal case. United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir.), cert. denied, 118 S. Ct. 78 (1997). Evidence obtained from a consensual wiretap conforming to Title III is admissible in federal court proceedings without regard to state law. United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983). Several circuits have held that a more restrictive state law, such as Maryland's, would not affect the admissibility of wiretap evidence in a federal court. See, e.g., Leitman v. McAusland, 934 F.2d 46, 50 (4th Cir. 1991); United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Horton, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Nelligan, 573 F.2d 251, 253 (5th Cir. 1978); United States v. Turner, 558 F.2d 46, 49 (2d Cir. 1977).

Whether or not Maryland law would prohibit the use of these tape recordings in a Maryland court does not affect this Court's determination. Title III controls and the Court may properly consider Ms. Tripp's tapes.

C. Monica Lewinsky's Fifth Amendment Right Against Self-Incrimination

Mr. Carter claims that materials in his possession may not be revealed without violating Ms. Lewinsky's Fifth Amendment rights. The subpoena to Ms. Lewinsky in Jones v. Clinton demanded specific items that she allegedly possessed and allegedly gave to Mr. Carter. Mr. Carter argues that production of those items or documents reflecting their existence would be incriminatory.

The privilege protects against "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972). The Supreme Court has found that the act

of producing a document may fall within the Fifth Amendment privilege. "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." United States v. Doe, 465 U.S. 605, 612 (1984).

The standard set out by the Supreme Court is the following: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Kastigar, 406 U.S. at 486-87. The privilege includes "answers that would in themselves support a conviction under a federal criminal statute" and also included answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Id.

Regarding the particular items specified by Mr. Carter, enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items.

D. Allegations of Prosecutorial Misconduct

Mr. Carter claims that OIC attorneys engaged in various types of misconduct in their handling of this matter.

a. *Department of Justice policy on issuing subpoenas*

Mr. Carter argues that the subpoenas issued to him violate a Department of Justice policy that limits the circumstances under which an attorney may be subpoenaed. See DOJ Manual at § 9-2.161(2). The guidelines provide that, first, before an attorney can be subpoenaed, all

reasonable attempts should have been made to obtain information from alternative sources. Second, there should be an independent evaluation of whether the subpoena is narrowly drawn and directed at material information regarding a limited subject matter. Third, there should also be an evaluation of whether the subpoena seeks information protected by a valid claim of privilege.

The DOJ guidelines do not confer enforceable rights on those who receive subpoenas, as movant concedes. The DOJ Manual "is a publication which, by its own terms, provides 'internal Department of Justice guidance,' and is 'not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.'" Nichols v. Reno, 124 F.3d 1376, 1377 (10th Cir. 1997) (quoting D.O.J. Manual, at § 1-1.00). The government's violation of its internal operating procedures, on its own, does not create a basis for suppressing Carter's subpoena. See United States v. Myers, 123 F.3d 350, 355-56 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997).

Most importantly, the Court has no reason, other than the allegations in Mr. Carter's papers, to believe that the Independent Counsel did not undertake the applicable balancing. Mr. Carter's attempt to apply the DOJ guidelines in this instance must fail.

b. *Contact with represented persons*

Mr. Carter claims that OIC attorneys communicated with Ms. Lewinsky, and sent Ms. Tripp to record her conversations with Ms. Lewinsky, when they knew Ms. Lewinsky was represented by Mr. Carter. Rule 4.2 of the D.C. Rules of Professional Conduct provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the

> prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2(a) (emphasis added). The Comment to the Model Rule states:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Model Rule 4.2 cmt. 2.

The D.C. Circuit has found that non-custodial communications with represented criminal suspects during the investigatory stage are not subject to the anti-contact rule. United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973). In Sutton, government informants recorded inculpatory conversations with the defendant prior to indictment and after the government became aware that the defendant was represented by counsel. The Court of Appeals stated that the disciplinary rule against contact "was never meant to apply to situations like this one" and refused to exclude the taped conversations. Sutton, 801 F.2d at 1366. A similar factual situation occurred in Lemonakis and the D.C. Circuit there stated: "we nevertheless find the actions of the U.S. Attorneys to be consistent with the current ethical standards demanded of the legal profession." Lemonakis, 485 F.2d at 955.

With the exception of the Second Circuit, every court of appeals that has considered a similar case has held that ethical rules such as Rule 4.2 do not apply to pre-indictment criminal investigations by government attorneys or their agents. See United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990); United

States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981). These courts have held that the anti-contact rule "is inapplicable to contacts made by prosecutors or their agents with criminal suspects in the course of a pre-indictment investigation." United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983).

Only the Second Circuit has found a prosecutor's conduct to violate the ethical rule against contact with a represented person in a non-custodial, pre-indictment setting. See United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). Even that court held that "the use of informants by government prosecutors in a pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the disciplinary rule] and therefore will not be subject to sanctions." Id. at 839.

The interview with Ms. Lewinsky occurred prior to any indictment and in a non-custodial setting; Mr. Carter has not alleged otherwise. Even if Ms. Tripp did act as an agent of the prosecutors, her undercover recording of Ms. Lewinsky also does not violate the ethical prohibition on contact with a represented party. The Court finds that attorneys from the OIC acted within the ethical rules in questioning Ms. Lewinsky without her attorney present.

However, Department of Justice regulations provide: "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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the

attorney representing such person or party." 28 C.F.R. § 77.8 (1998). The Independent Counsel statute provides: "An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1).

Department of Justice regulations explicitly provide that 28 C.F.R. Part 77 "does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States." 28 C.F.R. § 77.11(b) (1998). Moreover, the regulations provide that "[a]llegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice . . . ." 28 C.F.R. § 77.11(a) (1998).

This Court's supervisory power to control prosecutorial misconduct before the grand jury is quite limited. See United States v. Williams, 504 U.S. 36 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Supreme Court in Williams in essence removed all general supervisory authority over the grand jury from the federal courts. In that case, the district court had dismissed an indictment because the government failed to disclose substantial exculpatory evidence to the grand jury, in violation of a Tenth Circuit rule and provisions in the DOJ manual to the contrary. 504 U.S. at 47. The Supreme Court held that the district court had improperly used its supervisory powers, stating: "[W]e think it clear that, as a general matter at

least, no such 'supervisory' judicial authority [over grand jury functioning] exists . . . ." Id. at 50. It went on to state that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id.

The First, Sixth, and Seventh Circuits have addressed situations in which prosecutors who violated the Department of Justice Manual by failing to provide warnings to targets of a grand jury's investigation where such warnings were not constitutionally mandated. See Myers, 123 F.3d at 355; United States v. Gillespie, 974 F.2d 796, 799 (7th Cir. 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989). In each case, the courts found that they were faced with "the violation of a policy which does not justify a case-related judicial sanction and yet which appears immune to expressions of judicial satisfaction." Myers, 123 F.3d at 357; Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 310-11. The First and Seventh Circuits explicitly warned prosecutors that, in appropriate circumstances, they would consider referring such internal policy violations to the Department of Justice's Office of Professional Responsibility. Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 311.

The Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas. Myers, 123 F.3d at 358. However, as the First Circuit said, "[w]e assume that these policies are meant to be enforced. . . ." Pacheco-Ortiz, 889 F.2d at 311. The Court expresses its concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel but declines to take further action on this particular matter.

c. *Disruption of the attorney-client relationship*

Mr. Carter also claims that Ms. Lewinsky was not permitted to contact him while the Independent Counsel was questioning her. Ms. Lewinsky's counsel proffered at oral argument that Mr. Emmick told Ms. Lewinsky not to call Mr. Carter because he might "tip off" Vernon Jordan, but that allegation does not appear in Ms. Lewinsky's subsequent declaration. The Independent Counsel has submitted a declaration from an FBI Special Agent who states: "At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter." Fallon Decl. at ¶ 3.

Even if this conduct had occurred, it did not violate Ms. Lewinsky's Sixth Amendment right to counsel because that right had not yet attached at the time of the interview. Sixth Amendment rights do not "attach until after the initiation of formal charges." Moran v. Burbine, 475 U.S. 412, 431 (1986); see also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) (holding that Sixth Amendment rights do not attach until "the time that adversary judicial proceedings have been initiated" against the suspect). A right Ms. Lewinsky did not possess could not have been violated. This situation also does not appear to be covered by the Rules of Professional Conduct. See Rule 4.2 of the D.C. Rules of Professional Conduct.

Department of Justice regulations state that "An attorney for the government, or anyone acting at his or her direction, may not, when communicating with a represented person or represented party . . . improperly seek to disrupt the relationship between the represented person or represented party and counsel." 28 C.F.R. § 77.9 (1998). As the Court has found, Department of Justice regulations do not provide a basis for quashing the subpoenas. Further, it appears to the Court that no OIC attorney disrupted the attorney-client relationship between Ms. Lewinsky and Mr. Carter by refusing to give her permission to contact him. See Declaration of Michael

Emmick at ¶ 3; Second Declaration of Patrick Fallon, Jr. at ¶ 6; Declaration of Steven Irons at ¶¶ 4, 6; Declaration of Stephen Binhak at ¶ 5. She was given several unsupervised opportunities to contact anyone she chose, see Emmick Decl. at ¶ 14; Declaration of Bruce Udolf at ¶ 6; Irons Decl. at ¶ 6; Binhak Decl. at ¶¶ 6-8, and an FBI Special Agent working with the OIC called Mr. Carter to determine if he would be available if Ms. Lewinsky decided she wished to contact him. Second Fallon Decl. at ¶ 5. The Court will not refer this matter to the Department of Justice Office of Professional Responsibility for investigation.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: April 28, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	
	:	**Misc No. 98-00068 (NHJ)**
FEDERAL GRAND JURY PROCEEDING	:	
	:	**UNDER SEAL**

MOTION FOR STAY OF ENFORCEMENT OF ORDER PENDING APPEAL

On March 31, 1998, this Court issued an Order denying Francis D. Carter, Esq.'s Motion to Quash Subpoenas Duces Tecum and Ad Testificandum. The subpoenas, respectively, required Mr. Carter to testify, and to produce documents and other tangible things, before a grand jury specifically empaneled to determine whether criminal indictments should issue against Monica S. Lewinsky, Real Party in Interest and Movant herein ("Movant"). Mr. Carter's motion sought to quash the grand jury subpoenas based upon, *inter alia*, assertions of attorney-client privilege and attorney work product doctrine, violations of due process and federal statutory and regulatory law, and preservation of Movant's 5th Amendment privilege against self-incrimination pursuant to the Constitution of the United States.

Movant joined Mr. Carter's motion by filing with this Court her *Response of the Real Party in Interest* on February 25, 1998.

Mr. Carter, in turn, adopted each of the claims and arguments submitted by Movant therein, as evidence by Mr. Carter's *Reply to Opposition of United States to Motion to Quash* at Note 1.

Mr. Carter, however, has indicated his intent to abide by the Court's March 31, 1998, Order compelling him to testify, and to produce documents, before the grand jury pursuant to the subpoenas at issue. Therefore, as permitted by the prevailing authority, and as Real Party in Interest, Movant has appealed the March 31, 1998, Order. Herein, Movant seeks a stay of enforcement of the subject Order. Absent such a stay, Mr. Carter will be compelled to testify, and to produce documents, before the grand jury, causing Movant to suffer irreparable injur

Pursuant to the foregoing, Movant respectfully requests that this Court issue a stay of enforcement of its March 31, 1998, Order denying Mr. Carter's Motion to Quash Subpoenas Duces Tecum and Ad Testificandum pending Movant's appropriate appeal of that Order.

Respectfully Submitted,

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, SPRINGHER & RICHMAN
10100 Santa Monica Blvd, 8th Fl
Los Angeles, California 90067

Nathaniel H. Speights 952036
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-1419
(202) 783-6300

CERTIFICATE OF SERVICE

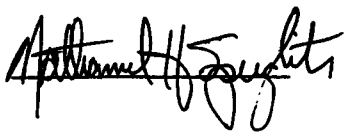
I HEREBY CERTIFY that a true and correct copy of the foregoing, Motion for Stay was mailed, United States Postage first class prepaid and telecopied this 28 day of April, 1998 to:

Kenneth W. Starr, Esquire
Robert Bittman, Esquire
Michael W. Emmick, Esquire
Office of the Independent Counsel
1001 Pennsylvania Ave, N.W.
Washington DC 20004

(202 514-8688)

Prof. Charles J. Ogletree, Jr.
Prof. Jamie S. Gardner
Harvard Law School
320 Hauser Hall
Cambridge Mass. 02138

(617 496 2277)



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	
	:	Misc No. 98-00068 (NHJ)
FEDERAL GRAND JURY PROCEEDING	:	
	:	UNDER SEAL

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY OF ENFORCEMENT OF ORDER PENDING APPEAL

PRELIMINARY STATEMENT

On March 31, 1998, this Court issued an Order denying Francis D. Carter, Esq.'s Motion to Quash Subpoenas Duces Tecum and Ad Testificandum. The subpoenas, respectively, required Mr. Carter to testify, and to produce documents and other tangible things, before a grand jury specifically empaneled to determine whether criminal indictments should issue against Monica S. Lewinsky, Real Party in Interest and Movant herein ("Movant"). Mr. Carter's motion sought to quash the grand jury subpoenas based upon, *inter alia*, assertions of attorney-client privilege and attorney work product doctrine, violations of due process and federal statutory and regulatory law, and preservation of Movant's 5th Amendment privilege against self-incrimination pursuant to the Constitution of the United States.

Movant joined Mr. Carter's motion by filing with this Court her *Response of the Real Party in Interest* on February 25, 1998. Mr. Carter, in turn, adopted each of the claims and arguments submitted by Movant therein, as evidence by Mr. Carter's *Reply to Opposition of United States to Motion to Quash* at Note 1.

Mr. Carter, however, has indicated his intent to abide by the Court's March 31, 1998, Order compelling him to testify, and to produce documents, before the grand jury pursuant to the subpoenas at issue. Therefore, as permitted by the prevailing authority, and as Real Party in Interest, Movant has appealed the March 31, 1998, Order. Herein, Movant seeks a stay of enforcement of the subject Order. Absent such a stay, Mr. Carter will be compelled to testify, and to produce documents, before the grand jury, causing Movant to suffer irreparable injury.

ARGUMENT

I. THIS COURT HAS AUTHORITY TO STAY ENFORCEMENT OF ITS ORDER DENYING MOTION TO QUASH SUBPOENAS PENDING MOVANT'S APPROPRIATE APPEAL OF THE ORDER.

A. The Court has Authority to Stay Enforcement of an Order Pending Appeal.

The District Court has authority to stay enforcement of an order pending appeal of the order. *Hawaii Housing Authority v. Midkiff, Hawaii,* 463 U.S. 1323, 1324, 104 S.Ct. 7, 77 L.Ed.2d 1426 (1983) (Court retains power to grant injunctive relief to party to preserve status quo during pendency of appeal, even to Supreme Court.) The purpose of such a stay is to preserve the status quo. *U.S. v. State of Mich.* 505 F.Supp. 467, 472 (D.C.Mich. 1980), *modified on other grounds,* 653 F.2d 277, *cert. denied,* 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110. Further, the party seeking appeal must first apply to the District Court, rather than to the Court of Appeals, for an order imposing stay. *Federal Rules of Appellate Procedure,* Rule 8; *In re Mirahne,* 852 F.2d 805, 806 (5th Cir. 1988); *District of Columbia Circuit Rules,* Rule 8.

B. Movant's Appeal is Appropriate.

As previously referenced, Mr. Carter has indicated his intent to abide by this Court's March 31, 1998, Order, which compels him to comply with the two grand jury subpoenas at issue. As Real Party in Interest, and pursuant to the authority granted in *Perlman v. U.S.,* 247 U.S. 7, 38 S.Ct. 417, 60 L.Ed. 368 (1918), Movant's pending appeal of the Order denying Mr. Carter's Motion to Quash is appropriate.

In *Perlman, supra,* the U.S. Supreme Court ruled that the petitioner, the president of a corporation, was entitled to immediately appeal a District Court order compelling the impoundment of certain exhibits produced by the corporation in the course of civil litigation initiated by the corporation in which it alleged patent infringement. The District Court's order mandated impoundment of the corporation's exhibits for use by the United States attorney in the investigation of a perjury charge against the petitioner.

Despite the fact that the petitioner was not a party to the underlying civil action in which the District Court's order compelling impoundment was made, the Supreme Court held that the petitioner possessed such an interest in the exhibits that he, individually, was entitled to appeal the District Court decision denying his petition to preclude the United States attorney from taking into possession the subject exhibits. *Id.,* at 419. Further, petitioner was entitled to seek interlocutory appeal of the District Court's decision denying his petition. *Id.,* at 419, 420. There, the Supreme Court reasoned that, when considered in the context of the criminal proceedings against the petitioner, the District Court's order for impoundment was final and therefore immediately appealable.

The Circuit Court for the District of Columbia itself recognized Movant's right under *Perlman, supra,* to immediately appeal an order such as this Court's March 31, 1998, ruling. In *In Re Sealed Case,* 754 F.2d 395, 399 (D.C.Cir. 1985), where certain attorneys indicated they would comply with a District Court's order compelling them to testify before a grand jury regarding their client's alleged violations of federal law, over the objections of their client, the Court of Appeals held that it would accept immediate appeal of the client's claims of privilege:

> This court recently held that when circumstances make it unlikely that an attorney would risk a contempt citation in order to allow immediate review of a claim of privilege, the *Perlman* exception will apply. (Internal citations omitted.) Doe and Roe have sworn in affidavits that they will comply with the district court's order and testify over the objections of their clients. We therefore accept immediate appellate review of Synanon's claim of privilege under the *Perlman* exception.

As to Movant's pending appeal and instant motion for stay, *Perlman* and *In re Sealed Case, supra,* are directly on point and are controlling. As explored in further detail, *infra,* Movant has paramount personal interest in the disclosure of the testimony and documents which this Court has compelled via its March 31, 1998, Order. Movant's interests include no less than

the preservation of her rights under the Constitution of the United States and the preservation of the confidentiality of attorney-client communications, a tenet historically and unequivocally "so sacred and compellingly important" that courts must "guard it jealously." *Haines v. Liggett,* 975 F.2d 81,90 (3rdCirc. 1992) (Internal citation omitted).

Accordingly, Movant has appealed the March 31, 1998, Order, which is deemed final as to her interests. Further, to preclude her irreparable injury pending its hearing, she seeks a stay of enforcement of the Order. As shown above, this Court holds power to grant the relief requested. See also In Re Sealed Case 107 F.3d 46 (D.C. Cir 1997)

II. THE WEIGHT OF LEGAL AUTHORITY COMPELS ISSUANCE OF AN ORDER FOR STAY PENDING APPEAL.

When deciding whether to issue a stay of enforcement of an order pending appeal of the order, the District Court is to consider: (1) Whether the opponent of the stay will sustain significant injury if the stay is granted; (2) Whether the proponent of the stay will be irreparably harmed if the stay is denied; (3) Whether the public interest favors issuance of the stay; and, (4) Whether there is a substantial likelihood that the proponent of the stay will prevail upon the merits. *U.S. v.*

Western Elec. Co., Inc., 774 F.Supp. 11, 11-12 (D.D.C. 1991), citing *Cuomo v. United States Nuclear Regulatory Commission,* 772 F.2d 972, 974 (D.C.Cir. 1985). Further, where the balance of hardships and the public interest weigh in favor of the proponent of the stay, the proponent need only show that serious and difficult issues are presented in order to obtain a stay. *Id.,* at 13, citing, *inter alia, Hilton v. Braunskill,* 481 U.S. 770, 778, 107 S.Ct. 2113, 2120, 95 L.Ed.2d 724 (1987). Finally, the proponent of the stay need not show a high probability of success of the merits, but rather, in the required judicious balancing of the equities, probability of success is inversely proportional to the degree of irreparable injury shown by proponent. *Chamber of Commerce v. Reich,* 897 F.Supp. 570 (D.D.C.1995), *motion to vacate denied, reversed (on other grounds),* 74 F.3d 1322, 316 U.S.App.D.C. 61, *rehearing denied,* 83 F.3d 439, 317 U.S.App.D.C. 330, *suggestion for rehearing denied,* 83 F.3d 442, 317 U.S.App.D.C. 330, citing *Cuomo, supra,* at 974.

A. Opponent Will Sustain No Harm in Face of Stay.

The Office of Independent Counsel ("OIC"), as opponent to Mr. Carter's Motion to Quash Subpoenas, is the anticipated opponent to Movant's request for stay of the March 31, 1998, Order denying Mr. Carter's Motion. The OIC, however, will

sustain no harm should a temporary stay be issued by this Court pending determination of Movant's appeal. Counsel is willing to join OIC in requesting a an expedited breifing schedule in the Court of Appeals.

As recently as April 22, 1998, the OIC itself acknowledged in pleadings filed with Court that its investigation "continues to progress rapidly."[1] Obviously, to date, the OIC's mammoth investigation has been able to "progress rapidly" absent the privileged testimony and documents the OIC seeks from Mr. Carter pursuant to the improper grand jury subpoenas at issue. A stay pending appeal will not unnecessarily delay the investigation.

Additionally, in denying that a decision has been made by either the OIC or the grand jury to compel the testimony of Movant herself, testimony which would address precisely the same issues involved in the proposed testimony of, and production of documents by, Movant's former counsel, Mr. Carter, the OIC maintains that "the United States has many options available..."[2] Clearly, in the event a stay of the March 31, 1998, Order denying

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[1] *Please see, Opposition of United States of America to* Motion for Stay Pending Appeal, at 6. Further, all citations herein to *Opposition of the United States of America to Motion for Stay Pending Appeal*, refers to the opposition filed by the OIC to Movant's previously submitted Motion for Stay Pending Appeal of this Court's April 3, 1998, Order denying Movant's Motion to Enforce Grant of Immunity.

[2] *Please see, Opposition of the United States of America to Motion for Stay Pending Appeal*, at 2, Note 1.

Mr. Carter's Motion to Quash Subpoenas is granted pending Movant's appeal of the ruling, the OIC will avail itself of one or more of the "many" options it contends are available to it relative to the common subject matter regarding which Movant and Mr. Carter were subpoenaed.

Accordingly, based upon its own admissions, should the requested stay be issued, the OIC will sustain no harm. Rather, its investigation will undoubtedly, through the utilization of its "many options," proceed unscathed by a temporary stay.

B. Movant will Suffer Irreparable Injury Absent Stay.

As previously discussed, absent issuance of a stay pending hearing of Movant's appeal of the Order denying Mr. Carter's motion, Mr. Carter will be compelled to testify, and to produce documents, relative to his communications with Movant, and regarding his thoughts, opinions, conclusions, and strategy in the course of his representation of her. Absent issuance of the stay requested, Mr. Carter's compelled testimony and disclosure of documents prior to the Court of Appeals' decision, will irreparably harm Movant. As discussed, *infra*, Movant's candid and unrestrained communications with her then-counsel, Mr. Carter, rendered pursuant to the confidentiality provided under the Attorney-Client Privilege, may, via their improper disclosure

pursuant to this Court's March 31, 1998, Order, prior to the hearing of Movant's pending appeal, make Movant an unwitting and unwilling, that is, a compulsory, incriminatory witness against herself, in violation of the protections guaranteed under the 5th Amendment to the Constitution of the United States. Such potential injury alone constitutes a sufficient basis upon which to issue the stay requested herein.

The purpose of the Perlman doctrine would be completely frustrated in the absence of a stay pending appellate review. As the Court of Appeals has recognized, once compliance is complete, the appeal is rendered moot because the harm can no longer be remedied. See In Re Sealed Case 737 F.2d 94, 98 n.7 (D.C. Cir 1984): "The purpose of the attorney-client privilege, however, is to protect the client's confidences. . .Once the cat is out of the bag, it cannot be put back in". (citations omitted)

C. Public Interest Favors Stay.

Indisputably, the public holds a profound interest in preserving an individual's rights under the Constitution of the United States, including the rights to be free from compulsory self-incrimination, and to be afforded due process in prosecution of the law. Further, the general citizenry maintains an interest in keeping inviolable the traditional immunity from disclosure of communications rendered between an attorney and his or her client

relative to the subject matter about which the attorney was retained, and in confirming the concomitant protections afforded the attorney's documented thoughts, opinions, conclusions, and strategy, all of which arise as a natural, inevitable, and necessary product flowing directly from the confidential communications which transpire between counsel and client. The weight of these interests, standing by themselves, supports issuance of a temporary stay pending the hearing of Movant's appeal of this Court's March 31, 1998, Order.

Additionally, however, in pleadings on file with and currently pending before this Court, the OIC cites *Newsweek* and asserts that "there is tremendous public pressure on the OIC to complete its investigation as soon as possible. (Internal citation omitted.) 'The public pressure is now on Starr to put up or shut up...[P]ublic patience is running out.'" [3] The public desire that the OIC "put up or shut up" to which the OIC refers, merely *fortifies* Movant's argument that the public interest favors the stay requested herein, pending the Court of Appeals' decision on the issues before it.

The *Newsweek* article evidences that, in fact, what interests, or rather, what concerns, the public most, is protection of the individual from the alarmingly unfettered and

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[3] *Please see, Opposition of the United States of America to Motion for Stay Pending Appeal,* at 6.

unchecked governmental intrusions exhibited by the OIC to date. That is, the public interest in the *process* of the OIC investigation has superseded and become paramount to the public's interest in the *result* of the inquiry. The public's desire that the OIC, in effect, "wrap up" its investigation, is a testament to the public sentiment that the OIC has, via its sprawling, perpetual inquiries, invaded privacy, and other rights, held dear by the individual. Consequently, the OIC's own admissions show that the public interests involved weigh heavily in favor of granting the requested stay.

D. Movant's Appeal Poses Serious and Difficult Issues Upon Which Movant is Likely to Prevail Upon the Merits.

Movant's appeal poses serious and difficult issues, including preservation of the privilege afforded attorney-client communications and attorney work-product, the protections of due process and the privilege against compulsory self-incrimination under the Constitution of the United States, and the violation of federal laws by the government. Pursuant to the prevailing authority, in the judicious balancing of equities, the great weight and import of these issues, alone, requires issuance of the stay pending the Court of Appeal's decision on the merits. *U.S. v. Western, supra,* at 11-12, *citing Cuomo, supra,* at 974.

1. Preservation of the Confidentiality of Attorney-Client Communications is at Issue.

a. Movant's Appeal Contends the Confidentiality of Attorney-Client Communications and Attorney Work-Product is Preserved Because the Crime-Fraud Exception is Inapplicable to the Case at Bar.

Via her appeal, Movant contends that her communications with her then-counsel, Mr. Carter, were made in confidence and within the context of Mr. Carter's appropriate representation of her relative to the subpoena issued to Movant in the civil litigation, *Jones v. Clinton,* No. LR-C-94-290, in the United States District Court for the Eastern District of Arkansas, West Division ("*Jones v. Clinton*"). Movant vehemently denies that any crime or fraud was committed, furthered, or intended, by her in the course of, and/or as a result of, Mr. Carter's representation of her. As this Court's March 31, 1998, Opinion concedes, both the elements of *intent* to further the unlawful act, and of actual *commission of a crime* must exist before the crime-fraud exception may be invoked to uncloak otherwise privileged attorney-client communications and attorney work-product. *In Re Sealed Case,* 107 F.3d 46, 49 (D.C.Cir. 1997). Movant's appeal argues that, in that neither element under *In Re Sealed Case*
existed, the crime-fraud exception was inappropriately applied to unjustifiably defeat Mr. Carter and Movant's claims of privilege.

b. Movant's Appeal Contends the OIC Failed to Meet the Burden Necessary to Invoke the Crime-Fraud Exception.

The OIC, in its *Opposition* to Mr. Carter's *Motion to Quash Subpoenas* neither disputed that the privileges of attorney-client communications and attorney work product apply to the testimony and material subpoenaed,[4] nor made any attempt at showing an extraordinary need for disclosure of the protected testimony and materials, as is otherwise required pursuant to *Federal Rules of Civil Procedure,* Rule 26(b)(3). *See also, Upjohn v. United States,* 449 U.S. 383, 398 (1981). Thus, in an attempt to obviate the privilege, the OIC instead relied upon application of the crime-fraud exception to the instant matter. However, to do so, the OIC bore the burden of establishing the elements, that is, a prima facie case, of an ongoing or imminent crime or fraud perpetrated by Movant via consultation with her then counsel. *In Re Sealed Case, supra,* at 49-50. Movant's appeal contends that the OIC failed to meet the required showing, resulting in the wrongful application of the crime-fraud exception to improperly defeat Mr. Carter and Movant's claims of privilege.

In its March 31, 1998, *Memorandum Opinion,* this Court deemed the OIC to have established the elements of perjury (18 U.S.C. §

[4] See *Opposition,* at 4-5.

1621) and false declaration (18 U.S.C. § 1623) existed relative to the unlawful acts the OIC contends were committed by Movant. However, as addressed in further detail, *infra*, the "evidence" proffered by the OIC was improperly submitted and considered, *in camera*, to the exclusion of both Mr. Carter and Movant, in violation of due process. Further, some of the information submitted was illegally obtained, and in violation of federal wiretapping laws, and therefore improperly considered by the Court in rendering its decision. Finally, the information which Movant understands to have been submitted fails to establish that an ongoing or imminent crime was committed by Movant. Absent proof that Movant's consultation with her counsel ensued to further an ongoing or imminent unlawful act, the crime-fraud exception is impotent to invalidate the privilege afforded attorney-client communications and attorney work-product. *In Re Sealed Case*, 107 F. 3d 36, 49.

c. Movant's Appeal Contends the OIC's *Ex Parte* Submission Violated Due Process and Was Improperly Considered in Ruling the Crime-Fraud Exception Applied.

To begin, the *ex parte* submission by the OIC for review by the Court in determining whether the crime-fraud exception applies herein is unprecedented. In fact, the exclusive decisional authority upon which the OIC relies in support of its

submission, *In re Sealed Case*, 676 F.2d 793, 814 (D.C.Cir. 1982), is inapposite. In *In re Sealed Case*, the Court considered, *in camera*, the information claimed as privileged, submitted by the holder of the privilege. Clearly, this was done in order to maintain confidential status of the information prior to the decision on whether the privilege was defeated. There is no prevailing authority to support the OIC's unilateral, *ex parte* submission of information proffered to defeat the privilege afforded to Mr. Carter and Movant as counsel and client. In that neither Mr. Carter, nor Movant, was given an opportunity to review, or to refute, the submission by the OIC, and in that the information, absent Movant's educated response, was considered in violation of federal evidentiary law requiring completeness[5] the information was inappropriately considered by the Court in issuing its March 31, 1998, Order denying Mr. Carter's Motion to Quash Subpoenas.

Additionally, the totality of information submitted by the OIC, specifically, the intercepted communications obtained by Linda Tripp, addressed in further detail, *infra*, was not entitled to be considered by the Court *in camera* based merely upon the OIC's unilateral assertions of grand jury secrecy under Rule 6(e), or simply because the information may, in the future, be

[5] *Please see, Federal Rules of Evidence*, Rule 106.

introduced before the grand jury. *In Re Grand Jury Impanelled October 2, 1973,* 510 F.Supp. 112, 115 (D.D.C. 1981)(Pre-existing documents not entitled to secrecy merely because disclosed before a grand jury.); *Securities and Exchange Com'n v. Dreser Indus.,* 628 F.2d 1368, 1382-84 (D.C.Cir.)(en banc)(Rule 6(e) does not provide a veil of secrecy over information merely because the information had been, or was being, submitted to a grand jury.) *cert. denied,* 449 U.S. 993 (1980); *see also,* Rule 6(e).

Finally, even in the event the totality of information submitted to the Court falls within the shroud of secrecy created under Rule 6(e), the information is permitted to be disclosed to an individual under several circumstances. First, the information may be disclosed when the balance of equities favors the individual's interest in a fair determination of the issue at bar over the government's interest in secrecy. *In Re Taylor,* 567 F.2d _____, 1188; *In Re Antitrust Grand Jury,* 805 F.2d 155, 161-162 (6thCir. 1986).

Here, Movant, and her former counsel, Mr. Carter, sought, and should have been permitted disclosure of the information reviewed *in camera* in order to refute contentions that Movant waived the confidentiality otherwise afforded her communications with her then-counsel. Movant's interest in maintaining that confidentiality, in turn, includes, *inter alia,* her interest against potential compulsory self-incrimination. In that Movant

and Mr. Carter merely sought disclosure to themselves and their respective legal representation, in proceedings which remain under seal, in order to determine whether something so sacred as the privileges of attorney-client communications and attorney work-product should be invaded, the equities balanced in favor of the limited disclosure requested and necessary under the circumstances.

Second, otherwise secret information may be revealed upon the demonstration of an individual of a particularized need. Particularized need, in turn, exists when the individual seeking disclosure has shown (1) The material sought is needed to avoid a possible injustice in another judicial proceeding; (2) The need is for disclosure is greater than the need for continued secrecy; and, (3) The request is structured to obtain only the material needed. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 211, 219 & Note 10 (1979). As the foregoing shows, both Mr. Carter and Movant demonstrated the particularized need upon which disclosure of otherwise secret materials may be based.

Third, at the very least, the entirety of the communications intercepted by Linda Tripp are required to be disclosed to Mr. Carter and Movant pursuant to federal statute. *Please see,* 18 U.S.C. § 2518(10)(a). However, this was not accomplished, denying the due process to which Mr. Carter and Movant were entitled in their attempt to showing that the subpoenas issued to

Mr. Carter should not be judicially sanctioned.

Consequently, the *ex parte* submission by the OIC, which neither Mr. Carter, nor Movant was given an opportunity to review, or to refute, was not properly considered by the Court in its determination of whether the crime-fraud exception applies herein. Therefore, the OIC failed to submit information sufficient to defeat Mr. Carter and Movant's assertions of attorney-client privilege and attorney work-product doctrine. Whether Movant was improperly stripped of the confidentiality afforded attorney-client communications and attorney work-product is a serious and difficult issue presented by Movant's appeal, tipping the balance of the equities in favor of issuing a stay pending appeal.

d. Movant's Appeal Contends the OIC's *Ex Parte* Submission Included Illegally Obtained Intercepted Communications which were Improperly Considered in Ruling the Crime-Fraud Exception Applied.

Movant understands that at least a portion of the OIC's *ex parte* submission in support of its opposition to Mr. Carter's motion contained communications between Movant and Linda Tripp, illegally intercepted by Ms. Tripp. Consideration of these recordings in determining that the crime-fraud exception applied to defeat Mr. Carter and Movant's claims of privilege was improper pursuant to Title III of the Omnibus Crime Control and

Safe streets Act of 1968, 18 U.S.C. §§ 2510-2520, the statutory law governing the interception and use of communications. [6] Consequently, there was no proper showing by the OIC sufficient to defeat the claims of privilege and sufficient support this Court's order compelling Mr. Carter to breach the privileges by complying with the subpoenas at issue.

Secretly recorded communications, otherwise permitted pursuant to 18 U.S.C. § 2511(2)(d), are forbidden where the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or of any law of the United States or of any State. *Id.* *See also, Biton v. Menda,* 796 F.Supp. 631, 633 (D.P.R. 1992). As the following unequivocally shows, the communications were obtained in violation of the criminal and tort law of Maryland, Ms. Tripp's residential state.

To begin, Md. Code § 10-401 (a)(1)-(3), (c)(3), and § 1-=401(a) make Ms. Tripp's actions of secretly recording oral communications, absent Movant's consent, both criminal and tortious. Federal courts have noted that where a state enacts more stringent requirements for wiretapping, the federal courts

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[6] Specifically, *please see,* 18 U.S.C. §§ 2515 and 2518, which prohibit use of such tapes, and any derivatory evidence, in all judicial proceedings.

are to apply the more stringent state statutory requirements. *United States v. Marion*, 535 F.2d 697, 702 (2ndCir. 1976); *United States v. Vario*, 943 F.2d 236, 244 (2ndCir. 1991) *cert. denied*, 502 U.S. 1036 (1992).

Additionally, in *Boddie v. American Broadcasting Companies, Inc.*, 731 F.2d 333 (6th Cir. 1984), the Court noted that one intent of Section 2511(d)(2) was to prohibit a recording made "for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him." *Id.*, at 338. Thus, secretly recording another person for the ulterior motive of publicly embarrassing that person is a tortious act under Title III. *See also, Simpson v. Simpson*, 490 F.2d 803 (5thCir. 1974)(Where husband secretly recorded wife's compromising conversation with another man, and played the recording to an attorney, friends, and family members which was publicly embarrassing to wife, husband's recording was illegal.)

Here, it is an understatement to say that Ms. Tripp's actions have publicly embarrassed Movant. Ms. Tripp knew that allegations of an affair between the President of the United States and Movant would embarrass both the President and Movant, and would further Ms. Tripp's personal motivations in attempting to discredit the Presidency and Movant in the course of the *Jones v. Clinton* litigation. The communications between Movant and Ms. Tripp, intercepted with Ms. Tripp's knowing intent to publicly

embarrass Movant and the President, were therefore illegally made.

Ms. Tripp's actions are also in violation of Maryland law regarding the tort of intentional infliction of emotional distress. Damages for this tort are awarded when a person: (1) engages in intentional or reckless conduct; (2) that is extreme and outrageous; (3) and causes severe emotional distress. *Harris v. Jones,* 281 Md. 5601 (1977). Movant can show each of these elements. Ms. Tripp's outrageous acts constitute the ultimate act of betrayal. Further, her acts unquestionably caused Movant grave emotional distress and indeed, have ruined Movant's personal and professional life via the scandalous and slanderous media report which have issued about Movant subsequent to the release of Ms. Tripp's tapes, and via the withdrawal of Movant's offer for employment from Revlon Corporation after release of the tapes.

Finally, Ms. Tripp's actions are constitute the tort of invasion of privacy under Maryland tort law. Damages for this tort are awarded where a person publicizes a matter concerning the private life of another, if the matter publicized is a kind that: (1) would be highly offensive to a reasonable person; and (2) is not of legitimate concern to the public. *Bilney v. Evening Star Newspaper Company,* 43 Md. App. 560, 571 (1979). The

public release of highly confidential and very private information about one's sex life would be highly offensive to anyone. As discussed above, the results have been disastrous for Movant.

18 U.S.C. § 2518(10)(a) permits and validates Movant's claim that the OIC's *ex parte* proffer of any communications intercepted by Ms. Tripp was improper:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that --(i) the communication was unlawfully intercepted...*Id.* (Emphasis added.)

In that the communications intercepted by Ms. Tripp which were utilized by the OIC were committed in violation of law, the OIC's proffer to this Court in opposition to Mr. Carter's motion, was illegally submitted, and improperly considered by the Court in ruling that the crime-fraud exception applied to defeat the claims of privilege. Movant's appeal addresses this serious and difficult issue, a temporary stay should be granted pending the appeal.

e. Movant's Appeal Contends the OIC's *Ex Parte* Submission Failed to Establish the Elements of any Unlawful Act and, Even in the Event it Did, the Alleged Unlawful Act is Insufficient to Support Piercing of the Privileges at Issue.

Even in the event the OIC's *ex parte* submission can properly be considered by the Court in the determination of whether the crime-fraud exception applies, the proffer apparently submitted fails to establish the elements of the unlawful acts in which Movant is alleged to have engaged, *supra*. At most, through use of covertly recorded intercepted communications, which Movant contends were obtained in violation of federal wiretapping statute, *supra*, the OIC has suggested the existence of unsworn prior inconsistent statements allegedly made by Movant. This does not the crimes of perjury, or false affidavit, make.

To prove perjury, it must be shown that Movant made a knowing and willful false statement under oath in a proceeding authorizing sworn testimony under federal law regarding a fact material to the proceeding. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). However, the sole "evidence" upon which the OIC relies to support its allegations of perjury and false affidavit is Movant's own, uncorroborated, unsworn, prior statements. Such uncorroborated, unsworn prior statements are insufficient to establish the falsity of a statement of a defendant submitted under oath. *United States v. Haldeman*, 559 F.2d 31, 97 n.185 (D.C.Cir. 1976).

Further, pursuant to *United States v. Cross*, 638 F.2d 1375, 1378 (5th Cir.), *modified*, 655 F.2d 50 (1981), the OIC's proffer

is also insufficient to establish false affidavit by Movant under 18 U.S.C. § 1623. There, the Court held that two inconsistent statements, only one of which is made under oath, absent independent corroboration, cannot support a conclusion that the statement under oath is false. In fact, the government itself has asserted, and relied upon, the validity of a sworn statement when confronted with an inconsistent unsworn statement, and federal courts have confirmed the government's ability to rely on the credibility of the sworn statement. *Price v. United States,* 545 A.2d 1219, 1224 (D.C. 1976). Additionally, an inconsistent statement given under oath is admissible not merely for impeachment, but as non-hearsay testimony admissible for the truth of the matter asserted. *Federal Rules of Evidence,* Rule 801(d)(1).

Finally, the Presiding Judge in *Jones v. Clinton* has rendered inadmissible at trial the issue about which Movant was subpoenaed to testify, and about which Movant's affidavit was drafted. Consequently, even assuming, *arguendo,* that a false affidavit was submitted regarding Movant's private, sexual life, such a false statement hardly justifies complete invalidation of the usually inviolable confidentiality of attorney-client communications and attorney work-product:

> [T]he violation involved must be of sufficient weight to warrant abridging the privilege..."No court should order disclosure...if disclosure would traumatize the

adversary process more than the underlying legal misbehavior.

In Re Sealed Case, 676 F.2d 793, 815 (D.C.Cir. 1982).

Pending the appellate court's consideration of the serious and difficult issues presented above, this Court should issue a temporary stay.

2. Whether Movant's Privilege against Compulsory Self-Incrimination under the Fifth Amendment to the U.S. Constitution Was Violated is at Issue.

Movant's appeal contends the privilege of confidentiality attendant to attorney-client communications and attorney work product applies, without exception, to the testimony and documents requested in the portions of the grand jury subpoenas with which this Court has compelled Mr. Carter to comply pursuant to the March 31, 1998, Order which is the subject matter of the instant motion for stay. As set forth in detail above, Movant's appeal contends that the crime-fraud exception was improperly, impermissibly, applied to the instant matter to defeat Mr. Carter and Movant's claims of privilege.

Although Movant vehemently asserts that no unlawful act was intended or committed by her in connection with the *Jones v. Clinton* litigation, there exists the possibility that: (1) the appellate court will find that the crime-fraud exception was improperly applied by this Court to impermissibly defeat the privileges attendant to attorney client communications and

attorney work-product, thereby reviving the privileged nature of the communications and documents; *and* (2) Movant is nonetheless found to have committed some unlawful act, the elements of which might be established through the improper disclosure of attorney-client communications and attorney work-product compelled by this Court's March 31, 1998, Order.

Should this very plausible scenario ensue, testimony rendered, or documents produced, by Mr. Carter before the grand jury *prior to the appellate court ruling on Movant's appeal* would equate with Movant's compulsory self-incrimination, abridging her 5th Amendment right to be free of such. Please see, *U.S. v. Doe*, 465 U.S. 605, 612-616; *Perlman, supra*, at 13, 16 (Where Court found that 5th Amendment privilege did not apply to documents and communications ordered impounded by the District Court only because petitioner had previously voluntarily produced the information in prior judicial proceeding.)

In the face of such a serious and difficult issue on appeal, the instant request for a temporary stay should be granted.

3. Whether the Grand Jury Subpoenas Were Unreasonable and Should Not Have Been Enforced is at Issue.

Movant's appeal contends that the subpoenas at issue should have been quashed by this Court pursuant to the Court's supervisory powers granted under Rule 17(c) to review the

reasonableness of the subpoena issued to Mr. Carter seeking violation of the confidentiality of attorney-client communications and attorney work-product. In its inquiry, the Court is required to consider the totality of the circumstances in the case at bar to determine whether the subpoena was reasonable. *United States v. R. Enterprises,* 498 U.S. 292, 299 (1991). In that the subpoenas which were issued were a direct product of the OIC's illegal contact with Movant, the subpoenas are unreasonable, and, therefore, unenforceable.

D.C. Rules of Professional Conduct, Rule 4.2, forbids the OIC's marathon, several hour interrogation of, and contact with, Movant, which the OIC concedes transpired on January 16, 1998. On that date, as the OIC also concedes, the OIC communicated with Movant directly and attempted to negotiate with her an immunity agreement, absent the presence and mediation of her then-counsel, Mr. Carter, whom the OIC also concedes to have known represented Movant on that date.

Rule 4.2 forbids contact by the OIC attorneys and agents with "any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.) *Id.,* Comment 4. The OIC communicated, and attempted to negotiate an immunity agreement with Movant, regarding the affidavit executed and submitted by Movant, under oath, in the *Jones v. Clinton* litigation. Movant, in turn, had

previously retained her then-counsel, Mr. Carter, exclusively to represent her interests, and to provide legal advice. Consequently, the prohibition of Rule 4.2 applies to the OIC's conduct herein.

As the Court's March 31, 1998, *Memorandum Opinion* conceded, the OIC's direct contact with Movant was not merely unprofessional, but improper, and impermissibly disrupted the attorney-client relationship. Further, this Court held the OIC's improper contact with Movant warranted referral to the Department of Justice Office of Professional Responsibility for investigation. *See, Memorandum Opinion,* at 19.

Movant contends that, based upon the OIC's undisputed impermissible conduct, the subpoenas at issue, which arose directly from the OIC's prohibited contact with Movant, should have been deemed unreasonable, and invalidated, by this Court. Due to the serious and difficult issue of whether the subject subpoenas are unreasonable, and therefore, invalid, the Court should issue the stay requested, pending the appellate court's determination.

4. Whether the OIC Committed Unlawful Acts in Obtaining and Presenting Information Allegedly Implicating Movant is at Issue.

Movant's appeal seeks a finding by the appellate court as to whether the OIC committed unlawful acts in procuring and

submitting information to this Court, *ex parte*, in support of the OIC's opposition to Mr. Carter's motion, in violation of federal wiretapping law codified in Title III, and in violation of other federal statutory, regulatory, and decisional authorities, as discussed above. Such governmental wrongdoings and intrusions upon the individual's rights under the United States Constitution and laws, is an issue of sufficient seriousness and difficulty to balance the equities in favor of granting the requested stay, pending the appellate court's decision on Movant's appeal.

In summary, as previously referenced, where the proponent of the stay has demonstrated that irreparable injury will ensue absent issuance of the stay, and/or has demonstrated serious and difficult legal issues to be decided upon appeal, the proponent needn't establish a high probability of prevailing on the merits at appeal. *Cuomo, supra*, at 974. Rather, in the balancing of hardships, stay should be granted to preserve the status quo pending the proponent's appeal *Id.*, at 974.

Movant herein has certainly established the irreparable harm which she will endure in the absence of the stay requested herein. Additionally, she has shown the gravity and difficulty of the multiple issues her appeal presents. Consequently, although Movant believes she has established the likelihood of her success on appeal, prevailing authority requires that stay be

issued whether or not the Court agrees such a showing has been made.

Stays Granted in Similar Cases

Under similar circumstances stays have been granted to protect the client's privilege pending appeal in a number of cases. See e.g. In Re Sealed Case, 107 F.3d 46 (D.C. Cir 1997) (stay granted by District Court); In Re Sealed Case, 29 F.3d 715 (D.C. Cir 1994) (stay granted by Court of Appeals).

CONCLUSION

Pursuant to the foregoing, Movant respectfully requests that this Court issue a stay of enforcement of its March 31, 1998, Order denying Mr. Carter's Motion to Quash Subpoenas Duces Tecum and Ad Testificandum pending Movant's appropriate appeal of that Order.

Respectfully Submitted,

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, ORINGHER & RICHMAN
10100 Santa Monica Blvd, 8th Fl
Los Angeles, California 90067
(310) 557-2009

Nathaniel R. Speights 952036
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-1419
(202) 783-6300

Counsel for Monica Lewinsky

CERTIFICATE OF SERVICE

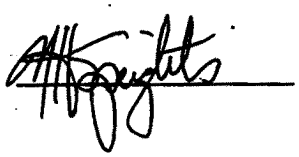
I HEREBY CERTIFY that a true and correct copy of the foregoing, Memorandum of Law was mailed, United States Postage first class prepaid and telecopied this 28 day of April, 1998 to:

Kenneth W. Starr, Esquire
Robert Bittman, Esquire
Michael W. Emmick, Esquire
Office of the Independent Counsel
1001 Pennsylvania Ave, N.W.
Washington DC 20004

(202 514-8688)

Prof. Charles J. Ogletree, Jr.
Prof. Jamie S. Gardner
Harvard Law School
320 Hauser Hall
Cambridge Mass. 02138

(617 496 2277)



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	:	
	:	**Misc No. 98-00068 (NHJ)**
FEDERAL GRAND JURY	:	
PROCEEDING	:	
	:	**UNDER SEAL**

ORDER

THIS matter having come before the Court on the motion of Monica Lewinsky for an Order of Stay pending appeal the Court being well advised, it is,

ORDERED, that said motion be Granted.

Norma Holloway Johnson
Chief Judge

WILLIAM H. GINSBURG
GINSBURG, STEPHAN, ORINGHER & RICHMAN
10100 Santa Monica Blvd, 8th Fl
Los Angeles, California 90067

Nathaniel H. Speights
SPEIGHTS & MITCHELL
1511 K Street N.W. Suite 811
WASHINGTON D.C. 20005-141

Kenneth W. Starr, Esquire
Robert Bittman, Esquire
Michael W. Emmick, Esquire
Office of the Independent Counsel
1001 Pennsylvania Ave, N.W.
Washington DC 20004

Prof. Charles J. Ogletree, Jr.
Prof. Jamie S. Gardner
Harvard Law School
320 Hauser Hall
Cambridge Mass. 02138

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	**(Filed Under Seal)**
AD TESTIFICANDUM #D937	:	

MOTION TO JOIN MOTION FOR STAY PENDING APPEAL
AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

Francis D. Carter, Esquire, through undersigned counsel, respectfully joins the Motion to Stay enforcement of the above subpoenas pending appeal filed by the real party in interest, Monica S. Lewinsky, and hereby adopts by reference all of the arguments made by Ms. Lewinsky. A hearing is requested on the Motion for Stay. In support of these requests, counsel for Mr. Carter state as follows:

Mr. Carter joins in Ms. Lewinsky's request for a stay pending appeal of this Court's March 31, 1998, order denying the Motion to Quash Subpoenas. As Mr. Carter's counsel have informed both Ms. Lewinsky and the Office of the Independent Counsel, he is prepared to comply with the subpoenas if ordered by the Court to do so. See Declaration of Francis D. Carter, Esquire, attached. However, for the reasons set forth in Ms. Lewinsky's Motion for Stay, she is entitled to a stay of the enforcement of the subpoenas to allow appellate review of the important and difficult issues raised before this Court. Unless a stay is granted, Ms. Lewinsky will have absolutely no opportunity for review because Mr. Carter will comply with the subpoenas rather than suffer a contempt citation.

As Ms. Lewinsky's former counsel, Mr. Carter is obligated to preserve the confidences and secrets of his former client. D.C. Rules of Professional Conduct 1.6. He therefore joins in her request to stay enforcement of these subpoenas pending review in the appellate court.

In addition, Mr. Carter and Ms. Lewinsky request that this Court hold a hearing in advance of May 4, 1998, on the Motion for Stay. Mr. Carter is currently scheduled to appear before the grand jury, pursuant to the subpoenas, on Tuesday, May 5, 1998. The Office of the Independent Counsel has indicated to counsel its opposition to any continuance of that date in the absence of a stay. In addition, the United States Court of Appeals for the D.C. Circuit has issued an order requesting that the parties file motions on or before May 4, 1998, to govern the further proceedings in the appeal. See Order, attached. The status of the enforcement of the subpoena will have a bearing on the parties' requests in the Court of Appeals and obviously will affect the May 5th appearance date. Finally, if this Court denies this request, the parties will be seeking a stay from the Court of Appeals. See Fed. R. App. Proc. 8(a).

Wherefore, for the reason set forth above and for the reasons set forth in Ms. Lewinsky's Motion for Stay, and for any other reasons that my appear to the Court at a hearing, Mr. Carter respectfully requests that the Court stay enforcement of the subpoenas.

Respectfully submitted,

Charles J. Ogletree, Jr.
#272658

Jamie S. Gardner
#375811
Counsel for
Francis D. Carter, Esquire
Harvard Law School
320 Hauser Hall
Cambridge MA 02138
(617) 495-5097

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Join Motion to Stay and Points and Authorities in Support Thereof, as well as all attachments, have been served, by first class mail and by hand, upon Tom Bienert, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and upon Counsel for Monica Lewinsky, Nathaniel H. Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005, and by first class mail upon William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Boulevard, Los Angeles, CA 90067, this 25th day of April, 1998.

Charles J. Ogletree, Jr.

DECLARATION OF FRANCIS D. CARTER, ESQUIRE

I, Francis D. Carter, Esquire, do hereby declare:

1. I have been informed by my attorneys that my appearance before the grand jury pursuant to Subpoenas #D902 and #D937 is currently scheduled for May 5, 1998.

2. I am not willing to suffer a contempt citation and therefore, if compelled by the Court to do so, I will comply with the subpoenas.

I hereby declare that the foregoing is true to the best of my knowledge. Signed under the penalties of perjury this 2nd day of April, 1998.

Francis D. Carter, Esquire

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3052 **September Term, 1997**
98ms00068

In re: Sealed Case, No. 98-3052

98-3053 98ms00068

In re: Sealed Case, No. 98-3053

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA
FILED
APR 23 1998
CLERK

ORDER

Upon consideration of the notices of appeal and the district court record, which indicates the pendency of requests for reconsideration of the March 31, 1998 order, it is

ORDERED, on the court's own motion, that the above-captioned cases be consolidated. It is

FURTHER ORDERED, on the court's own motion, that the parties file, within ten days of the date of this order, motions to govern further proceedings herein.

FOR THE COURT:
Mark J. Langer, Clerk

BY: _____
Deputy Clerk/LD

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
	:	Misc. No. 98-068 (NHJ)
DUCES TECUM #D902	:	
	:	**(Filed Under Seal)**
AD TESTIFICANDUM #D937	:	

ORDER

Upon consideration of the Motion to Join Motion for Stay and Points and Authorities in Support Thereof, it is this _____ day of _____,

ORDERED that the Motion to Join Motion for Stay is hereby GRANTED; and it is

FURTHER ORDERED that the Motion for Stay pending appeal is GRANTED.

_____
Norma Holloway Johnson
Chief Judge

Copies:

Charles J. Ogletree, Jr., Esquire
Jamie S. Gardner, Esquire
320 Hauser Hall
Harvard Law School
Cambridge, MA 02138

Francis D. Carter, Esquire
Carter & Varrone
Suite 510, 1341 G Street, N.W.
Washington, D.C. 20005

Nathaniel Speights, Esquire
William Ginsburg, Esquire
Speights & Mitchell
1511 K Street, N.W.
Washington, D.C. 20005

Tom Bienert
Associate Independent Counsel
Office of
the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

RECEIVED
APR 30 1998
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

RESPONSE OF THE UNITED STATES OF AMERICA
TO MOTION FOR STAY OF ENFORCEMENT OF ORDER PENDING APPEAL

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Response to the Motion of Monica S. Lewinsky to stay the enforcement of this Court order in this miscellaneous action pending appeal. Counsel for Ms. Lewinsky represents that it will join the United States in requesting expedited consideration in the Court of Appeals. See Mem. in Supp. at 8. With this understanding, the United States does not oppose Ms. Lewinsky's motion. The United States reserves the right to ask this Court to remove any stay if Ms. Lewinsky opposes the United States's motion for expedited consideration or otherwise seeks to delay appellate consideration of this matter.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Response of the United States of America to Motion for Stay of Enforcement of Order Pending Appeal, was served via hand delivery or Federal Express next business day delivery on this the 30th day of April, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

J. Forrest Norman

(UNDER SEAL (

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO
FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
APR 30 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

On March 31, 1998, this Court denied in substantial part the motion of Francis Carter to quash a subpoena duces tecum and a subpoena ad testificandum. Mr. Carter is scheduled to testify before the grand jury on Tuesday, May 5, 1998. Before the Court now are Monica Lewinsky's motion for stay of enforcement of this Order pending appeal and Frank Carter's motion to join Monica Lewinsky's motion for stay. The Office of Independent Counsel does not oppose the motion for stay given the representation of Ms. Lewinsky's counsel that she will join in requesting expedited consideration of this matter by the Court of Appeals.

The Court finds that Ms. Lewinsky meets the well-known standard for a stay pending appeal enunciated in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). She would likely suffer irreparable harm were the Court to refuse to stay this matter and there is no indication that a stay pending an expedited appeal would result in substantial harm to the investigation of the Office of Independent Counsel.

Accordingly, it is this 30th day of April 1998,

ORDERED that Monica Lewinsky's motion for stay of enforcement of Order pending appeal be, and hereby is, granted; it is further

ORDERED that Frank Carter's motion to join motion for stay pending appeal be, and hereby is, granted; and it is further

ORDERED that enforcement of the Court's Order of March 31, 1998 be, and hereby is, stayed pending disposition of this matter by the Court of Appeals of the District of Columbia Circuit.

Norma Holloway Johnson

NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

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APR 2 0

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

NOTICE OF APPEAL

Notice is hereby given this 30th day of April, 1998, that the United States of America, by Kenneth W. Starr, Independent Counsel, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31st day of March, 1998, as amended on the 28th day of April, 1998, in favor of Monica S. Lewinsky and Francis D. Carter, Esq. against said United States of America.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

RECEIVED
MAY 01 1998
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

SECTION 3731 CERTIFICATE

On April 30, 1998, the United States of America, by Kenneth W. Starr, Independent Counsel, appealed to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 31st day of March, 1998, as amended on the 28th day of April, 1998, in favor of Monica S. Lewinsky and Francis D. Carter, Esq. against said United States of America. This appeal was pursuant to 18 U.S.C. § 3731. The § 3731 certificate need not accompany the notice of appeal. See United States v. Smith, 135 F.3d 963, 967-68 (5th Cir. 1998).

I hereby certify that this appeal is not taken for the purpose of delay and that, to the best of my knowledge and belief, the evidence suppressed by the Court's order is a substantial proof of a fact material in the proceeding.

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Notice of Appeals, was served via hand delivery or Federal Express next business day delivery on this the 30th day of April, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

These are all the parties requiring service by the Clerk of the District Court under Fed. R. App. P. 3(d).

J. Forrest Norman

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Section 3731 Certificate, was served via hand delivery or facsimile and Federal Express next business day delivery on this the 1st day of May, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

Caitlin C. Antowicz

RECEIVED
MAY 07 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

MOTION OF THE UNITED STATES OF AMERICA FOR RELEASE OF HEARING TRANSCRIPT

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this motion for the release of the transcript of the March 4, 1998, hearing to all parties to this action. Initial briefs in the appeal of the Court's order in this miscellaneous action are due on May 11, 1998, at 4 p.m. The Office of Independent Counsel ("OIC") has been advised by counsel for Francis D. Carter, Esq. that the transcript cannot be released to the parties without an order from this Court. We also understand that Mr. Carter has filed a motion for release of the transcript to his counsel. We support that motion and further respectfully request that the Court order the release of the transcript to all parties.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Jackie M. Bennett, Jr.
Deputy Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	**Misc. No. 98-68 (NHJ)**
	)	
	)	**(Under Seal)**

ORDER

Upon consideration of the Motion of the United States of America for Release of Hearing Transcript, IT IS HEREBY ORDERED that the Motion is GRANTED. The transcript of the March 4, 1998, hearing shall be released to all parties that argued before the Court.

_____ ___, 1998

NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Motion of the United States of America for Release of Hearing Transcript, was served via hand delivery or facsimile and Federal Express next business day delivery on this the 7th day of May, 1998, to:

Prof. Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

J. Forrest Norman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
DUCES TECUM #D902	:	Misc. No. 98-068 (NHJ)
AD TESTIFICANDUM #D937	:	FILED UNDER SEAL

FRANCIS D. CARTER'S MOTION
FOR RELEASE OF HEARING TRANSCRIPT

Comes now Francis D. Carter, through counsel, and moves this Court for the release of the transcript of a closed hearing conducted by this Court on March 4, 1998.

On February 17, 1998, Mr. Carter filed his Motion to Quash Subpoena Duces Tecum and Subpoena Ad Testificandum. After other pleadings were filed with this Court, a closed hearing was held by this Court on March 4, 1998. On March 31, 1998, this Court issued its Memorandum Opinion and Separate Order. This was modified, after some additional pleadings were filed, by an Amended Memorandum Opinion filed April 28, 1998.

Mr. Carter has filed a Notice of Appeal of these rulings. On May 5, 1998, the United States Court of Appeals for the District of Columbia Circuit issued a briefing schedule which will require Mr. Carter to file his brief on Monday, May 11, 1998. Mr. Gordon Slodysko, the court reporter for this Court, has advised that the proceeding of March 4, 1998, has already been transcribed, but that he cannot release it to Mr. Carter without an Order from this

Court.

Counsel for Ms. Lewinsky, Mr. Speights, and Associate Independent Counsel Joseph Ditkoff both have authorized the undersigned to represent that they have no objection to this Motion being granted.

WHEREFORE, the foregoing being considered, Mr. Carter prays that this Court GRANT this Motion and enter an Order releasing a copy of the transcript to Mr. Carter and his counsel.

Respectfully submitted,

CHARLES J. OGLETREE, ESQ.
Bar No. 272658

JAMIE S. GARDNER, ESQ.
Bar No. 375811
Counsel for Mr. Carter

Harvard law School
320 Hauser Hall
Cambridge, MA 02138
(617) 495-5097

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Francis D. Carter's Motion for Release of Hearing Transcript was delivered by hand, this 7th day of May, 1998, to the office of:

Independent Counsel Kenneth Starr
1001 Pennsylvania Avenue, N.W.
Suite 490-N
Washington, D.C. 20004

Nathaniel H. Speights, Esq.
Speights and Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

and mailed, first class postage prepaid to the office of:

William Ginsburg, Esq.
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard
Eighth Floor
Los Angeles, CA 90067

JAMIE S. GARDNER, ESQ

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS	:	
DUCES TECUM #D902	:	Misc. No. 98-068 (NHJ)
AD TESTIFICANDUM #D937	:	FILED UNDER SEAL

ORDER

This matter having been considered upon Francis D. Carter's Motion for Release of Hearing Transcript and the record herein, it is

This _____ day of May, 1998:

ORDERED, that Francis D. Carter's Motion for Release of Hearing Transcript shall be, and hereby is, GRANTED, and it is further,

ORDERED, that Mr. Gordon Slodysko, the Court Reporter, who transcribed the March 4, 1998 proceeding in this case, shall release the transcript to counsel for Mr. Carter and to the United States Court of Appeals for the District of Columbia Circuit.

_____
UNITED STATES DISTRICT CHIEF JUDGE

cc: Charles J. Ogletree, Esq.
Jamie S. Gardner, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Independent Counsel Kenneth Starr
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Nathaniel H. Speights, Esq.
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1511 K Street, N.W.
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Washington, D.C. 20005-1419

William Ginsburg, Esq.
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10100 Santa Monica Boulevard
Eighth Floor
Los Angeles, CA 90067

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS :

DUCES TECUM #D902 : Misc. No. 98-068 (NHJ)

AD TESTIFICANDUM #D937 : FILED UNDER SEAL

FILED
MAY - 7 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

This matter having been considered upon Francis D. Carter's Motion for Release of Hearing Transcript and the record herein, it is

This 7th day of May, 1998:

ORDERED, that Francis D. Carter's Motion for Release of Hearing Transcript shall be, and hereby is, GRANTED, and it is further,

ORDERED, that Mr. Gordon Slodysko, the Court Reporter, who transcribed the March 4, 1998 proceeding in this case, shall release the transcript to counsel for Mr. Carter and to the United States Court of Appeals for the District of Columbia Circuit.

Norma Holloway Johnson
UNITED STATES DISTRICT CHIEF JUDGE

cc: Charles J. Ogletree, Esq.
Jamie S. Gardner, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Independent Counsel Kenneth Starr
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

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Speights and Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William Ginsburg, Esq.
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Boulevard
Eighth Floor
Los Angeles, CA 90067

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

FILED

MAY - 8 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the Motion of the United States of America for Release of Hearing Transcript, IT IS HEREBY ORDERED that the Motion is GRANTED. The transcript of the March 4, 1998, hearing shall be released to all parties that argued before the Court.

May 7, 1998

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

26

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3052 **September Term, 1997**
98ms00068

In re: Sealed Case, No. 98-3052

98-3053 98ms00068

In re: Sealed Case, No. 98-3053

UNITED STATES COURT OF
FOR DISTRICT OF COLUMBIA
FILED
APR 23 1998
CLERK

ORDER

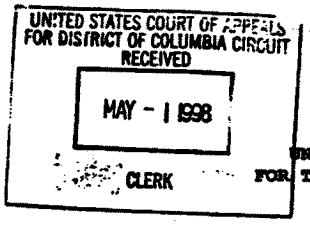
Upon consideration of the notices of appeal and the district court record, which indicates the pendency of requests for reconsideration of the March 31, 1998 order, it is

ORDERED, on the court's own motion, that the above-captioned cases be consolidated. It is

FURTHER ORDERED, on the court's own motion, that the parties file, within ten days of the date of this order, motions to govern further proceedings herein.

FOR THE COURT:
Mark J. Langer, Clerk

BY: _____
Deputy Clerk/LD



UNDER SEAL

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052 & 98-3053

IN RE: SEALED CASE

MONICA S. LEWINSKY;
FRANCIS D. CARTER, ESQ., Appellants-Cross Appellees,

v.

UNITED STATES OF AMERICA, Appellee-Cross Appellant.

MOTION OF THE UNITED STATES OF AMERICA TO EXPEDITE CONSIDERATION OF THE APPEAL AND FOR AN ABBREVIATED BRIEFING SCHEDULE

The United States of America, by Kenneth W. Starr, Independent Counsel, Appellee and Cross-Appellant, respectfully submits this motion for expedited consideration of this appeal and for an abbreviated briefing schedule.[1] Expedited consideration is automatic under 18 U.S.C. § 3731, D.C. Cir. R. 47.2(a), and parts VIII.B and III.J of this Court's HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES ("HANDBOOK"). Out of an abundance of caution, however, the United States respectfully submits this

[1] In a separate motion filed with this Court, the United States moves for summary dismissal of the appeal of Francis D. Carter, Esq. for want of jurisdiction. The United States, however, does not challenge the jurisdictional basis for Monica S. Lewinsky's appeal at this time. Thus, granting that motion will not moot this motion for expedited review.

motion.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

In late 1997, Monica S. Lewinsky received a subpoena to produce items and to testify in *Paula Jones v. William Jefferson Clinton*, a civil matter then pending in the Eastern District of Arkansas. She retained Francis D. Carter, Esq. to represent her in filing a motion to quash this subpoena. This motion included an affidavit of Ms. Lewinsky as an exhibit. The district court found that the United States's evidence shows that Ms. Lewinsky hired Mr. Carter with the intent and the express purpose to further perjury and obstruction of justice. *See* Mem. Op. at 4.[3]

On January 16, 1998, at Attorney General Janet Reno's request, a Special Division of this Court expanded the jurisdiction of the Office of Independent Counsel ("OIC") to include an investigation into whether Monica S. Lewinsky or other individuals may have suborned perjury, obstructed justice, or intimidated witnesses in connection with the *Jones v. Clinton* case. In furtherance of this mandate, the grand jury issued two subpoenas to Francis D. Carter, Esq. calling for items and

---

[2] Ms. Lewinsky has represented that she requests an expedited briefing schedule. *See* Attachment F at 8. We have conferred with counsel for Mr. Carter and they do not oppose the motion at this time.

[3] The Court's memorandum opinion was amended on April 28, 1998, to alter a portion incidental to the matters on appeal. The amended opinion is Attachment B.

testimony.

Mr. Carter and Ms. Lewinsky each filed motions before Chief Judge Norma Holloway Johnson to quash the grand jury subpoenas. On March 31, 1998, the district court found that the United States had "amply demonstrated" that the crime-fraud exception vitiated the attorney-client privilege, and ruled that Mr. Carter must testify before the grand jury. *See* Mem. Op. at 4. The court also held that Ms. Lewinsky's Fifth Amendment rights prevent the grand jury from subpoenaing items given by her to Mr. Carter. *See id.* at 11-12. Mr. Carter and Ms. Lewinsky each filed notices of appeal, and the United States cross-appealed, pursuant to 18 U.S.C. § 3731. *See* Attachments C & D.

On April 30, 1998, the Court, in part based on the assumption that the appeal would be expedited, granted Ms. Lewinsky's motion to stay the district court's order pending the disposition of this appeal in the D.C. Circuit. *See* Attachment E. The United States did not oppose the stay, based on Ms. Lewinsky's representation that she would join the United States's request for expedited consideration of the appeal.

II. EXPEDITED CONSIDERATION IS AUTOMATIC IN APPEALS UNDER 18 U.S.C. § 3731.

The United States takes its cross-appeal under 18 U.S.C. § 3731, which, *inter alia*, authorizes an appeal by the government of an order suppressing evidence. The government may appeal an order quashing a grand jury subpoena under § 3731. *See, e.g.*,

United States v. Smith, 135 F.3d 963, 967 (5th Cir. 1998); *United States v. Hirsch* (*In re Grand Jury Subpoenas*), 803 F.2d 493, 495-96 (9th Cir. 1986); *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d 851, 854-55 (3d Cir. 1979); *Nixon v. Sirica*, 487 F.2d 700, 721 n.100 (D.C. Cir. 1973). The § 3731 certificate need not be filed on the same day as the notice of appeal. *See Smith*, 135 F.3d at 967-68.

Because of the disruptive effect of interlocutory appeals in criminal matters, § 3731 mandates diligent prosecution and swift review. *See* D.C. Cir. R. 47.2(a); HANDBOOK, parts III.J, VIII.B. As a result, an expedited briefing and argument schedule is automatic for appeals pursuant to § 3731. *See* HANDBOOK, part VIII.B. The United States has notified the Clerk orally and by writing of this appeal, as required by D.C. Cir. R. 47.2(a).

III. EXPEDITED CONSIDERATION IS WARRANTED UNDER THIS COURT'S STANDARDS.

A. The public has an unusual interest in prompt disposition.

Out of an abundance of caution, the United States addresses here the standards applicable to motions to expedite where expedition is not required by statute. Under part VIII.B of the HANDBOOK, there are two grounds for expedited consideration of an appeal, and either ground alone is sufficient to justify expedited review. The first is that "the public generally" has "an unusual interest in prompt disposition." This appeal meets

this standard.

Until the Office of Independent Counsel ("OIC") can complete its investigation of high public officials, the government faces vast uncertainty and the consequent distractions from the proper administration of the government. As a result, there is tremendous public pressure on the OIC to complete its investigation as soon as possible. See, e.g., USA Today, Apr. 28, 1998, at 6A ("Starr is under intense pressure to wrap up grand jury investigations in Little Rock and Washington."); Newsweek, Apr. 13, 1998, at 26 ("The pressure is now on Starr to put up or shut up. . . . [P]ublic patience is running out."); id. at 30 ("The White House can use privileges and appeals to indefinitely delay Starr's investigation—all the while feeding the popular pressure on Starr to wrap it up."). The public, quite justifiably, desires a prompt resolution to the grand jury's investigation and prompt disposition of this appeal is integral to that goal.

B. The United States has a substantial chance of success on appeal and delay will cause irreparable injury to the United States's interest.

1. Irreparable injury

Under part VIII.B of the HANDBOOK, the other ground for expedited review is that "the decision under review is subject to substantial challenge" and "delay will cause irreparable injury." As demonstrated below, this appeal meets both prongs of the test.

As stated *supra*, the OIC is under intense public pressure to complete its investigation as quickly as possible. Our investigation progresses rapidly, but is stymied by several groundless assertions of privileges. It appears that Ms. Lewinsky gave Mr. Carter items she possessed that were responsive to the *Jones v. Clinton* subpoena. These items may well include gifts from President Clinton to Ms. Lewinsky. These items, if they exist, may have tremendous value in demonstrating whether Ms. Lewinsky or others committed perjury or obstructed justice in the *Jones* case. More importantly, these items may lead to new investigative avenues, producing new and important information for the grand jury's investigation.

Considering the time pressures on the OIC, the United States fears that a delay in obtaining this information may mean that the grand jury will receive it too late to be of use in furthering the investigation. This would cause irreparable injury to the interests of the United States in the due administration of justice.

2. Substantial chance of success on appeal

The United States cross-appealed because the district court erroneously found that production of the items sought by the grand jury subpoena could not be compelled because such compulsion would violate Ms. Lewinsky's rights under the Fifth Amendment against self-incrimination. Generally, when a person

voluntarily gives items to an agent, the government may compel production of those documents from the agent without violating the owner's Fifth Amendment rights. *See Couch v. United States*, 409 U.S. 322, 329 (1973); *In re Grand Jury Investigation*, 921 F.2d 1184 (11th Cir. 1991).

When the items are given to an attorney, however, the attorney-client privilege is implicated. "Where the transfer to the attorney is for the purpose of obtaining legal advice," the attorney-client privilege, rather than the Fifth Amendment, may forbid compelled production. *Fisher v. United States*, 425 U.S. 391, 405. But because items do not become privileged by the mere fact of being given to an attorney, the privilege applies only when the items would have been protected from compelled disclosure under the Fifth Amendment if the client had retained them. *See id.* In sum, the items are protected from compelled production only when (1) they were given to an attorney for the purpose of obtaining legal advice; and (2) the items would have been privileged under the Fifth Amendment if the client had retained them.

The district court concentrated on the second prong, *see* Mem. Op. at 11-12, but overlooked the first prong and the fact that Ms. Lewinsky's attorney-client privilege was vitiated by the crime-fraud exception. *See id.* at 3-5. In the absence of attorney-client privilege, *Fisher* does not apply and the grand

jury is able to compel production of them without granting Ms. Lewinsky act-of-production immunity. The United States has a substantial chance of success on appeal.

IV. EXPEDITED CONSIDERATION IS PARTICULARLY APPROPRIATE, AS MS. LEWINSKY ALREADY HAS PREPARED A SUBSTANTIAL PORTION OF HER APPELLANT BRIEF.

Ms. Lewinsky's memorandum in support of her motion for a stay pending appeal addressed her likelihood of success on appeal in great detail. Her memorandum contained nineteen pages of legal argument concerning the merits of her appeal. *See* Attachment F at 13-31. It contained four argument headings and five subheadings touching on virtually every point raised before the district court. Although Ms. Lewinsky no doubt will wish to expand on her existing briefing, it is evident that she already had done a substantial portion of the research and drafting necessary to prepare an appellant brief. The United States respectfully submits that this fact argues in favor of granting expedited consideration.

V. CONCLUSION

Because the United States has appealed pursuant to 18 U.S.C. § 3731, expedited consideration is automatic under D.C. Cir. R. 47.2(a) and parts III.J and VIII.B of the HANDBOOK. In the alternative, this appeal meets both of the tests for expedited consideration: (1) The public interest strongly favors prompt disposition of this appeal and (2) the United States will suffer

irreparable injury from a delay in an appeal and has a substantial chance of prevailing. The United States respectfully requests that this Court set an expedited briefing and argument schedule.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

Joseph M. Ditkoff
Terrence J. Galligan
Rodger A. Heaton
Associate Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

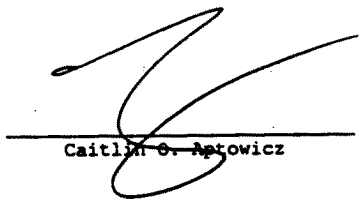
I hereby certify that a true and correct copy of the foregoing, Motion of the United States of America to Expedite Consideration of the Appeal and for an Abbreviated Briefing Schedule, was served via hand delivery on this the 1st day of May, 1998, to:

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

and via facsimile and Federal Express next business day delivery on this the 1st day of May, 1998, to:

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138



Caitlin C. Aptowicz

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
RECEIVED
MAY - 1 1998
CLERK

UNDER SEAL

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052 & 98-3053

IN RE: SEALED CASE

MONICA S. LEWINSKY;
FRANCIS D. CARTER, ESQ., Appellants-Cross Appellees,

v.

UNITED STATES OF AMERICA, Appellee-Cross Appellant.

MOTION OF THE UNITED STATES OF AMERICA FOR SUMMARY DISMISSAL OF APPEAL OF FRANCIS D. CARTER, ESQ. FOR WANT OF JURISDICTION

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this motion for summary dismissal of the appeal of Francis D. Carter, Esq. for want of jurisdiction. Mr. Carter, as a grand jury witness, may not appeal the district court's order without first taking a contempt citation. As Mr. Carter has not been cited for contempt and, in fact, has expressed his intention to comply with the grand jury subpoena if compelled to do so, his appeal lacks jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

In late 1997, Monica S. Lewinsky received a subpoena to produce items and to testify in *Paula Jones v. William Jefferson Clinton*, a civil matter then pending in the Eastern District of

Arkansas. She retained Francis D. Carter, Esq. to represent her in filing a motion to quash this subpoena. This motion included an affidavit of Ms. Lewinsky as an exhibit. The district court found that the United States's evidence shows that Ms. Lewinsky hired Mr. Carter with the intent and the express purpose to further perjury and obstruction of justice. *See* Mem. Op. at 4.[1]

On January 16, 1998, at Attorney General Janet Reno's request, a Special Division of this Court expanded the jurisdiction of the Office of Independent Counsel ("OIC") to include an investigation into whether Monica S. Lewinsky or other individuals may have suborned perjury, obstructed justice, or intimidated witnesses in connection with the *Jones v. Clinton* case. In furtherance of this mandate, the grand jury issued two subpoenas to Francis D. Carter, Esq. calling for items and testimony.

Mr. Carter and Ms. Lewinsky each filed motions before Chief Judge Norma Holloway Johnson to quash the grand jury subpoenas. On March 31, 1998, the district court found that the United States had "amply demonstrated" that the crime-fraud exception vitiated the attorney-client privilege, and ruled that Mr. Carter must testify before the grand jury. *See* Mem. Op. at 4. The court also held that Ms. Lewinsky's Fifth Amendment rights

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[1] The Court's memorandum opinion was amended on April 28, 1998, to alter a portion incidental to the matters on appeal. The amended opinion is Attachment B.

prevent the grand jury from subpoenaing items given by her to Mr. Carter. *See id.* at 11-12. Mr. Carter and Ms. Lewinsky each filed notices of appeal (Attachments C & D), and the United States cross-appealed, pursuant to 18 U.S.C. § 3731 (Attachment E).

The United States now moves for summary dismissal of Mr. Carter's appeal, as authorized by D.C. Cir. R. 27(g). Summary disposition is appropriate where "the merits of [the] case are so clear that expedited action is justified." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *see Cascade Broadcasting Group v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam).

II. A GRAND JURY WITNESS MAY NOT CHALLENGE THE DENIAL OF A MOTION TO QUASH WITHOUT FIRST TAKING A CONTEMPT CITATION.

Society has a strong interest in preventing delays in an ongoing criminal proceeding. *See Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Grand jury investigations are not an exception. *See id.* at 327 ("It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found."). Consequently, a grand jury witness must disobey the district court and be cited for contempt before he or she may appeal the district court's order to testify. *See id.* at 328.

In 1971, the Supreme Court reaffirmed this principle in rejecting the argument that a subpoenaed witness could obtain appellate review without taking contempt when he otherwise would be "forced to undertake a substantial burden in complying with the subpoena." *United States v. Ryan*, 402 U.S. 530, 532 (1971). The Court unambiguously stated that "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *Id.*

The D.C. Circuit has reaffirmed this principle on numerous occasions. *See In re Sealed Case*, 107 F.3d 46, 48 n.1 (D.C. Cir. 1997) ("An order compelling testimony is not generally appealable unless the witness refuses to comply and is held in contempt."); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) ("An order in an ongoing proceeding to compel testimony or document production ordinarily is not appealable unless the party to whom it is addressed refuses to respond and is held in contempt."); *In re Sealed Case*, 737 F.2d 94, 97 (D.C. Cir. 1984) ("to obtain instant appellate review, the party to whom the command is addressed must refuse to respond and submit to a contempt citation").

Furthermore, this principle is jurisdictional. The D.C. Circuit has held that, absent a finding of contempt, a denial of

motion to quash is not a final decision within the meaning of 28 U.S.C. § 1291. *See In re Sealed Case*, 655 F.2d 1298, 1300 (D.C. Cir. 1981) ("The denial of a motion to quash a subpoena is not such a final decision; the district court decision becomes 'final' only when the subpoenaed party refuses to comply with the court order and is cited for contempt."); *accord Cobbledick*, 309 U.S. at 324.[2]

Mr. Carter has not received a contempt citation. In fact, Mr. Carter has signed a declaration, under penalties of perjury, that he is "not willing to suffer a contempt citation" and that he will testify if compelled to do so. *See* Carter Decl. (Attachment F).

III. CONCLUSION

Mr. Carter is a grand jury witness and has not been cited for contempt for failing to comply with an order to testify. Pursuant to well-established Supreme Court and D.C. Circuit precedent, therefore, he may not appeal the district court's

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[2] By contrast, a non-witness third-party holding a privilege preventing the witness from testifying may appeal "so long as the witness swears he will give the testimony." *See Sealed Case*, 107 F.3d at 48 n.1. For example, when the witness is the client's former attorney and swears under oath that he will testify if compelled to do so, the client may appeal an order compelling testimony. *See Sealed Case*, 737 F.2d at 98. The United States, therefore, does not challenge the jurisdictional basis for Ms. Lewinsky's appeal at this time.

order.[3] The United States respectfully requests that the Court of Appeals summarily dismiss Mr. Carter's appeal for want of jurisdiction.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

Joseph M. Ditkoff
Rodger A. Heaton
Associate Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

[3] Mr. Carter may, if he so desires, appear as cross-appellee and argue the issue involved in the United States's cross-appeal.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Motion of the United States of America for Summary Dismissal of Appeal of Francis D. Carter, Esq. for Want of Jurisdiction, was served via hand delivery on this the 1st day of May, 1998, to:

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

and via facsimile and Federal Express next business day delivery on this the 1st day of May, 1998, to:

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Caitlin O. Aptowicz

Under Seal

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3053	:	
	:	
In Re Sealed Case	:	
	:	
Francis D. Carter, Esquire, Appellant and Cross-Appellee	:	Misc. 98-068 (NHJ)
	:	
v.	:	
	:	
United States of America, Appellee and Cross-Appellant	:	

MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO MOTION FOR SUMMARY DISMISSAL AND MOTION TO SET BRIEFING SCHEDULE

Appellant, Francis D. Carter, Esquire, through undersigned counsel, respectfully moves this Court for an extension of time to respond to the government's Motion for Summary Dismissal of Appeal. In addition, Mr. Carter does not object to expedited consideration of this case and the consolidated appeal (No. 98-3052) of the same District Court order, consistent with counsel's other obligations, and therefore requests the Court to set a briefing schedule.

Counsel for Mr. Carter teach at Harvard Law School. The end of the semester including examinations and grades for graduating students as well as other obligations necessitate that counsel request the schedules indicated below. Counsel have conferred with the Office of the Independent Counsel and counsel for Monica Lewinsky (appellant in No. 98-3052). The OIC opposes the proposed schedules. Counsel for Ms. Lewinsky agrees to the requested briefing schedule.

Counsel will be attending the Association of American Law School Clinical Conference in Portland, Oregon from Tuesday, May 5, 1998 through Saturday, May 9, 1998. In addition, examinations for the third year law students are due May 20, with final grades due May 27, 1998. The faculty vote to confer degrees is on June 1, 1998. The opposition to the Motion for Summary Dismissal is currently due on Monday, May 11, 1998. Because of counsel's unavailability, counsel request an extension of time until May 15, 1998 to file the opposition. Furthermore, counsel for Mr. Carter and Ms. Lewinsky agree and jointly propose the following briefing schedule:

- Appellants' briefs due the first week in June
- Appellee's brief (and Cross-appellant's brief) due seven (7) days later
- Cross-appellees' briefs (and Appellants' reply brief) due seven (7) days later
- Cross-appellants reply brief due three (3) days later.

This schedule is the most expedited schedule possible given counsel's other obligations. All of the briefing would be completed before the end of June.

Wherefore, for the reasons set forth above and for any other reasons that may appear to the Court, counsel for Mr. Carter respectfully request that the Motion for Extension of Time to File Opposition to Motion for Summary Dismissal and Motion to Set Briefing Schedule be granted and that the Court adopt the proposed briefing schedule.

Respectfully submitted,

Charles J. Ogletree, Jr.

Jamie S. Gardner
Counsel for Appellant
Harvard Law School, Hauser 320
Cambridge MA 02138
617-495-5097

Certificate of Service

I hereby certify that the foregoing Motion for Extension of Time to File Opposition to Motion for Summary Dismissal and Motion to Set Briefing Schedule has been served, by facsimile and by first class mail upon Robert J. Bittman, Deputy Independent Counsel, and Joseph M. Ditkoff, Associate Independent Counsel, Office of the Independent Counsel, 1001 Pennsylvania Avenue, N.W., Suite 490-North, Washington, D.C. 20004; and upon Nathaniel Speights, Esquire, Speights & Mitchell, 1511 K Street, N.W., Suite 811, Washington, D.C. 20005; and upon William Ginsburg, Esquire, Ginsburg, Stephan, Oringher & Richman, 10100 Santa Monica Blvd., Los Angeles CA 90067.

Jamie S. Gardner

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3059 **September Term, 1997**
98ms00068

In re: Sealed Case, No. 98-3059

98-3052

In re: Sealed Case, No. 98-3052

Consolidated with 98-3053

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
MAY - 1 1998
CLERK

ORDER

It is ORDERED, on the court's own motion, that case No. 98-3059 is consolidated as a cross-appeal to the existing consolidation of 98-3052, et al.

FOR THE COURT:
Mark J. Langer, Clerk

BY: John T. Haley
Deputy Clerk

FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
MAY - 5 1998
CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3052 September Term, 1997

98ms00068

In re: Sealed Case, No. 98-3052

Consolidated with 98-3053, 98-3059

BEFORE: Ginsburg, Randolph, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to expedite, the motion to dismiss, and the motion for extension of time to file opposition to motion for summary dismissal and motion to set briefing schedule, it is

ORDERED that the motion to expedite be granted. The following briefing format and schedule shall apply. The parties are directed to include in their briefs a discussion of the issues raised by the motion to dismiss No. 98-3053.

Briefs for Appellants Carter, Lewinsky, and the Office of Independent Counsel ("OIC") (not to exceed 5,000 words apiece)	—	Monday, May 11, 1998 (4:00 p.m.)
Briefs for Appellees Carter, Lewinsky, and the OIC (not to exceed 5,000 words apiece)	—	Thursday, May 14, 1998 (9:00 a.m.)
Reply Briefs (not to exceed 2,500 words apiece)	—	Friday, May 15, 1998 (4:00 p.m.)

The parties are directed to hand-serve and hand-file their briefs.

Per Curiam

UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT FRANCIS D. CARTER, ESQUIRE

Charles J. Ogletree, Jr.
Jamie S. Gardner
Harvard Law School*
Hauser 320
Cambridge MA 02138
617-495-5097

Counsel for Francis D. Carter, Esquire

*For identification and mailing purposes only

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The following parties appeared before the district court: Francis D. Carter, Esquire (movant), Monica S. Lewinsky (intervenor), and the Office of the Independent Counsel (Kenneth Starr). The following amici appeared before the district court supporting the motion to quash: the National Association of Criminal Defense Lawyers (NACDL) and the District of Columbia Association of Criminal Defense Lawyers (DCACDL). Mr. Carter and Ms. Lewinsky appear before this Court as appellants and cross-appellees and the Office of the Independent Counsel appears as appellee and cross-appellant.

(B) Rulings Under Review

Chief Judge Norma Holloway Johnson's March 31, 1998 memorandum opinion and order, as amended on April 28, 1998, denying in part and granting in part Francis D. Carter's motion to quash subpoenas and denying Mr. Carter's motion for production of ex parte submission. The district court's opinion was not published and no official citation exists. The orders and opinions appear at App.[1/] 1, 40-41, and App. 2-39, 43-60.

(C) Related Cases

In re: Motions of Dow Jones & Co., Inc., et al., No. 98-3033 (D.C. Cir. May 5, 1998), vacating and remanding the portion of the district court's order denying a motion by the press for access to redacted papers and orders concerning Mr. Carter's motion to quash and a redacted transcript of the hearing. Other cases involving the investigation by the Office of the

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1/ Appendix.

Independent Counsel may be pending with this Court, but Mr. Carter is not involved in and has no information about those cases.

Charles J. Ogletree, Jr.

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JURISDICTION

See Section IV. of this brief. A timely notice of appeal was filed on April 10, 1998.

STATUTES AND REGULATIONS

See statutory appendix.

ISSUES PRESENTED

1) Whether the district court erred in not quashing unreasonable grand jury subpoenas to an attorney concerning his client when the subpoenas were overly broad, violated relevant guidelines and the D.O.J. regulations and ethical rules.

2) Whether the district court erred in considering ex parte evidence to determine whether the crime-fraud exception had been proved.

3) Whether the district court erred in concluding that the crime-fraud exception was proved when the only evidence of criminal conduct consisted of unsworn statements inconsistent with a sworn affidavit.

4) Whether this Court has jurisdiction over an attorney's appeal of the denial of his motion to quash subpoenas without suffering contempt when the Court has jurisdiction of the same issues on appeal of the client/intervenor and on the cross-appeal?

STATEMENT OF THE CASE

Appellant, Francis D. Carter is a prominent member of the District of Columbia bar. He has practiced here for 25 years. App. 199. On December 19, 1997, Monica Lewinsky was subpoenaed to testify and to produce documents and things in Jones v. Clinton, LR-C-94-290, then pending in the Eastern District of Arkansas. She sought legal advice and retained Mr. Carter to represent her. App. 196. Mr. Carter prepared and Ms. Lewinsky signed an affidavit that the government now contends was false.[1]

On January 16, 1998, while Mr. Carter was her lawyer, and without Mr. Carter's knowledge or consent, Ms. Lewinsky was contacted by FBI agents and attorneys from the Office of the Independent Counsel (OIC), at the Ritz-Carlton hotel in Arlington, Virginia. App. 327. For more than 10 hours, without counsel, the attorneys and agents tried to persuade Ms.

[1] The government's contentions are based on taped telephone recordings made by Linda Tripp mostly from her home in Maryland. At least one conversation was recorded with the assistance of the government.

Lewinsky, who was "nearly hysterical," to agree to a cooperation agreement and to participate in the government's investigation of the President and other prominent individuals. App. 327. She was threatened with prosecution and offered immunity only in exchange for cooperation. App. 329-30. OIC never sought Mr. Carter's permission to communicate or negotiate with Ms. Lewinsky, although the attorneys and agents undeniably knew Mr. Carter was her lawyer. App. 330.

Because of the conduct of the OIC attorneys and agents, Ms. Lewinsky ultimately retained new counsel. App. 312. Within days, OIC subpoenaed Mr. Carter to the special grand jury. App. 156. Ultimately he received one subpoena demanding a vast array of materials from his files and another commanding unlimited testimony.

Mr. Carter filed a motion to quash the subpoenas in the district court challenging the subpoenas as unreasonable and oppressive and because they sought information protected by the attorney-client, work-product and fifth amendment privileges. App. 147. Ms. Lewinsky joined that litigation as the real party in interest. App. 276. The district court denied the motion to quash, and ordered Mr. Carter to comply with the subpoenas except insofar as compliance would violate Ms. Lewinsky's fifth amendment rights. App. 1. Ms. Lewinsky and Mr. Carter appealed the district court's ruling. OIC cross-appealed the portion of the order granting the motion.[2]

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[2] OIC filed a motion to reconsider a portion of the district court's opinion. On April 28, 1998, the district court granted the motion and issued an amended opinion. App. 40. Mr. Carter appeals from that order as well.

SUMMARY OF ARGUMENT[3]

This appeal concerns an extraordinary invasion by OIC into the protected realm of the attorney-client relationship without *any* independent review. The OIC attorneys breached the guidelines, regulations and ethical rules designed to protect that relationship and permanently interfered with Mr. Carter's relationship with his client. The district court erred in failing to perform its own independent review of the subpoenas. Furthermore, the district court erred by reviewing evidence *ex parte*, without *any* showing of need, and based exclusively on that secret evidence, by ruling that the government had proved the existence of the crime-fraud exception. Finally, this Court has jurisdiction to consider this appeal.

ARGUMENT

I. The Subpoenas are Unreasonable and Oppressive.

Mr. Carter moved to quash the grand jury subpoenas pursuant to Fed. R. Crim. P. 17(c) as "unreasonable or oppressive." The subpoenas were unreasonable and oppressive precisely because they were issued in violation of the letter and the spirit of the guidelines, regulations and ethical rules designed to protect the important relationship between attorney and client. The district court failed to appreciate the nature of its authority under Rule 17(c) and its supervisory power over the grand jury in these circumstances. The district court's cramped exercise of its authority was unwarranted and should be reversed.

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[3] Mr. Carter and Ms. Lewinsky have divided the issues presented. See Internal Procedures. Rule 9(A)(2). Mr. Carter expressly adopts by reference all arguments raised by co-appellant Ms. Lewinsky. In addition, he expressly adopts all the arguments and authority relied on below by Mr. Carter, Ms. Lewinsky and amici.

The district court construed Mr. Carter's Rule 17(c) argument as limited to the scope of the subpoena. Although Mr. Carter did contend that the subpoena was overly broad in scope, App.163, and renews that argument in this Court,[4] that was not the exclusive basis for the Rule 17(c) challenge. As Mr. Carter, Ms. Lewinsky and amici explained below, OIC's violation of the carefully drafted guidelines designed to protect the attorney-client relationship from unwarranted intrusion demonstrates the unreasonableness of the subpoena. Whether the rules themselves provide enforceable rights is not the point. Rather they provide a framework for evaluation of the reasonableness under Rule 17(c).

Independent review of reasonableness is particularly important in the context of an Independent Counsel investigation. Although OIC is an office of the federal government, unlike the Department of Justice, whose regulations it is obligated to follow, 28 U.S.C. §594(f), there is no mechanism for *independent* review or oversight. As one former Independent Counsel noted recently, "I was astonished at the authority I had [as an Independent Counsel]. . . . I had more authority than anyone should have." Jacob Stein, The New Yorker, May 11, 1998, p. 37. Recent events have demonstrated that OIC has not and will not exercise restraint. But the district court retains the authority, pursuant to Rule 17(c), to impose that restraint when a subpoena is unreasonable.

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[4] This subpoena is extraordinary in its scope. The six-page subpoena duces tecum demands production of documents (defined in an astonishing two-page, single-spaced definition) including every single thing in Mr. Carter's possession remotely related to Ms. Lewinsky and others. App. 181-186. The district court suggests that the relatively short period of time Mr. Carter represented Ms. Lewinsky renders the subpoena reasonable. To the contrary, Mr. Carter's limited time representing Ms. Lewinsky renders the subpoena unreasonable, spanning as it does, almost a year before he ever met her. And the subpoena for testimony is completely unlimited in its scope.

The guidelines require *independent* evaluation of whether the subpoena is "narrowly drawn and directed at material information regarding a *limited* subject matter," and expressly prohibit a subpoena that seeks information protected by a valid claim of privilege. Id. (emphasis added). *Independent* review is impossible at OIC and the subpoenas are anything but narrowly drawn or limited in scope. The guidelines also require a reasonable effort to obtain the information from alternative sources. No such effort has been made here, and the government did not contend otherwise.

The subpoenas are unreasonable and oppressive because they violate the rules designed to protect the attorney-client relationship. Because the district court failed to recognize its authority to quash the subpoena on those grounds, its order must be reversed.

II. Reliance on an Ex Parte In Camera Submission Violated Due Process.

The district court found that although the attorney-client and work-product privileges were applicable, OIC demonstrated the existence of the crime-fraud exception to those privileges.[6] That finding was based solely on an ex parte in camera submission by OIC. Proffering absolutely no specific need to proceed in camera, OIC baldly asserted that this procedure was "consistent with general practice." App. 230. The district court allowed the ex arte submission, also without making any finding of a specific need, and despite Mr. Carter's vigorous objection.[7] Rather than balance appellant's interest in adversarial testing of OIC's evidence against the government interest in secrecy, the court simply announced the general rule

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[6] The government has repeatedly represented and the district court found that there is no suggestion that Mr. Carter was aware of any criminal or fraudulent conduct.

[7] See reply memorandum, app. 258, and Motion for Production. App. 293. The District Court denied the request for production.

that "[r]eview of ex parte in camera materials to establish the crime-fraud exception does not violate due process."[8] Mem. Op. at 7. This was error, which fundamentally prejudiced Mr. Carter's and Ms. Lewinsky's ability to defend against OIC's claim of crime-fraud.

Although proceedings before the grand jury itself are not adversarial, proceedings ancillary to grand jury matters, including motions to quash grand jury subpoenas and adjudications of privilege, often require contested hearings. In re Motions of Dow Jones, No. 98-3033, slip op. at 3-4 (D.C. Cir. May 5, 1998). Due process mandates an opportunity to be heard, including adversarial testing of the opponent's evidence. As the Second Circuit explained in this context:

> In camera proceedings are extraordinary events in the constitutional framework because they deprive the parties against whom they are directed of the root requirements of due process, i.e. notice . . . and an opportunity to be heard. They can only be allowed and justified by compelling state interests.
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> . . .
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> In order to determine, therefore, whether the in camera proceeding . . . afforded appellant all the process to which he was entitled, the nature of the Government interest must be balanced against the private interests that are affected by the court's actions.

In re Taylor, 567 F.2d 1183, 1187-88 (2d Cir. 1977) (emphasis added; citations omitted). Accord In re John Doe, 13 F.3d 633, 636 (2d Cir. 1994) (use of in camera submission "is justified only by a compelling interest," not justified where secrecy concerns are weak); Haines v. Liggett Group, 975 F.2d 81, 96-97 (3d Cir. 1992) (party defending attorney-client privilege

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[8] The district court's mistaken view that in camera ex parte proceedings are the rule rather than the exception here is further revealed by the court's pronouncement that any evidence submitted by Ms. Lewinsky and Mr. Carter would also be considered in camera. Tr. 46. Hence, the district court's nonadversarial approach to factfinding was not predicated on any finding that the specific evidence at issue actually required secrecy.

has due process right to be heard at evidentiary hearing seeking exception to privilege); see also Carter v. Kubler, 320 U.S. 243, 247 (1943) ("The basic elements of [a full and fair] hearing include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence"); U.S. v. Thompson, 827 F.2d 1254, 1258-59 (9th Cir. 1987) ("Absent . . . compelling justification, ex parte proceedings are anathema in our system of justice . . .").

Thus, far from being the general rule regardless of specific need, an ex parte submission to defeat a claim of attorney-client privilege is presumptively impermissible, absent a compelling interest in secrecy.[9] The government cited no decision from this Court authorizing a secret procedure to defeat a claim of privilege.[10] But even assuming this procedure could be justified, no finding of compelling need was or could have been made here.

First, OIC acknowledged that Rule 6(e)'s grand jury secrecy provisions cover only "*some*" of the in camera evidence. App. 230. Neither OIC nor the court offered any justification

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[9] Clifford v. U.S., 136 F.3d 144 (D.C. Cir. 1998), relied on by the district court, is not to the contrary. There this Court stated that "communications between a judge and one party are not per se deprivations of the due process rights of the opposing party." Id. at 149 (emphasis added). Plainly, the fact that ex parte communications are not per se violations but are *sometimes* permissible does not support the district court's *across-the-board* rule permitting ex parte evidentiary submissions in the present context. Moreover, Clifford involved an entirely different fact pattern and procedural posture, and the ex parte communications involved no fact or law in controversy. Id. at 150. Here, OIC's ex parte presentation was the sole basis for the district court's decision to breach the attorney-client privilege.

[10] The practice of ex parte review of the very documents for which the privilege is claimed, see e.g., In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982), provides no precedent for the entirely different practice employed here. In the former context, the privilege would be irrevocably lost if the opposing party could examine the documents. By contrast, an ex parte procedure may not be used in the circumstances here *unless* all the materials submitted are protected by grand jury secrecy requirements, the government need for secrecy is so compelling as to defeat the opponent's right to an adversarial hearing to defend the attorney-client privilege, *and* no other option, such as a protective order, would adequately safeguard the government's interest.

for refusing to disclose material not covered by Rule 6(e). Further, OIC also relied on evidence that had never been submitted to the grand jury. Evidence that is in the possession of the prosecutor, that was not obtained by subpoena and that has not been submitted for the grand jury's consideration does not automatically fall within the protection of Rule 6(e).[11] See Fund for Constitutional Government v. National Archives, 656 F.2d 856, 869 (D.C. Cir. 1981) (potential witnesses and potential documentary exhibits "less clearly within the rule" and are only protected *if* disclosure would reveal direction and strategy of investigation); SEC v. Dresser Indus., 628 F.2d 1368, 1382-84 (D.C. Cir. 1980) (en banc) (rule does not require "veil of secrecy over all matters occurring in the world that happen to be investigated by a grand jury"); Washington Post v. Robinson, 935 F.2d 282, 291 (D.C. Cir. 1991) (only materials that reveal matters occurring before grand jury may be kept secret). Furthermore, "when information is sufficiently widely known . . . it has lost its character as Rule 6(e) material." Dow Jones, slip op. at 17. Plainly, at a bare minimum appellants had "the right to examine, explain or rebut all such evidence," Carter, 320 U.S. at 247, for which no claim of a need for secrecy is or can appropriately be made.

Second, the secrecy surrounding materials that *are* covered by Rule 6(e) is not absolute. The rule permits disclosure by court order in connection with a judicial proceeding. Fed. R. Crim. P. 6(e)(3)(C)(i). Because of due process concerns, courts must carefully weigh a private litigant's particularized need for specific grand jury materials against the government's need for continued secrecy. See Douglas Oil v. Petrol Stops, 441 U.S. 211, 222-23 (1979); U.S. v. Baggot, 463 U.S. 476, 480 (1983) ("[t]he particularized-need test is a criterion of *degree*"). Where, as here, the government seeks to defeat a claim of privilege, that particularized need

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[11] This Court's suggestion in another context, that evidence that is likely to be presented to the grand jury is also protected by Rule 6(e), is overinclusive. Dow Jones, slip op. at 6.

exists. The government must therefore show that the interest in grand jury secrecy would be so compromised by this limited disclosure as to constitute a compelling interest that defeats the privilege proponent's due process right. See Taylor, 567 F.2d at 1187-88. For example, in John Doe, 13 F.3d at 636, the Second Circuit upheld the use of ex parte evidence to establish the crime-fraud exception only after a specific conclusion that disclosure could "jeopardize the grand jury investigation."

That finding cannot be made here. The record reveals that the in camera submission included "transcripts of tape recordings made by Linda Tripp of conversations she had with Monica Lewinsky." App. 9. Even assuming that these transcripts or tapes were covered by Rule 6(e), the secrecy interest in them is slight because their content exists entirely independently of the grand jury and reveals little about its proceedings. The tapes were not prepared for purposes of the investigation. "Undoubtedly the degree of exposure of the grand jury process inherent in the revelation of subpoenaed documents is lesser than the degree of disclosure attributable to publication of witness transcripts. That is to be taken account of . . . in the balancing process that the 'particularized need' standard envisions . . . ." In re Sealed Case, 801 F.2d 1379, 1381 (D.C. Cir. 1986). Only documents that would reveal matters like "the direction of the grand jury's investigation and the names of persons involved" are protected. Id. But no such secrets would be revealed by subjecting the Tripp tapes to adversarial testing. OIC's possession of these tapes is already widely publicized, and the district court itself has revealed that the tapes were part of OIC's in camera submission. Access to the tapes would not reveal whether or to what extent OIC has placed or will place them before the grand jury. Furthermore, the tapes' contents exist independently of the grand jury and reveal nothing about its investigation. See Dresser, 628 F.2d at 360 (documents do not reveal what occurred before the grand jury, only what occurred in

company's foreign operations). Finally, Ms. Lewinsky, as a participant in the taped conversations, is already familiar with their contents.[12]

Moreover, in the context of this specific grand jury investigation, the traditional reasons for grand jury secrecy, see Douglas, 441 U.S. at 219 & n.10, have but slight application to *any* Rule 6(e) evidence included in the in camera submission. There is, for example, no likelihood that suspects will flee, or that public ridicule of the grand jury's targets would increase. Just as importantly, any privilege hearing in the district court is itself sealed and closed to the public, Dow Jones, supra, and the court may also order additional "protective limitations on the use of the disclosed material," Douglas, 441 U.S. at 223. Thus, it is clear that if the district court had weighed appellant's due process interests in adversarial procedures to prevent a breach of the attorney-client privilege against the government's interest in secrecy, the in camera submission should have been subject to adversarial testing. Because the district court's erroneous decision to review the submission ex parte necessarily prevented appellants from explaining or rebutting that evidence, the court's finding of the crime-fraud exception must be reversed.

III. There is an Insufficient Basis for Vitiating the Privileges.

The district court gave insufficient weight to the importance of the role of the attorney-client relationship in the adversary system. As the oldest evidentiary privilege, the attorney-client privilege "is at the heart of our adversarial system of justice." Whitehouse v. U.S. District Court, 53 F.3d 1349, 1360 (1st Cir. 1995). Because of its critical role, before authorizing application of the crime-fraud exception, the alleged crime or fraud "*must be of sufficient weight*

[12] In addition, of course, the tapes could not be considered by the district court, and were required to be disclosed, under Title III. See Brief for Monica Lewinsky.

to warrant abridgement of the privilege." In re Sealed Case, 676 F.2d 793, 814 n. 84 (D.C. Cir. 1982) (emphasis added). Restraint in applying the exception rests on recognition that preserving the confidentiality of the attorney-client relationship serves "the interest and administration of justice." Hunt v. Blackburn, 128 U.S. 464, 470 (1888). "No court should order disclosure . . . *if the disclosure would traumatize the adversary process more than the underlying legal misbehavior.*" Sealed Case, 676 F.2d at 814 n. 84. The district court's ruling risks permitting eradication of the protection of the attorney-client privilege in virtually every case in which a witness or client is impeached with a deposition or other inconsistent statement.[13]

IV. This Court has Authority to Consider this Consolidated Appeal.[14]

A. Under these Circumstances, the Denial of the Motion to Quash is Final as to Mr. Carter.

Ms. Lewinsky is the real party in interest, and she joined the motion to quash and the district court held that she was an appropriate party. App. 67. Both Ms. Lewinsky and Mr. Carter filed notices of appeal from the district court's order denying the motion in part and this Court consolidated those appeals by order dated April 23, 1998. The consolidated appeals are pending along with the cross-appeal filed by the Office of the Independent Counsel.

The government's motion for summary dismissal of Mr. Carter's appeal argues that Mr. Carter cannot appeal unless he is held in contempt.[15] See Cobbledick v. U.S., 309 U.S. 323

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[13] Evidence of inconsistent statements by Ms. Lewinsky is legally insufficient to prove perjury. U.S. v. Cross, 638 F.2d 1375, 1378 (5th Cir.), modified, 655 F.2d 50 (1981).

[14] OIC moved for summary dismissal of Mr. Carter's appeal and this Court's briefing order of May 5, 1998, consolidated the response to the motion with the brief on the merits.

[15] Mr. Carter submitted a sworn declaration in the district court indicating that if compelled to testify, he will comply rather than suffer a contempt citation.

(1940); U.S. v. Ryan, 402 U.S. 530 (1971). While generally a witness cannot appeal the denial of a motion to quash a subpoena without being held in contempt, under the circumstances of this case, this Court may and should consider Mr. Carter's appeal.

This Court has jurisdiction over final orders of the district court. 28 U.S.C. §1291. The rule generally limiting appellate review to "final orders" assures that parties are not harassed by successive appeals and that judicial administration is effective, not "leaden-footed." Cobbledick, 309 U.S. at 325-26. "For purposes of appellate procedure, finality -- the idea . . . now expressed by 'final decisions' in [28 U.S.C. §1291] -- is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system." Id. The rule, ultimately, is one of practicality. "[S]ection 1291 must be given a 'practical rather than a technical construction.'" McSurely v. McClellan, 521 F.2d 1024, 1031 (D.C. Cir. 1975) (quoting Cohen v. Beneficial Loan, 337 U.S. 541, 546 (1949)). In appropriate circumstances, orders may be appealed that do not finally terminate the litigation. See Cohen, 337 U.S. 541 (1949); Perlman v. U.S., 247 U.S. 7 (1918); Abney v. U.S., 431 U.S. 651 (1977); Mitchell v. Forsyth, 472 U.S. 511 (1985). "The requirement of submitting to contempt [in order to appeal], however, is not without exception and in some cases the purposes underlying the finality rule require a different result." U.S. v. Nixon, 418 U.S. 683, 691 (1974).

Viewed in a practical rather than a technical light, the government's motion for summary dismissal must be denied. There is no reason related to judicial efficiency or fairness to dismiss Mr. Carter's appeal under the factual circumstances of this case.

First, this Court's order consolidating Mr. Carter's appeal with Ms. Lewinsky's effectively resolves the issue from a pragmatic point of view. The issues raised by Ms. Lewinsky and Mr. Carter are virtually the same. All of the arguments raised by Mr. Carter below were

adopted by Ms. Lewinsky and addressed by the district court in a single order. There is no dispute that Ms. Lewinsky is properly before this Court. Perlman, 247 U.S. 7 (1918); In re Sealed Case, 107 F.3d 46, 48 n.1 (D.C. Cir. 1997). OIC must respond to and this Court must resolve the same issues whether Mr. Carter remains an appellant or not. In re Grand Jury Proceedings, 841 F.2d 230 (8th Cir. 1988) (holding appellate court had jurisdiction over *both* attorney's *and* client's appeal pursuant to Perlman exception). Therefore, there is no benefit to the effective administration of justice in invoking the final order doctrine to dismiss Mr. Carter's appeal.

Second, the government does not dispute that Mr. Carter may participate as cross-appellee on the issue of Ms. Lewinsky's fifth amendment privilege. See Motion for Summary Dismissal at 6 n. 3. However, as the government's motion for expedited consideration reveals, it intends to challenge this portion of the district court's order by contending that the district court's finding on the crime-fraud exception effectively applies to the fifth amendment privilege question as well. Therefore, in addressing the government's arguments as cross-appellee, Mr. Carter will necessarily address the central basis for the district court's denial of his motion to quash. In order to present the issues in a clear and logical manner, Mr. Carter should be entitled to maintain this appeal as appellant, rather than raise the issues indirectly as cross-appellee.

B. Pendent Appellate Jurisdiction over a Non-Final Order Should be Exercised.

Even if the order as to Mr. Carter is not final under the circumstances of this case, the Court may and should exercise pendent appellate jurisdiction over his appeal because the issues are inextricably intertwined with the issues before the Court in the appeals of Ms. Lewinsky and OIC. When some issues or orders are immediately appealable but others are not, and judicial

economy and fairness warrant, a court of appeals may exercise pendent appellate jurisdiction over the nonappealable issues or orders. Rendall-Speranza v. Nassim, 107 F.3d 913, 917 (D.C. Cir. 1997). Pendent appellate jurisdiction is especially appropriate when "the order (or part thereof) that is not independently appealable is 'inextricably intertwined' with the order (or part thereof) that is that is appealable." Id.; see Jungquist v. Sheikh Sultan, 115 F.3d 1020, 1026-27 (D.C. Cir. 1997); Gilda Marx v. Wildwood Exercise, 85 F.3d 675, 679 (D.C. Cir. 1996).

The Court may exercise pendent jurisdiction even over an *adverse* party's cross-appeal when closely related rulings, for reasons of judicial economy and fairness, should be considered at the same time. See Clinton v. Jones, 117 S.Ct. 1636, 1651 n.41 (1997) (pendent jurisdiction over plaintiff's cross-appeal proper because "inextricably intertwined" with immunity issue). Where, as here, *consolidated and aligned* parties appeal from the same order raising the same issues, and the order is indisputably final as to one of the parties but not the other, the identity of issues favors exercise of pendent jurisdiction over the appeal of the party for whom the order is arguably non-final. In re Tutu Wells Contamination Lit., 120 F.3d 368, 381-82 (3d Cir. 1997) (sanction order that is final collateral order for one party but not other is appealable by both); Morley v. Ciba-Geigy Corp., 66 F.3d 21, 22 n.1 (2d Cir. 1995) (same). Here, Mr. Carter's and Ms. Lewinsky's issues are virtually identical and in any event "inextricably intertwined." As to the government's cross-appeal, "'review of the [latter] decision [is] necessary to ensure meaningful review of the [former].'" Clinton v. Jones, 117 S.Ct. at 1651 n.41 (brackets in original) (quoting Swint v. Chambers County Comm'n, 514 U.S. 35, 51 (1995)). Therefore,

because both Ms. Lewinsky's appeal and the government's cross-appeal are properly before the Court, exercising pendent jurisdiction here could not possibly result impair judicial economy.[16]

In the alternative, the Court should treat Mr. Carter's notice of appeal as a motion to intervene in Ms. Lewinsky's appeal. See Amalgamated Transit Union v. Donovan, 771 F.2d 1551, 1552 (D.C. Cir. 1985) (intervention on appeal).

CONCLUSION

The district court's order denying the motion to quash and the motion for production of ex parte submission must be reversed.

Respectfully submitted,

Charles J. Ogletree, Jr.
#272658
Jamie S. Gardner
#375811
Harvard Law School, Hauser 320
Cambridge MA 02138
617-495-5097
Attorneys for Appellant,
Francis D. Carter

[16] These facts fundamentally distinguish this case from Swint, supra and Abney, supra, which rejected pendent appellate jurisdiction over issues that, far from being "inextricably intertwined" with issues already on appeal, were entirely unrelated to those issues.

ADDENDUM OF STATUTES AND REGULATIONS

28 U.S.C. § 594(f) 1

Fed. R. Crim. P. 6(e) 2

Fed. R. Crim. P. 17(c) 5

28 C.F.R. part 77 6

Dep't of Justice Manual § 9-2.161(a) 13

28 U.S.C. § 594(f)

(f) Compliance with policies of the Department of Justice.--

(1) In general.--An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies and policies under subsection (l)(1)(B), the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

(2) National security.--An independent counsel shall comply with guidelines and procedures used by the Department in the handling and use of classified material.

Fed. R. Crim. P. 6(e)

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure

has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made--

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter

is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) **Sealed Indictments.** The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) **Closed Hearing.** Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) **Sealed Records.** Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

Fed. R. Crim. P. 17(c)

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

order of the Attorney General becomes the final order.

(c) An individual subject to an order assessing a penalty after a hearing may, before the expiration of the thirty (30) day period beginning on the date the final order is entered, either by the Judge or the Attorney General, whichever is applicable, bring a civil action in the appropriate District Court of the United States pursuant to the provisions of 21 U.S.C. 844a(g) and obtain *de novo* judicial review of the final order.

§ 76.37 Collection of civil penalties.

(a) Collection of any penalty shall be the responsibility of the United States Attorney having jurisdiction over the matter.

(b) The United States Attorney having jurisdiction over the matter may commence a civil action in any appropriate district court of the United States for the purpose of recovering the amount assessed and an amount representing interest at a rate computed in accordance with 28 U.S.C. 1961.

§ 76.38 Deposit in the United States Treasury.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the United States Treasury.

§ 76.39 Compromise or settlement after Decision and Order of a Judge.

(a) The United States Attorney having jurisdiction over the case may, at any time before the Attorney General issues an order, compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(b) Any compromise or settlement must be in writing.

§ 76.40 Records to be public.

All documents contained in the records of formal proceedings for imposing a penalty under this part may be inspected and copied, unless ordered sealed by the Judge.

§ 76.41 Expungement of records.

(a) The Attorney General shall expunge all official Department records created pursuant to this part upon application of a respondent at any time after the expiration of three (3) years from the date of the final order of assessment if:

(1) The respondent has not previously been assessed a civil penalty under this section;

(2) The respondent has paid the penalty;

(3) The respondent has complied with any conditions imposed by the Attorney General;

(4) The respondent has not been convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); and

(5) The respondent agrees to submit to a drug test, and such test shows the individual to be drug free.

(b) A non-public record of a disposition under this part shall be retained by the Department solely for the purpose of determining in any subsequent proceeding whether the person qualifies for a civil penalty or expungement under this part.

(c) If a record is expunged under this part, the individual for whom such an expungement was made shall not be held guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this part or the results thereof in response to an inquiry made of him for any purpose.

§ 76.42 Limitations.

No action under this part shall be entertained unless commenced within five (5) years from the date on which the violation occurred.

PART 77—COMMUNICATIONS WITH REPRESENTED PERSONS

Sec.

77.1 Purpose and authority.
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77.4 Constitutional and other limitations.
77.5 General rule for civil and criminal enforcement; represented parties.
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77.9 Represented persons and represented parties; respect for attorney-client relationships.
77.10 Organizations and employees.

77.11 Enforcement of this part.
77.12 Relationship to state and local regulation.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515(a), 516, 519, 533, 547.

SOURCE: Order No. 1909-94, 59 FR 39928, Aug. 4, 1994, unless otherwise noted.

§ 77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to provide a comprehensive, clear, and uniform set of rules governing the circumstances under which Department of Justice attorneys may communicate or cause others to communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. 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. (Copies of the Bar rules are on file in most law libraries, and through on-line legal research services).

(b) This part is issued under the authority of the Attorney General to prescribe regulations for the government of the Department of Justice, the conduct of its employees, and the performance of its business, pursuant to 5 U.S.C. 301; to direct officers of the Department of Justice to secure evidence and conduct litigation, pursuant to 28 U.S.C. 516; to direct officers of the Department to conduct grand jury proceedings and other civil and criminal legal proceedings, pursuant to 28 U.S.C. 515(a); to supervise litigation and to direct Department officers in the discharge of their duties, pursuant to 28 U.S.C. 519; and otherwise to direct Department officers to detect and prosecute crimes, to prosecute offenses against the United States, to prosecute civil actions, suits, and proceedings in which the United States is concerned, and to perform such other functions in an appropriate and ethical manner as may be provided by law, pursuant to 28 U.S.C. 509, 510, 533, and 547.

§ 77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) *Attorney for the government* means the Attorney General; the Deputy Attorney General; the Associate Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, or Tax Division; the Chief Counsel of the DEA and any attorney employed in that office, the General Counsel of the FBI and any attorney employed in that office or in the Legal Counsel Division of the FBI, and, in addition, any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; or any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The term *attorney for the government* does not include any attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) *Civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(c)(1) *Civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the police or regulatory powers

of the United States to enforce federal laws, including, but not limited to, civil actions or proceedings brought to enforce the laws relating to:

(i) Antitrust;

(ii) Banking and financial institution regulation;

(iii) Bribery, kickbacks, and corruption;

(iv) Civil rights;

(v) Consumer protection;

(vi) Environment and natural resource protection;

(vii) False claims against the United States;

(viii) Food, drugs, and cosmetics regulation;

(ix) Forfeiture of property;

(x) Fraud;

(xi) Internal revenue;

(xii) Occupational safety and health;

(xiii) Racketeering; or

(xiv) Money-laundering.

(2) The term *civil law enforcement proceeding* shall not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand. An action or proceeding shall be considered "brought by the United States" only if it involves a claim asserted by the Department of Justice on behalf of the United States, whether the claim is asserted by complaint, counterclaim, cross-claim, or otherwise.

(d) *Cooperating witness or individual* means any person, other than a law enforcement agent, who is acting to assist the government in an undercover or confidential capacity.

(e) *Employee* means any employee, officer, director, partner, member, or trustee.

(f) *Organization* means any corporation, partnership, association, joint-stock company, union, trust, pension fund, unincorporated association, state or local government or political subdivision thereof, or non-profit organization.

(g) *Person* means any individual or organization.

(h) *Undercover investigation* means any investigation undertaken in good faith to fulfill law enforcement objectives, in which a person communicates with a federal, state or local law enforcement agent or a cooperating witness or individual whose identity as an official of the government or a person acting at the behest thereof is concealed or is intended to be concealed.

§77.3 Represented party; represented person.

(a) A person shall be considered a "represented party" within the meaning of this part only if all three of the following circumstances exist:

(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.

(b) A person shall be considered a "represented person" within the meaning of this part if circumstances set forth in paragraphs (a) (1) and (2) of this section exist, but the circumstance set forth in paragraph (a)(3) does not exist.

§77.4 Constitutional and other limitations.

Notwithstanding any other provision of this part, any communication that is prohibited by the Sixth Amendment right to counsel, by any other provision of the United States Constitution, by any federal statute, by the Federal Rules of Criminal Procedure (18 U.S.C. App.) or by the Federal Rules of Civil Procedure (28 U.S.C. App.) shall be likewise prohibited under this part.

§77.5 General rule for civil and criminal enforcement; represented parties.

Except as provided in this part or as otherwise authorized by law, an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented by an attorney concerning the subject matter of the representation without the consent of the lawyer representing such party.

§ 77.6 Exceptions; represented parties.

An attorney for the government may communicate, or cause another to communicate, with a represented party without the consent of the lawyer representing such party concerning the subject matter of the representation if one or more of the following circumstances exist:

(a) *Determination if representation exists.* The communication is to determine if the person is in fact represented by counsel concerning the subject matter of the investigation or proceeding.

(b) *Discovery or judicial or administrative process.* The communication is made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal where the matter is pending, including, but not limited to testimony before a grand jury, the taking of a deposition, or the service of a grand jury or trial subpoena, summons and complaint, notice of deposition, administrative summons or subpoena or civil investigative demand.

(c) *Initiation of communication by represented party.* The represented party initiates the communication directly with the attorney for the government or through an intermediary and:

(1) Prior to the commencement of substantive discussions on the subject matter of the representation and after being advised by the attorney for the government of the client's right to speak through his or her attorney and/or to have the client's attorney present for the communication, manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed and, if willing to do so, signs a written statement to this effect; and

(2) A federal district judge, magistrate judge or other court of competent jurisdiction has concluded that the represented party has:

(i) Waived the presence of counsel and that such waiver is voluntary, knowing, and informed; or

(ii) Obtained substitute counsel or has received substitute counsel by court appointment, and substitute counsel has consented to the communication.

(d) *Waivers at the time of arrest.* The communication is made at the time of the arrest of the represented party and he or she is advised of his or her rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily and knowingly waives them.

(e) *Investigation of additional, different or ongoing crimes or civil violations.* The communication is made in the course of an investigation, whether undercover or overt, of additional, different or ongoing criminal activity or other unlawful conduct. Such additional, different or ongoing criminal activity or other unlawful conduct may include, but is not limited to, the following:

(1) Additional, different or ongoing criminal activity or other unlawful conduct that is separate from or committed after the criminal activity for which the represented party has been arrested or charged or for which the represented party is a defendant in a civil law enforcement proceeding; or

(2) Criminal activity that is intended to impede or evade the administration of justice including, but not limited to, the administration of justice in the proceeding in which the represented party is a defendant, such as obstruction of justice, subornation of perjury, jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution.

(f) *Threat to safety or life.* The attorney for the government in good faith believes that there may be a threat to the safety or life of any person; the purpose of the communication is to obtain or provide information to protect against the risk of injury or death; and the attorney for the government in good faith believes that the communication is necessary to protect against such risk.

§ 77.7 Represented persons; investigations.

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate, with a represented person in the process of conducting an investigation, including, but not limited to, an undercover investigation.

§77.8 Represented persons and represented parties; plea negotiations and other legal agreements.

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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the attorney representing such person or party; provided, however, that this restriction will not apply if the communication satisfies §77.6(c).

§77.9 Represented persons and represented parties; respect for attorney-client relationships.

When an attorney for the government communicates, or causes a law enforcement agent or cooperating witness to communicate, with a represented person or represented party pursuant to any provision of these regulations without the consent of counsel, the following restrictions must be observed:

(a) *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 paragraph (a)(1) of this section, 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 prior written 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.

(b) *Attorney-client meetings.* An attorney for the government may not direct or cause an undercover law enforcement agent or cooperating witness to attend or participate in lawful attorney-client meetings or communications, except when the agent or witness is requested to do so by the represented person or party, defense counsel, or another person affiliated or associated with the defense, and when reasonably necessary to protect the safety of the agent or witness or the confidentiality of an undercover operation. If the agent or witness attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the agent or witness shall not be communicated to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges, or used in any other way to the substantial detriment of the client.

§77.10 Organizations and employees.

This section applies when the communication involves a former or current employee of an organization that qualifies as a represented party or represented person, and the subject matter of the communication relates to the business or other affairs of the organization.

(a) *Communications with current employees; organizational representation.* A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. 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.

(b) *Communications with former employees; organizational representation.* A communication with a former employee of an organization that is represented by counsel shall not be considered to be a communication with the organization for purposes of this part.

(c) *Communications with former or current employees; individual representation.* A communication with a former or current employee of an organization who is individually represented by counsel may occur only to the extent otherwise permitted by this part. However, a claim by an attorney that he or she represents all or a large number of individual current and/or former employees of an organization does not suffice to establish that those employees are represented persons or represented parties under this part. In such circumstances, prior to engaging in communications that would be prohibited under this part as a result of the individual representation, the attorney for the government shall communicate with the individual current or former employee to determine if in fact that employee is represented by counsel concerning the subject matter of the investigation or proceeding.

(d) *Communications with separately represented controlling individuals.* When this part would preclude discussions with a controlling individual as defined in §77.10(a) and the controlling individual has retained separate counsel on the relevant subject matter, an attorney for the government may communicate with such individual in the following circumstances:

(1) If the controlling individual's separate counsel consents;

(2) If the communication falls within one of the exceptions set forth in §§77.6 or 77.9; or

(3) In the case in which the individual does not qualify as a represented party, if the individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing and informed, and, if willing to do so, signs a written statement to this effect.

(e) *Initiation of communication with unrepresented controlling individuals.* Notwithstanding any other provision of this part, an attorney for the government may communicate with a controlling individual who is not individually represented as to the subject matter of the communication when the controlling individual initiates the communication and states that he or she is communicating exclusively in his or her personal capacity and not on behalf of the represented organizational party, and manifests that his or her waiver of counsel for the communication is voluntary, knowing, and informed, and, if willing to do so, signs a written statement to this effect.

(f) *Multiple representation.* Nothing in this section is intended or shall be construed to affect the requirements of Rule 44(c) of the Federal Rules of Criminal Procedure, or to permit the multiple representation of an organization and any of its employees, or the multiple representation of more than one such employee, if such representation is prohibited by any applicable law or rule of attorney ethics.

§77.11 Enforcement of this part.

(a) *Exclusive enforcement by Attorney General.* The Attorney General shall have exclusive authority over this part and any violations of it, except as provided in §77.12. Allegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice and shall be addressed when appropriate as matters of attorney discipline by the Department. The Office of Professional Responsibility shall review any complaint alleging a violation of this part made by a state or federal judge, bar disciplinary board, official, or ethics committee, or by any other person or entity. The findings of the Attorney General or her designee as to an attorney's compliance or noncompliance with this part shall be final and conclusive except insofar as the attorney for the government is afforded a right of review by other provisions of law.

(b) *No private remedies.* This part is not intended to and does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States.

§77.12 Relationship to state and local regulation.

Communications with represented parties and represented persons pursuant to this part are intended to constitute communications that are "authorized by law" within the meaning of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, DR 7-104(A)(1) of the ABA Code of Professional Responsibility, and analogous state and local federal court rules. In addition, this part is intended to preempt and supersede the application of state laws and rules and local federal court rules to the extent that they relate to contacts by attorneys for the government, and those acting at their direction or under their supervision, with represented parties or represented persons in criminal or civil law enforcement investigations or proceedings; it is designed to preempt the entire field of rules concerning such contacts. When the Attorney General finds a willful violation of any of the rules in this part, however, sanctions for the conduct that constituted a willful violation of this part may be applied, if warranted, by the appropriate state disciplinary authority.

PART 79—CLAIMS UNDER THE RADIATION EXPOSURE COMPENSATION ACT

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In The United States Court of Appeals For The District Of Columbia Circuit

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OFFICE OF
INDEPENDENT COUNSEL

No. 98-3052
Consolidated with Nos. 98-3053, 98-3059
September 1997, Term

In Re: Sealed Case, No. 98-3052

On Appeal From The United States District Court
For The District Of Columbia
Misc. Action No. 98-068 (NHJ)

OPENING BRIEF OF APPELLANT MONICA LEWINSKY

SPEIGHTS & MITCHELL
NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINSBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Appellant MONICA LEWINSKY

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

SPEIGHTS & MITCHELL
Nathaniel H. Speights
(D.C. Bar No. 952036)
1511 K Street, Northwest
Suite 811
Washington, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
William H. Ginsburg
Harry W.R. Chamberlain II
(D.C. Bar No. 439182)
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067-4012
(310) 557-2009

Attorneys for Appellant/Appellee MONICA LEWINSKY

OFFICE OF THE INDEPENDENT COUNSEL
Kenneth W. Starr
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Attorneys for Appellant/Appellee OFFICE OF THE INDEPENDENT COUNSEL

Professor Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
(617) 498-5097

Attorney for Appellant/Appellee FRANCIS D. CARTER, ESQ.

(B) Rulings Under Review

Order filed March 31, 1998 and Memorandum Opinion filed March 31, 1998, Amended Memorandum Opinion filed April 28,1998 – In re: Grand Jury Proceedings, U.S. District Court No. Misc. 98-59 (NHJ) (Under Seal) granting in part and denying in part motions relating to subpoenas issued to Francis D. Carter, Esq. former attorney of Monica Lewinsky for testimony and production of documents

(C) Related Cases

- * *In Re Sealed Case* No. 98-302 Appeal of Monica Lewinsky
- * *In Re Sealed Case* No. 98-3053 Appeal of Francis D. Carter, Esq. (former counsel for Monica Lewinsky)
- * *In Re Sealed Case* No. 98-3059 Appeal of the Office of Independent Counsel

  In Re Sealed Case No. 98-3054 Appeal of Monica Lewinsky

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GLOSSARY

"APP" shall refer to Appellant's Appendix of Monica Lewinsky

"RJN" shall refer to Request For Judicial Notice of Appellant Monica Lewinsky

"R.T." shall refer to The Reporter's Transcript of the March 4, 1998 Hearing in the District Court

I.

STATEMENT OF JURISDICTION

The right of immediate appeal from an order denying a motion to quash subpoenas issued in grand jury proceedings calling for disclosure of privileged attorney-client communications, privileged documents or other materials protected as attorney work product is vested in the client as the real-party-in-interest. See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (*Sealed Case II*); *In re Sealed Case*, 107 F.3d 46, 48 (D.C. Cir. 1997) (*Sealed Case III*).

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. ***Did The District Court Err In Concluding That The Office Of Independent Counsel ("OIC") Satisfied Its Heavy Burden Of Demonstrating That The Crime-Fraud Exception Should Be Applied With Respect To Any Of The Privileged Communications Or Documents Exchanged Between Monica Lewinsky And Her Former Attorney Francis D. Carter?***

2. ***May The OIC Rely Upon "Evidence" Unlawfully And Improperly Obtained In Excess Of Its Limited Jurisdiction, In Violation Of Title III And In Violation Of Ms. Lewinsky's Fourth, Fifth and Sixth Amendment Rights To Satisfy Its Burden Of Establishing That The Crime-Fraud Exception Applies To Defeat Those Rights?***

3. ***Did The District Court's Order Denying Ms. Lewinsky And Her Counsel The Right To Examine And Rebut The Purported "Evidence" Relied Upon By The OIC Before Compelling This Involuntary Waiver Of Her Constitutional Rights And Privileges Violate Well Settled Principles Of Fundamental Fairness And Due Process?***

III.

STATEMENT OF THE CASE

Monica Lewinsky is a 24 year old woman whom the Office of Independent Counsel ("OIC") contends had a sexual affair with President William Clinton while she was an unpaid intern at the White House -- an alleged liaison that the OIC further maintains should somehow be viewed as "material" to a now-dismissed civil action for sexual harassment against the President in Arkansas. Without prior authorization from the United States Attorney General or the Special Division of this Court, Kenneth Starr and the OIC have seized upon salacious gossip and improperly attempted to use their prosecutorial powers to investigate Ms. Lewinsky, threatening to indict Ms. Lewinsky for among other "crimes," perjury and obstruction of justice. Between January 12-15, 1998 OIC obtained and reviewed illegal wiretap tapes from Linda Tripp. On January 14th without authorization from the Attorney General or a grant of jurisdiction from the Special Division of this Court OIC cause said Linda Tripp to make another surreptitious tape.

Employing the constitutionally inadmissible wiretap evidence, on January 16, 1998, the OIC made a request for expansion of its jurisdiction under the guise that "exigent circumstances" existed and that there was no time for the Attorney General to conduct the statutorily required preliminary investigation to target Ms. Lewinsky for possible indictment and prosecution. In furtherance of this investigation, the OIC caused to be issued Grand Jury Subpoenas Duces Tecum #D902 and Ad Testificandum #D937 to Ms. Lewinsky's legal counsel, Francis D. Carter. The subpoenas sought to compel Mr. Carter's testimony and production of documents relating to Ms. Lewinsky before the grand jury, including all notes and documents held by Mr. Carter pertaining to his representation of Ms. Lewinsky. (APP 1-10.)

Ms. Lewinsky, as the real-party-in-interest, joined in Mr. Carter's applications to the district court to quash the subpoenas on the grounds they are overly broad and unreasonable in scope, violate Ms. Lewinsky's constitutional rights and were issued in contravention of the policies of the Department of Justice governing subpoenas to attorneys. See D.O.J. Manual 9-2.161(2); Carter Motion at 4; 3/31/98 Mem. Opn., APP 23-24.

Mr. Carter's motion to quash, Ms. Lewinsky's joinder in response and the OIC's opposition thereto and Mr. Carter's related motion for production of the ex parte submission made by OIC were heard in the district court on March 4, 1998, Chief Judge Norma Holloway Johnson, presiding. (3/4/98 R.T.) On March 31, 1998, the district court issued its order denying Mr. Carter's motion for production of OIC's ex parte submission; granting in part, and denying in part Mr. Carter's motion to quash the grand jury subpoenas as follows:

> ORDERED that Mr. Carter must comply with the two subpoenas at issue except for those portions of the subpoenas that call for him to disclose materials in his possession that may not be revealed without violating Monica Lewinsky's Fifth Amendment rights. (APP 11.)

The district court's memorandum opinion of March 31 recites that the parties do not dispute "that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to documents prepared by Mr. Carter during his representation of Ms. Lewinsky." (APP 3.) Thus, the principal dispute before the district court was "whether the crime-fraud exception applies and overcomes the asserted privileges" as well as Ms. Lewinsky's constitutional rights under the circumstances. (*Ibid.*)[1]

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[1] The district court expressly rejected the OIC's contention that Ms. Lewinsky used Mr. Carter's services to suborn perjury (APP at March 31 Memo at 15, fn. 1), and although finding that the OIC "has met its burden under the crime-fraud exception" the district court made clear that it "expressly does not find, however, that Ms. Lewinsky in fact committed these crimes." (*Id.* (continued...)

While the district court found the OIC's in camera proffer was sufficient to overcome the applicable privileges and several of Ms. Lewinsky's constitutional rights, it also nevertheless limited the production of particular items specified by Mr. Carter in his motion to quash (and his testimony regarding them) on the ground that:

> . . . enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items. (APP 23.)

On April 9, 1998, Ms. Lewinsky timely appealed from the order and memorandum denying the relief Mr. Carter and she requested. (APP 50.) Mr. Carter appealed the following day (APP 51), and the OIC thereafter cross-appealed from the order and memorandum (as modified) limiting the disclosure of information sought by its subpoenas in recognition of Ms. Lewinsky's Fifth Amendment rights (APP 52).

IV.

SUMMARY OF ARGUMENT

The district court erred in holding that the *ex parte* submission made by OIC was sufficient to establish the "crime-fraud exception," thereby abrogating the vital privileges (and underlying constitutional rights) protecting Ms. Lewinsky's attorney-client communications and counsel's work product from disclosure to the government.

Ms. Lewinsky's affidavit in *Jones v. Clinton*, Civil Action No. LR-C-94-290 (E.D. Ark.) -- denying she had a "sexual relationship" with President Clinton --could not have been "material" to the issues of that now-defunct civil case. District Judge Susan Webber Wright presiding over that

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(...continued)
at fn. 2.)

matter issued an order on January 30, 1998 precluding all evidence concerning Ms. Lewinsky at trial.[2] Judge Wright expressly ruled that nothing Ms. Lewinsky might have to say concerning an *alleged* consensual affair with Mr. Clinton was material to the "core issues" of the *Jones* action -- a case involving allegations of sexual harassment of a state employee committed by Mr. Clinton while serving as the Governor of Arkansas. (Order of Dismissal, RJN at 12-50; Order Re: Discovery, RJN at 8-11.)[3]

On the record below, the OIC failed to make the requisite *prima facie* showing that the crime-fraud exception applied by reference to the illegally obtained "Tripp tapes" or any other purported evidence.[4] Nor can disclosure be premised upon the information the OIC procured in violation of Department of Justice regulations by communicating with (i.e., interrogating) a citizen whom they had targeted for criminal investigation in these very grand jury proceedings, knowing she was represented by legal counsel.. Respectfully, the district court's unwarranted "extension" of the crime-fraud exception under these circumstances was without legal basis and would unduly permit disclosure of confidential attorney-client information in violation of Ms. Lewinsky's Fourth, Fifth and Sixth Amendment rights. *In the Matter of Feldberg*, 862 F.2d 622, 626 (7th Cir. 1988) (party

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2 Ms. Lewinsky filed a motion to quash a deposition subpoena served upon her in the *Jones v. Clinton* matter. OIC also intervened but filed a motion to stay discovery. Judge Wright granted the motion, finding evidence relating to Ms. Lewinsky not material to the essential core issues. (RJN at 8-11.)

3 Appellant's Request For Judicial Notice submitted pursuant to Federal Rule of Evidence 201 and the public records appended to that request shall hereafter be abbreviated "RJN".

4 Contrary to OIC's erroneous argument (adopted by the district court), Congress has *never authorized* wiretap evidence of private conversations under Title III in furtherance of criminal investigations of the very crimes of which Ms. Lewinsky stands unfairly accused in this proceeding without competent proof; i.e., "**perjury, subornation of perjury *and false declarations before a grand jury or court*** . . . ." *U.S. v. Vest*, 813 F.2d 477, 483 (1st Cir. 1987) (emphasis added internal citation omitted); cf. 4/28/98 Amend. Mem. Opn., APP 35-36.

asserting the privilege must have opportunity for rebuttal before loss of privilege); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 97 (3rd Cir. 1992).

V.

ARGUMENT

A. The Attorney-Client and Work-Product Privileges Are The Cornerstone Of Our Adversary System of Justice And Must Be Protected To Encourage Full And Frank Communications Between Attorneys And Their Clients

1. The OIC's Subpoenas Violate Ms. Lewinsky's Sixth Amendment Right To Effective Assistance of Counsel

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. U.S.*, 449 U.S. 383, 388 (1981). The privilege is founded on the recognized need, intrinsic to our judicial system, for persons to receive confidential legal counsel "which can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

Likewise, the attorney work-product privilege is a reflection of the "historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Thus, "it is not only the attorney who has an interest in his work product or that the principal purpose of the privilege--to foster and protect proper preparation of a case--is not also of deep concern to the client, the person paying for that work. To the extent a client's interest may be affected, [s]he, too, may assert the work-product privilege." *In Re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3rd Cir. 1979); see also *id.* at 801-802 & fns. 4-5 (work-product protection may be asserted independently by *either* attorney or client).

2. The OIC's Overly Broad Subpoenas, If Enforced, Would Violate Ms. Lewinsky's Due Process and Fourth Amendment Rights To Be Free From Unreasonable Searches And Seizures

As such, both privileges fall comfortably within the range of interests afforded constitutional protection, as they are "individual entitlement[s] grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). The ability to confer in utmost confidence with one's own counsel, and without fear of subsequent disclosure to prosecutorial agencies, are among the procedural rights that form the original "cornerstone" of constitutional due process, assuring that rights created under the Constitution or at common law (including the rights of privacy and privileged communications with a trusted legal advisor) are "not arbitrarily abrogated." NACDL Amici Br. at 7; *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government. . .").

Production of documents and other items in Mr. Carter's possession pursuant to the Subpoena Duces Tecum furthermore constitutes an unreasonable search and seizure in violation of Ms. Lewinsky's Fourth Amendment rights. Here, the Independent Counsel seeks to invoke the "compulsory extortion" of Ms. Lewinsky's private papers that are in the custody of her attorney to use as evidence to help convict her of a crime. See *Boyd v. U.S.*, 116 U.S. 616, 630 (1886) ("In this regard the Fourth and Fifth Amendments run almost together"). It has long been recognized that the Fourth Amendment protects an individual where there exists a legitimate expectation of privacy and there is a semblance of government compulsion against the accused. *Couch v. U.S.*, 409 U.S. 322, 336 (1973). Thus, "private information not obtained through compelled self-incriminating testimony is legally protected by the Fourth Amendment." *Fisher v. U.S.*, 425 U.S. 391, 401 (1975).

3. Enforcement Of The Grand Jury Subpoenas Would Violate Ms. Lewinsky's Fifth Amendment Privilege Against Self-Incrimination

Once targeted, the witness's right to remain silent at any proceeding, criminal in nature (including these grand jury proceedings), goes to the very heart of our constitutional requirement that it is the ***prosecution's burden to prove its case*** without the accused's assistance. A citizen may not be involuntarily compelled -- by a subpoena directed to Ms. Lewinsky or her legal counsel -- to provide information helpful to the prosecution's case in violation of her right to remain silent. See *Kastigar v. U.S.*, 406 U.S. 441, 445, 486-487 (1972); *Doyle v. Ohio*, 426 U.S. 610, 617-620 (1976).

The investigative powers of the grand jury cannot support this pernicious effort to breach the attorney-client privilege. In *United States v. R. Enterprises*, 498 U.S. 292 (1990) the Supreme Court, addressing the limits on the investigatory powers of the grand jury, stated:

> The investigatory powers of the grand jury are nevertheless not unlimited. . . . Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. 498 U.S. at 299.

In the instant case the Independent Counsel, through the grand jury, is engaged in such an arbitrary fishing expedition by selecting Mr. Carter as a subject for interrogation when Ms. Lewinsky would no longer speak with the deputies who reneged on an agreement to grant her immunity from prosecution (not coincidentally the same day the first subpoena was issued to Mr. Carter). The only inference to be drawn from the timing of OIC's attempt to make Mr. Carter a witness against his own client is that the Independent Counsel now seeks to intimidate and harass Ms. Lewinsky. The Independent Counsel is well aware of the attorney-client privilege and that his actions will infringe upon the privilege. The malice is clear given the status of the time-honored sanctity of the privilege and pressure brought to bear upon Mr. Carter for the sole purpose of avoiding the development of ***independent sources*** for the threatened prosecution of its case.

Unless these subpoenas are quashed, no attorney can safely confer with his client without apprehension that the documents and information, delivered to him by his client, will be the subject of a subpoena for documents or testimony by the government. *U.S. v. Trammel*, 445 U.S. 40, 50 (1980). It will turn the time-honored profession of the advocate into the prosecutor's unwitting tool. The issuance of the subpoenas has already hampered communication between Mr. Carter and Ms. Lewinsky's present counsel[5] rendering any communication and/or documents exchanged subject to the long shadow cast by the subpoenas presently at issue.

"It is generally acknowledged that the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously" with any "doubt resolved in favor of application of [the] privilege." *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3rd Cir. 1992).[6] The OIC's burden of proving the crime-fraud exception must be reviewed in light of these fundamental rights and privileges. The OIC failed to meet that heavy burden.

B. The OIC Failed to Satisfy Its Heavy Burden Of Establishing A *Prima Facie* Case That The Crime-Fraud Exception Should Be Applied To Defeat The Privileges And Constitutional Protections Attaching to Ms. Lewinsky's Confidential Communications With Her Former Attorney And To Mr. Carter's Files Concerning That Representation

1. The District Court Misapplied the Legal Standard Applicable In This Circuit – Requiring That The Government's *Prima Facie* Case Demonstrate The Client's Communications With The Attorney Were Made In Furtherance Of The Commission Of "Ongoing Or Imminent Crime" – And As A Matter Of Law, The Elements Of The "Crimes"

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5 Mr. Carter, by letter, informed new counsel that he could not meet with him to confer on the case except through Mr. Carter's lawyer. (Lewinsky Resp. to Carter Mtn. at 6.)

6 The attorney's duty to preserve his client's confidential communications is, of course, far broader than the privilege against self-incrimination; the attorney must preserve those confidences "at every peril to himself" as Mr. Carter, a prominent and respected member of this Bar, has vigorously done throughout the several difficult months since being served by the OIC. *Haines*, 975 F.2d at 90; 3/4/98 R.T. at 6, 18.

That The OIC Has Alleged Should Justify The Exception With Respect To Ms. Lewinsky's Privileges Cannot Be Established

As the party seeking to overcome Ms. Lewinsky's privileges and constitutional protections, the government bears "the ultimate burden of showing that the crime-fraud exception applied to [her consultation and retention of Mr. Carter]." *Sealed Case III*, 107 F.3d at 49. This begs the question answered by this court on several occasions in recent years:

> What was the nature of that burden? . . . This Court and others have described the required showing in terms of establishing a "prima facie case." . . . The problem is that prima facie invokes the concept, familiar in civil litigation of shifting the burden from one party to another. *Yet it is altogether clear where the burden in these cases lies -- on the party invoking the crime-fraud exception.* *Id.* at 49-50 (emphasis added); *Sealed Case II*, 754 F.2d at 399.

At least two conditions must be met by the OIC's evidentiary showing: "First, the client must have made or received the otherwise privileged information with the intent to further an unlawful or fraudulent act. [Citations] Second, the client must have carried out the crime or fraud. In other words, the exception does not apply even though at one time [in the past] the client had bad intentions." *Sealed Case III*, 107 F.3d 49. "The advice must relate to *future* illicit conduct by the client; it is the *causa pro causa*, the advice that leads to the deed." *Haines*, 975 F.2d at 90. The burden is satisfied only if the government offers competent evidence that "if believed by the trier of fact would establish *the elements of an ongoing or imminent crime or fraud.*" *Sealed Case III*, 107 F.3d at 50. "Otherwise, 'it would penalize the client for doing what the privilege is designed to encourage -- consulting a lawyer for the purpose of achieving law compliance." *Id.* at 49.

The OIC concedes that its evidence must "demonstrate the elements of a crime or fraud" by Ms. Lewinsky. (OIC Opp. at 9.) On this record, it does not and could not. The district court rejected out-of-hand OIC's claim that Ms. Lewinsky "used Mr. Carter's services to suborn perjury." (APP 15, fn. 1.) The same analysis applies to the alleged "crimes" of perjury and obstruction of justice. The

singular premise of the OIC's charge regarding both crimes is that Ms. Lewinsky "signed the affidavit [in the *Jones* action denying the existence of a 'sexual relationship' with the President] . . . that the affidavit is materially false and that it is used to obstruct justice." (OIC Opp. at 9.)

As a matter of law, the elements of neither charge would be satisfied based on the "facts" disclosed in the district court's opinions. Perjury under federal law requires proof that the accused "knowingly" made a "false" and "material declaration" in a court or grand jury proceeding. 18 U.S.C. section 1623(a). In the *Jones* action, the OIC actually intervened to "support" Ms. Lewinsky in seeking to quash a subpoena for her testimony, resulting in District Judge Wright's legal ruling that nothing Ms. Lewinsky might testify about concerning an alleged consensual "sexual relationship" with Mr. Clinton could have any material bearing on the essential or "core issues" in that civil action.[7]

The absence of "materiality" regarding Ms. Lewinsky's declaration about the existence of any alleged sexual relationship may thus be (and indeed already has been) determined as a matter of law in light of Judge Wright's decisions in the *Jones* action. (Order Re Discovery, RJN at 9-11; Order Re Dismissal, RJN at 12.) No perjury charge is viable without this essential element of the "crime." *U.S. v. Littleton*, 76 F.3d 614, 617 (4th Cir. 1996); *State v. Naranjo*, 611 P.2d 1107, 1116 (N.M. App. 1979) (evidence of each element of perjury must "strong, clear, convincing and direct . . . [e]vidence which is merely probable is not enough [to sustain a conviction]") (digesting numerous state and federal authorities); *U.S. v. Gaudin*, 115 U.S. 506, 508-512 (1995) (although "materiality"

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7 "Materiality " is defined as "one essential to the claim" in terms of whether something "has the natural tendency to influence, or is capable of influencing, the decision-making body to which it is addressed." *Black's Law Dictionary*, 976 (1990 6th ed.); *Kungys v. U.S.*, 485 U.S. 759, 769-770 (1988); F.R.E. 401. Contrast "collateral issue" i.e. one not directly involved in the matter or one that could not be shown in evidence for any independent purpose. *Black's* at 262.

element is a question of law for the court, jury must decide all elements to avoid impairing defense's constitutional rights where jury trial necessary).

By the same token, Ms. Lewinsky's affidavit in *Jones v. Clinton* could not serve as the basis for a charge that she acted "corruptly" with the intent to "obstruct justice" in that case. Not every sworn declaration -- whether true or false -- is capable of influencing the decision-making body to which it is addressed. *Kungys*, 485 U.S. at 769-770; *Littleton*, 76 F.3d at 617 (mother's false testimony at son's criminal proceeding could not have affected the outcome; hence, perjury and obstruction of justice charges dismissed). Ironically, just days before issuing its first subpoena to Mr. Carter, the OIC by intervening in the *Jones* case to advise that Ms. Lewinsky was the "target" of this grand jury, prompting the Court to rule that her testimony could not have materially affected the outcome of that civil action. By virtue of Judge Wright's order excluding Ms. Lewinsky's testimony at trial given its lack of materiality, a scenario transpired that is exactly the opposite of the OIC's fanciful "obstruction of justice" charge -- "admitting any evidence of the Lewinsky matter would frustrate the timely resolution of this case and would undoubtedly cause undue expense and delay." (RJN 9-11.)

2. **The OIC Could Not, And Did Not, Meet Its Burden Of Establishing A *Prima Facie* Case Under The Above Standard By Its Ex Parte Submission To The District Court Of Non-Credible, Unlawfully Obtained And Legally Inadmissible "Evidence"**

The OIC stridently asserts that it acted within its juriadiction in accepting and using approximately 20 hours of illegally procured tape recordings of Linda Tripp's conversations with Ms. Lewinsky, and that on January 14, 1998 without a grant of jurisdiction from the Special Division, the Attorney General or any court, its agents acted properly in "wiring" Ms. Tripp for yet another clandestine recording of a conversation she had with Ms. Lewinsky for the avowed purpose of curing

the taint from the previous Tripp tapes. The district court ruled these materials were admissible as part of its in camera review on the attorney-client privilege question. (APP 40-41.) Not so.

The Supreme Court in *U.S. v. Zolin*, 491 U.S. 554 (1989), in ruling on the kind of evidence that might be considered at a hearing to decide the applicability of the crime-fraud exception, stated the following limitations:

> [W]e hold that the threshold showing to obtain in camera review may be met by using any *relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.* 491 U.S. at 575 (emphasis added).

The OIC's proffer satisfied none of those criteria; the "evidence" was obtained unlawfully, in violation of Ms. Lewinsky's constitutional rights and in excess of OIC's limited jurisdiction. OIC erroneously maintains that the original authority received in 1994 to investigate matters relating to Madison Guaranty and the Whitewater investment deal was sufficient to unilaterally broaden the scope of the inquiry based upon the information received from Ms. Tripp, including tape recorded conversations made of Ms. Lewinsky in violation of Maryland law.

The OIC's powers derive from the Ethics in Government Act, 28 U.S.C. section 591, et seq. The Supreme Court, while holding the Act was constitutional, also observed the Independent Counsel exercises limited jurisdiction and may permissibly act only within the grant of authority received from the Special Division pursuant to request from the Attorney General. *Morrison v. Olson*, 487 U.S. 654, 672 (1988). The jurisdiction extended to Mr. Starr's probe must be reasonably, causally or logically related to the original grant of authority his office received. Any connection between Whitewater and Ms. Lewinsky's social life can only be characterized as a bridge "stretched far over time and factually suspect" for purposes of assessing the OIC's investigative authority under the Act. *U.S. v. Secord*, 725 F.Supp. 563, 64-567 (D.D.C. 1989).

From this dubious origin, according to the OIC, as a prosecutorial arm of the federal government, it is authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sections 2510-2520 to make surreptitious tape recordings of the "targets" of its investigations for perjury, subornation and obstruction of justice. Again, OIC is mistaken:

> Clearly, by enumerating those crimes deemed serious enough to justify interception and disclosure of private communications, Congress intended to strike a balance between Title III's twin purposes of protecting privacy and recognizing the importance and legality of intercepting communications for the purpose of combating crime . . . ***Conspicuously absent from the list of enumerated offenses are the federal crimes of perjury, subornation of perjury, and false declarations before a grand jury.*** 18 U.S.C. §§ 1621-23. *U.S. v. Vest*, 813 F.2d 477, 483 (1st Cir. 1987) (emphasis added).

Moreover, Section 2511 of Title III expressly forbids secretly tape recording conversations in violation of state law. As for the "Tripp tapes," Linda Tripp herself expressed serious concern about the legality of the recordings she provided to the OIC staff. She had cause to worry. *U.S. v. Vario*, 943 F.2d 236, 244 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992); *U.S. v. McNulty*, 729 F.2d 1243, 1264-1265 (10th Cir. 1983); *U.S. v. Marion*, 535 F.2d 697, 702 (2nd Cir. 1976).[8] "Even if one party consents, taping of wire communications is illegal under Maryland law" subjecting the interceptor to civil fines and criminal penalties. APP 40; Md. Code Ann., Cts. & Jud. Proc. sections 10-402 & 10-410 (1997).

Any tapes obtained in violation of Title III are to be excluded from grand jury proceedings. *Gelbard v. U.S.*, 408 U.S. 41, 50-51 (1972). *Gelbard* holds, contrary to the OIC's position and the

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8 See, *Biton v. Menda*, 796 F.Supp. 631, at 633 (D.P.R. 1992) (Section 2511(2)(d) does not apply where state law makes intercepting a phone conversation a crime); *Hirschey v. Menlow*, 747 P.2d 402 (Or. Ct. App. 1987) (conversation illegally recorded under state law requiring consent of all parties does not fall under exception of Section 2511(2)(d)); *Navarra v. Bache Halsey Stuart Shields, Inc.*, 510 F.Supp. 831, 836 (E.D. Mich. 1981) (state law requiring consent by both parties supplements Title III).

district court's rulings below, that the exclusionary provisions of Title III protect not only the victim's right of privacy, but also ensure that the courts do not become partners in the illegal acts of government agents. *Ibid.* Of course, there is an even more compelling reason why the Tripp tapes and any information subsequently derived therefrom are inadmissible -- the Constitution forbids consideration of the "fruits" of any evidence unlawfully obtained in violation of a suspect's rights. *Katz v. U.S.*, 389 U.S. 347, 356 (1967); *Wong Sun v. U.S.*, 371 U.S. 471, 485 (1962). The fruit of the poisonous tree doctrine applies both to illegal wiretap evidence as well as information developed from it. *Chandler v. U.S. Army*, 125 F.3d 1296, 1304 (9th Cir. 1997). Ms. Lewinsky was subjected to 10 hours of "custodial" interrogation by OIC attorneys and the FBI on January 16 in violation of her Fifth and Sixth Amendment rights (she was not *Mirandized* and was told she would not receive immunity and would be prosecuted if she attempted to call her lawyer). The OCI further disregarded Rule 4.2 of the D.C. Rules of Professional Responsibility prohibiting ex parte contact with represented persons.

As this Court aptly stated more than 15 years ago, "No court should order disclosure of privileged [attorney-client communications or work product] . . . if the disclosure would traumatize the adversary process more than the underlying legal misbehavior" under investigation. *In re Sealed Case*, 676 F.2d 793, 814 fn. 84 (D.C. Cir. 1982) (*Sealed Case I*). Truer words were never spoken with respect to the OIC's investigation in this case.

V.

CONCLUSION

Ms. Lewinsky respectfully submits that this Court should continue to "zealously protect" the confidences between attorney and client by reversing the order of the district court allowing production of attorney work product.

Respectfully submitted this 11th day of May 1998,

By:

NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)
SPEIGHTS & MITCHELL
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINSBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

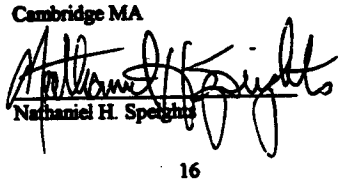
Attorneys for Appellant MONICA LEWINSKY

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief of Appellant was hand delivered to:

Kenneth W. Starr, Esq.
Office of Independent Counsel
1001 Pennsylvania Ave. NW #490 North
Washington D.C. 20004

Charles Ogletree, Esquire
Harvard Law School
320 Hauser Hall
Cambridge MA


Nathaniel H. Speights

APPENDIX OF STATUTES

MARYLAND CODE

Md. Courts and Judicial Proceedings Code Ann. @ 10-401 (1997)

(a) Civil liability. -- Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this subtitle shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications, and be entitled to recover from any person:

(1) Actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(2) Punitive damages; and

(3) A reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Defense. -- A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this subtitle or under any other law.

Md. Courts and Judicial Proceedings Code Ann. @ 10-402 (1997)

Interception of communications generally; divulging contents of communications; violations of subtitle

(a) Unlawful acts. -- Except as otherwise specifically provided in this subtitle it is unlawful for any person to:

(1) Wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle; or

(3) Wilfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subtitle.

(b) Penalty. -- Any person who violates subsection (a) of this section is guilty of a felony and is subject to imprisonment for not more than 5 years or a fine of not more than $10,000, or both.

UNITED STATES CODE

18 U.S.C. § 1503(a)

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or inducement assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats, or force, or by any influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. § 1622

Whoever procures another to commit any perjury is guilty of subornation of perjury and shall be fined under this title or imprisoned not more than five years or both.

18 U.S.C. § 1623(a)

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2511 (2)(d)

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has

given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. Rule 6(e)(2)

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribed recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

28 U.S.C. § 591

(a) Preliminary investigation with respect to certain covered person.—The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person describe din subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

28 U.S.C. § 593

(c) Expansion of jurisdiction.--

(1) In general.--The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appoint of another independent counsel.

(2) Procedure for request by independent counsel.--(A) If the independent counsel discovers or receives information about possible violations of criminal law by person as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determination required by section 592, the Attorney general shall give great weight to any recommendation of the independent counsel.

RECEIVED
OFFICE OF
INDEPENDENT COUNSEL

In The United States Court of Appeals For The District Of Columbia Circuit

No. 98-3052
Consolidated with Nos. 98-3053, 98-3059

In Re: Sealed Case, No. 98-3052

On Appeal From The United States District Court
For The District Of Columbia
Misc. Action No. 98-068 (NHJ)

APPENDIX OF APPELLANT MONICA LEWINSKY
(UNDER SEAL PURSUANT TO D.C. CIRCUIT COURT RULE 47.1)

SPEIGHTS & MITCHELL
NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Appellant MONICA LEWINSKY

Subpoena # D902

To: Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA RIDER

A. Produce any and all documents and things referring or relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, including but not limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings, and memoranda. Such documents should include, but are not limited to, any documents referring or relating to the financial terms and arrangements for payment in your representation of Monica Lewinsky.

B. Produce all telephone records for long distance and local calls made by you, your secretary, and anyone working on your behalf, from June 1, 1997 to the present, related or referring to the following persons:

Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asnes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

C. Produce any and all documents referring or relating to travel in a limousine or other chauffeur service by you or Vernon Jordan since June 1, 1997.

D. Produce any and all documents referring or relating to any communication since January 1, 1997 with any of the following persons or their representatives. These documents should include, but are not limited to, calendars, appointment books, telephone messages, telephone and toll records, correspondence, courier records/logs, and visitor records/logs:

INDEX TO APPELLANT'S APPENDIX*

Description	Appendix Page
Subpoena Duces Tecum #D902 dated Feb. 2, 1998, issued to Francis Carter, Esq.	APP 0001
Subpoena Ad Testificandum #D937 dated Feb. 9, 1998, issued to Francis D. Carter, Esq.	APP 0009
Order, *In Re Grand Jury Subpoena To Francis D. Carter*, Misc. Action No. 98-068 (NHJ) (UNDER SEAL) filed Mar. 31, 1998	APP 0011
Memorandum Opinion, *In Re Grand Jury Subpoena To Francis D. Carter*, Misc. Action No. 98-068 (NHJ) (UNDER SEAL) filed Mar. 31, 1998	APP 0012
Amended Memorandum Opinion, *In Re Grand Jury Subpoena To Francis D. Carter*, Misc. Action No. 98-068 (NHJ) (UNDER SEAL) filed Apr. 28, 1998	APP 0031
Notice of Appeal by Appellant Monica Lewinsky, *In Re Grand Jury Subpoena To Francis D. Carter*, Misc. Action No. 98-068 (NHJ) (UNDER SEAL) dated Apr. 9, 1998	APP 0050
Notice of Appeal of Appellant Francis D. Carter, *In Re Grand Jury Subpoena To Francis D. Carter*, Misc. Action No. 98-068 (NHJ) (UNDER SEAL), dated Apr. 10, 1998	APP 0051
Notice of Appeal of Appellant the Office of Independent Counsel, *In Re Grand Jury Subpoena To Francis D. Carter*, Misc. Action No. 98-068 (NHJ) (UNDER SEAL), dated Apr. 30, 1998	APP 0052

* F.R.A.P. 30 requires that the parties list the relevant docket entries in the Appendix. Because the docket in this action is under seal, the Appellant is unable to provide this docket information.

RETURN OF SERVICE[1]

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE

SERVED ON (PRINT NAME)

SERVED BY (PRINT NAME) | TITLE

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER[2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

[1] As to who may serve a citation and the manner of its service see Rule 4 Federal Rules of Criminal Procedure, or Rule 4(d)(4), Federal Rules of Civil Procedure.

[2] "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or an behalf of certain indigent parties and certain witnesses who are unable to pay such attendance fees (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)."

Subpoena # D902

To: Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA RIDER

A. Produce any and all documents and things referring or relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, including but not limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings, and memoranda. Such documents should include, but are not limited to, any documents referring or relating to the financial terms and arrangements for payment in your representation of Monica Lewinsky.

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Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asnes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

C. Produce any and all documents referring or relating to travel in a limousine or other chauffeur service by you or Vernon Jordan since June 1, 1997.

D. Produce any and all documents referring or relating to any communication since January 1, 1997 with any of the following persons or their representatives. These documents should include, but are not limited to, calendars, appointment books, telephone messages, telephone and toll records, correspondence, courier records/logs, and visitor records/logs:

CO 293 (Rev. 3/91) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE DISTRICT OF COLUMBIA

TO: Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Court for the District of Columbia Third & Constitution Avenue, N.W. Washington, D.C.	Grand Jury, Third Floor DATE AND TIME February 17, 1998/9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

See attached rider.

☐ Please see additional information on reverse.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
Nancy M. [illegible], Clerk (BY) DEPUTY CLERK Margaret [illegible] Napier	February 2, 1998 (D902)

This subpoena [illegible] of the United [illegible]

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY
Darrell M. Joseph, Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-North
Washington, D.C. 20004
(202) 514-8688

*If not applicable, enter "none."

APP0001

Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asnes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

E. Produce any and all documents referring or relating to Monica Lewinsky and any communication with McAndrews & Forbes or Revlon, Inc. and their employees, agents, or representatives, including, but not limited to, Ron Perelman, Howard Gittes, and Barry Schwartz.

F. Produce any and all documents referring or relating to Monica Lewinsky and any communication with the United Nations, or the office of the United States Ambassador to the United Nations, including but not limited to any communications with William Richardson, from January 1, 1997 to the present.

Definitions and Instructions

1. Definitions

a. The term "document" or "documents" as used in this subpoena means all records of any nature whatsoever within your possession, custody or control or the possession, custody or control of any agent, employee, representative (including, without limitation, attorneys, investment advisors, investment bankers, bankers and accountants), or other person acting or purporting to act for or on your behalf or in concert with you, including, but not limited to, draft, pending or executed contracts and/or agreements, sample documents, insurance policies, financial guarantee bonds, letters of credit, communications, correspondence, calendars, DayTimers, date books, telegrams, facsimiles, telexes, telefaxes, electronic mail, memoranda, records, reports, books, files (computer or paper), summaries or records of personal conversations, meetings or

interviews, logs, summaries or records of telephone conversations and/or telefax communications, diaries, forecasts, statistical statements, financial statements (draft or finished), work papers, drafts, copies, bills, records of payments for bills, retainer records, attorney time sheets, telephone bills and records, telefax bills and records, tax returns and return information, employee time sheets, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultants' reports and/or records, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, maps, plats, trade letters, depositions, statements, interrogatories and answers thereto, pleadings, docket sheets, discovery materials, audit letters, audit reports, materials underlying audits, document productions, transcripts, exhibits, settlement materials, judgments, press releases, notes, marginal notations, invoices, documents regarding collateral or security pledged, settlement statements, checks disbursed or received at settlement, inspection reports, title policies, financial statements and/or federal tax returns submitted by any person in support of any loan application, items related the repayment, if any, of any interest or principal on the loan, items relating to any default on the loan, commission records, evidence of liens, documents relating to filings under the Uniform Commercial Code and/or its equivalent, foreclosure and mortgage documentation, cashiers checks, bank drafts, money orders, bank and brokerage account statements, debit and credit memoranda, wire transfer documentation, opening account cards, signature cards, loan applications, any employment and bank account deposit verification documents, loan histories, loan files, records of loan repayment or any and all efforts to secure repayment, including foreclosure or records of lawsuits, credit references, board resolutions, minutes of meetings of boards of directors, opinion letters, purchases and sales agreements, real estate contracts, brokerage agreements, escrow agreements, loan agreements, offer and acceptance contracts, or any other contracts or agreements, deeds or other evidence of title, escrow accounts and any other escrow documentation, savings account transcripts, savings account deposit slips, savings account withdrawal slips, checks deposited in savings accounts, checking account statements, canceled checks drawn on checking accounts, deposit slips and checks deposited into checking accounts, credit card accounts, debit and credit documentation, safe deposit records, currency transaction reports (IRS Forms 4789), photographs, brochures, lists, journals, advertising, computer tapes and cards, audio and video tapes, computerized records stored in the form of magnetic or electronic coding on computer media or on media capable of being read by computer or with the aid of computer related equipment, including but not limited to floppy disks or diskettes, disks, diskettes, disk packs, fixed hard drives, removable hard disk cartridges, mainframe computers, Bernoulli boxes, optical disks, WORM disks, magneto/optical

disks, floptical disks, magnetic tape, tapes, laser disks, video cassettes, CD-ROMs and any other media capable of storing magnetic coding, microfilm, microfiche and other storage devices, voicemail recordings and all other written, printed or recorded or photographic matter or sound reproductions, however produced or reproduced.

The term "document" or "documents" also includes any earlier, preliminary, preparatory or tentative version of all or part of a document, whether or not such draft was superseded by a later draft and whether or not the terms of the draft are the same as or different from the terms of the final document.

b. The term "communication" or "communications" is used herein in its broadest sense to encompass any transmission or exchange of information, ideas, facts, data, proposals, or any other matter, whether between individuals or between or among the members of a group, whether face-to-face, by telephone or by means of electronic or other medium.

c. "Possession, custody or control" means in your physical possession and/or if you have the right to secure or compile the production of the document or a copy from another person or entity having physical possession, including, but not limited to, your counsel.

d. The term "referring or relating" to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject including, but not limited to, documents concerning the preparation of other documents.

e. The term "you" means yourself and any of your companies, partnerships and business entities with which you have been affiliated and any employees, partners, associates or members of any firm with which you have been affiliated in the course of your work for any of the persons or entities named in this rider, and any such firms and the affiliates of those firms.

2. Instructions

a. The originals of all documents and communications must be produced, as well as copies within your possession, custody, or control.

b. If any original document cannot be produced in full, produce such document to the extent possible and indicate specifically the reason for your inability to produce the remainder.

c. Documents shall be produced as they are kept in the usual course of business, as organized in the files.

d. File folders, labels, and indices identifying documents called for shall be produced intact with such documents. Documents attached to each other should not be separated.

e. In reading this rider, the plural shall include the singular and the singular shall include the plural.

f. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The use of the word "including" shall be construed without limitation.

g. In the event that any document, or portion thereof, called for by this subpoena is withheld on the basis of any claim of privilege or similar claim, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c) addressee; (d) the position or title of the addressee; (e) any indicated or blind copies; (f) date; (g) a description of the subject matter of the document; (h) number of pages; (i) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, has been disclosed, distributed, shown, or explained; and (k) present custodian. Each basis you contend justifies the withholding of the document shall also be specified. With respect to those documents or records as to which you may claim privilege, or attorneys' work product, set forth as to each such document the basis for such claim, including the purpose and circumstances surrounding the creation of the document, the identity of each person who has been privy to such communication reflected in the document, the identity of any person or entity instructing the subpoena recipient or the attorney of the subpoena recipient to withhold production of the document, and whether you will submit the document to the Court for an in camera determination as to the validity of the claim. If the existence of a joint defense agreement or any agreement as to common interest is relevant to the assertion of any claim of privilege or similar claim, please provide a copy of that agreement; if any such agreement is not in writing, please set forth the date of the creation of the agreement, the identities of all parties to the agreement and the specific individuals who entered into the agreement on behalf of these parties, and the objects, purposes, and scope of the agreement.

h. In the event that any document called for by this subpoena has been lost, destroyed, deleted, altered, or otherwise disposed of, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c)

addressee; (d) the position or title of the addressee; (e) indicated or blind copies; (f) date; (g) a brief description of the subject matter of the document; (h) number of pages; (I) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, had been disclosed, distributed, shown or explained; (k) the date of the loss, destruction, deletion, alteration, or disposal and the circumstances thereof; and (l) the reasons, if any, for the loss, destruction, deletion, alteration, or disposal and the person or persons responsible.

i. If any information or data is withheld because such information or data is stored electronically, it is to be identified by the subject matter of the information or data and the place or places where such information is maintained.

CO 253 (Rev. 9/91) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE DISTRICT OF COLUMBIA

TO:
Francis D. Carter, Esq.
1341 G St., NW
Washington, DC

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Court for the District of Columbia Third & Constitution Avenue, N.W. Washington, D.C.	Grand Jury, Third Floor DATE AND TIME February 17, 1998/9:15 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

☐ Please see additional information on reverse.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
Nancy M. [illegible] Whittington, Clerk (BY) DEPUTY CLERK Margaret [illegible] Papier	February 9, 1998 (D937)

This subpoena [illegible] of the United States [illegible]

PHONE, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Paul Rosenzweig, Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-North
Washington, D.C. 20004
(202) 314-8688

APP0009

[illegible] (Rev. [illegible]) Subsidiary to Treasury Defense Grand Jury

RETURN OF SERVICE (1)

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE

SERVED ON (PRINT NAME)

SERVED BY (PRINT NAME)	TITLE

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER (2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b), Federal Rules of Criminal Procedure)"

APP0010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED

MAR 31 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the motion of Francis D. Carter to quash grand jury subpoenas, supporting and opposing memoranda, and the oral argument of counsel thereon, it is this 31st day of March 1998,

ORDERED that the motion of Francis Carter for production of the ex parte submission of the Office of the Independent Counsel be, and hereby is, denied; it is further

ORDERED that the motion of Francis D. Carter to quash grand jury subpoenas be, and hereby is, granted in part and denied in part; and it is further

ORDERED that Mr. Carter must comply with the two subpoenas at issue except for those portions of the subpoenas that call for him to disclose materials in his possession that may not be revealed without violating Monica Lewinsky's Fifth Amendment rights.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO FRANCIS D. CARTER	Misc. Action No. 98-068 (NHJ) UNDER SEAL

FILED
MAR 3 1 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Attorney Frank Carter was retained by Monica Lewinsky to represent her in connection with the Jones v. Clinton civil action pending in the Eastern District of Arkansas. Mr. Carter drafted an affidavit for Ms. Lewinsky's signature stating that she did not have a sexual relationship with the President of the United States. She signed that affidavit under penalty of perjury. Mr. Carter has been served with two subpoenas: one calling for documents and the other seeking his testimony. He seeks to quash those subpoenas.

Before the Court is Mr. Carter's motion to quash, a brief from amici curiae the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers in support of the motion to quash, and Ms. Lewinsky's "Response of the Real Party in Interest" in support of the motion to quash, as well as an opposition from the Office of the Independent Counsel ("OIC").

Mr. Carter makes several arguments in support of his motion to quash the subpoenas: (1) the subpoenas are overbroad; (2) the subpoenas improperly seek to pierce Ms. Lewinsky's attorney-client privilege and work product protection; (3) compliance with the subpoenas would violate Ms. Lewinsky's Fifth Amendment privilege against self-incrimination; (4) issuance of the subpoenas violates Department of Justice policy; and (5) the OIC improperly communicated with Ms. Lewinsky while she was represented by Mr. Carter and prevented her from calling Mr.

Carter when still asked to do so.

A. Overbreadth

Mr. Carter first argues that the subpoenas are too broad. The subpoena duces tecum requests all documents and things relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, as well as all documents relating to any communications with a list of seventeen people. The Court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. 17(c). The law presumes that, "absent a strong showing to the contrary, . . . a grand jury acts within the legitimate scope of its authority." United States v. R. Enterprises, 498 U.S. 292, 301 (1991). Moreover, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." Id.

The Court finds that Mr. Carter has not met that burden. The subpoena duces tecum limits much of its inquiry to documents created after January 1, 1997. The brevity of Mr. Carter's representation of Ms. Lewinsky, no more than a three-month period, also weighs in favor of the reasonableness of the subpoena. The Court finds that the subpoenas are not overbroad or unduly oppressive.

B. The Attorney-Client Privilege and Work Product Doctrine

There is no dispute among the parties that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to documents prepared by Mr. Carter during his representation of Ms. Lewinsky. At issue is whether the crime-fraud exception applies and overcomes the asserted privileges.

1. *The Crime-Fraud Exception*

Mr. Carter asserts that the attorney-client privilege and the work product doctrine bar disclosure of the documents and testimony sought by the subpoena. The OIC claims that the crime-fraud exception to those privileges applies and the Independent Counsel is entitled to production of the documents and testimony. The Court notes that Mr. Carter's papers and that of amici express great concern that the subpoena "impinges on the long-honored respect of the adversarial system for the confidentiality of the attorney-client relationship." Mot. to Quash at 2. However, it is settled law in this Circuit that, where the relationship between attorney and client is abused and the client uses the attorney's legal services to further a crime or fraud, the privileges' protections are overcome. In re Sealed Case, 107 F.3d 46, 49, 51 (D.C. Cir. 1997).

Two conditions must be met for the crime-fraud exception to apply. First, "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." Id. at 49. Second, "the client must have carried out the crime or fraud." Id. The Independent Counsel carries the burden of showing that the crime-fraud exception applies. Id. The attorney does not need to know about his client's potential wrongdoing for the exception to apply, In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982), and there is no suggestion that Mr. Carter knew about any alleged wrongdoing.

This Circuit appears to hold to the following standard for the application of the crime-fraud exception: the proponent must bring forward "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 107 F.3d at 50 (quoting In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985)). The Court of Appeals also notes that the Second Circuit follows a different standard: the proponent must

demonstrate "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." Id. at 50 (quoting In re John Doe Corp., 675 F.2d 482, 491 & n.7 (2d Cir. 1982)). There is some confusion over which of these standards the D.C. Circuit finds controlling.

Nevertheless, the Court finds that, under either of those standards, the OIC has amply demonstrated that the crime-fraud exception applies and overrules the attorney-client privilege. The OIC's in camera submission shows that Ms. Lewinsky made the privileged communications with the intent and the express purpose to further unlawful acts and that she in fact carried out those unlawful acts. The unlawful acts were perjury and obstruction of justice.[1] See 18 U.S.C. §§ 1621 (perjury), 1623 (false declarations), 1503 (obstruction of justice).

The OIC has demonstrated in its in camera materials that there is probable cause to believe that these crimes were committed and that the communications furthered those crimes. If the trier of fact believed the evidence in the submission, that evidence would establish the elements of perjury and obstruction of justice. The OIC's evidence shows that Ms. Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice.[2]

As for the work product doctrine, "the crime-fraud exception calls for a somewhat different inquiry than with the attorney-client privilege. The focus is . . . on the client's intent in consulting the lawyer or in using the materials the lawyer prepared. The question is: Did the

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[1] The Court is not persuaded that the OIC has shown that Ms. Lewinsky used Mr. Carter's legal services to suborn perjury. See 18 U.S.C. § 1622 (subornation of perjury).

[2] The Court finds here that the OIC has met its burden under the crime-fraud exception. It expressly does not find, however, that Ms. Lewinsky in fact committed these crimes.

client consult the lawyer or use the material for the purpose of committing a crime or fraud?" In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). The evidence submitted by the OIC in camera meets the burden of showing an affirmative answer to this question. The Court finds that the OIC's in camera submission shows that Ms. Lewinsky consulted Mr. Carter for the purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice. The OIC has established that the crime-fraud exception applies to the work product subpoenaed in this case.

Because the Court finds that the crime-fraud exception applies, it need not address the issue of whether Ms. Lewinsky waived the attorney-client privilege by disclosing privileged material.

2. *Should the Court extend the crime-fraud exception to this case?*

Amici argue vigorously that the Court should not extend the crime-fraud exception to this case. They express concern that what is at issue here is simply an individual's prior inconsistent statement which should be used at trial to impeach, not to pierce the attorney-client privilege and work product protection. This is not a case, however, where the Court finds mere inconsistencies. It is a case where the OIC's in camera submission shows that Ms. Lewinsky deliberately intended to commit perjury and used her attorney to help her do so.

Amici suggest that perjury is not sufficiently serious to merit the application of the crime-fraud exception. They cite cases stating that the government must make a prima facie case of "a violation sufficiently serious to defeat the privilege." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982). The violation must, amici state, "be of sufficient weight to warrant abridging the privilege." Id. at 815 n.85. Perjury is

plainly of "sufficient weight" to warrant abridging the attorney-client privilege in this instance. "[P]erjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." Nix v. Whiteside, 475 U.S. 157, 169 (1986). This Court takes perjury very seriously and believes it to be a sufficiently weighty offense. It is a felony. Moreover, the evidence suggests that obstruction of justice has also taken place, another plainly weighty offense.

Moreover, case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply. The language in In re Sealed Case, 754 F.2d at 399, states that there must be "a violation" serious enough to defeat the privileges. There need not be "widespread criminal activity," Amici Br. at 18, in order to find that the client has eviscerated her attorney-client privilege and work product protection.

Contrary to amici's suggestions, this is not a situation in which a client confided in an attorney that she committed a crime. Here, the OIC's in camera submission demonstrates that the client utilized the attorney's legal services with the specific purpose of committing a crime, a crime she could not have committed without his services. Thus, it is merely alarmist for amici to warn that "[e]xtending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship." Amici Br. at 3.

The Court finds that the OIC has met its burden under the crime-fraud exception; its in camera submission demonstrates that Ms. Lewinsky consulted Mr. Carter and used his services

to commit perjury, not merely that her statements were inconsistent. There is probable cause to find not only that her testimony in the Jones v. Clinton affidavit was false, but also that Ms. Lewinsky purposefully and actively used Mr. Carter to commit the crimes of perjury and obstruction of justice. The Court does not believe that, by denying Mr. Carter's motion to quash, it will be "sending a message to every client and potential client that embarrassing or even incriminating information confided to their attorneys might, without warning, be disclosed to federal prosecutors." Amici Br. at 14. If this Court does send a message with this decision, that message would be that clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged.

3. *Does the OIC's ex parte in camera submission violate due process and must it be released to movant?*

Mr. Carter argues that the Independent Counsel's ex parte in camera submission violates due process. "[C]ommunications between a judge and one party are not per se deprivations of the due process rights of the opposing party." Clifford v. United States, ___ F.3d ___, 1998 WL 61165, *5 (D.C. Cir. 1998). The Independent Counsel was required to meet its burden of showing that the crime-fraud exception applies and properly did so with its submission to the Court. The Court's in camera inspection of materials upon which the OIC based its showing of the crime-fraud exception does not violate due process. Review of ex parte in camera materials to establish the crime-fraud exception does not violate due process. In re Grand Jury Proceedings, 33 F.3d 342, 351-53 (4th Cir. 1994); In re John Doe, Inc., 13 F.3d 633, 635-37 (2d Cir. 1994); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1989).

Mr. Carter also wants the OIC to disclose the ex parte submission to him.[3] Before the Court is the motion of Francis Carter for production of the ex parte submission. The Court finds that the ex parte submission is properly confidential and the practice of submitting such materials to the Court in camera is well recognized. See, e.g., In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982).

4. Can this Court properly consider Linda Tripp's tapes in deciding whether the crime-fraud exception applies?

As part of its in camera submission, the Independent Counsel provided the Court with transcripts of tape recordings made by Linda Tripp of conversations she had with Monica Lewinsky. Mr. Carter argues that federal law prohibits the use of Ms. Tripp's tape recordings in all judicial proceedings, including those before this Court, and therefore prevents the Court from relying on them to establish the crime-fraud exception. The Court finds that it may properly rely upon the tapes in making its determination of whether the crime-fraud exception applies.

The burden is on Mr. Carter to prove that the tapes are inadmissible. United States v. Dale, 991 F.2d 819, 840 (D.C. Cir.), cert. denied, 510 U.S. 1030 (1993). First, Mr. Carter argues that Ms. Tripp intercepted the communications in order to commit a criminal or tortious act, in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III") and that the tapes are thus inadmissible.

Title III provides that whenever any communication has been intercepted, the communication and any evidence derived therefrom may not be received in evidence in any

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[3] The Court strongly disagrees with movant's suggestion that "[t]he traditional reasons for grand jury secrecy are completely inapplicable in this, the most public of investigations." Reply Br. at 13.

proceeding before any court or before a grand jury "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The federal law also provides that it is lawful for a private party to intercept a communication

> where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Because Ms. Tripp was a party to the conversation, it was lawful for her to tape the conversation unless the communication was intercepted for the purpose of committing a criminal or tortious act as described in the statute.

This Circuit has held that "a violation of Title III is established when 'it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act.'" Dale, 991 F.2d at 841 (quoting United States v. Vest, 639 F. Supp. 899, 904 (D. Mass. 1986), aff'd, 813 F.2d 477 (1st Cir. 1987), cert. denied, 488 U.S. 965 (1988)). Mr. Carter has not sustained his burden of proving that Ms. Tripp acted with an impermissible purpose. In fact, he has not suggested that Ms. Tripp was motivated by a desire to commit an act that was criminal or tortious.

Under Title III, the relevant inquiry is whether the communication was intercepted for the purpose of committing a criminal or tortious act, not whether the interception itself constituted a criminal or tortious act. 18 U.S.C. § 2511(2)(d). Assuming that Ms. Tripp's recordings violated Maryland law, that fact by itself does not establish that she intercepted the conversations "for the purpose of committing [a] criminal or tortious act in violation of the . . . laws of . . . any State."

See United States v. DiFelice, 837 F. Supp. 81, 82 (S.D.N.Y. 1993). If Ms. Tripp had made the tapes in order to blackmail Ms. Lewinsky, for example, then that would have been for the purpose of committing a crime. Instead, she intercepted the communications for the purpose of bringing her conversations with Ms. Lewinsky to light, which Mr. Carter does not allege is a criminal or tortious act. The D.C. Circuit has found that "[t]aping phone calls to make an accurate record of a conversation 'in order to prevent future distortions by a participant' is not illegal, even when the recording is made in the hopes of producing evidence of an illegal conspiracy." Dale, 991 F.2d at 841 (citations omitted).

Mr. Carter does not allege that Ms. Tripp made these tapes for the purpose of violating Maryland's law against taping without both parties' consent. "[T]he legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communications intercepted." United States v. Underhill, 813 F.2d 105, 110 (6th Cir.), cert. denied, 482 U.S. 906 (1987). The Court finds that Title III does not prohibit it from considering the tapes in ruling on this motion.

Second, Mr. Carter argues that the taping was illegal under Maryland law and therefore the Court should apply the more stringent state standards and prevent disclosure of the tapes. Maryland law governing the interception of communications is more stringent than federal law. Even if one party consents, taping of wire communications is illegal under Maryland law. Md. Code Ann., Cts. & Jud. Proc. §§ 10-402 & 10-410 (1997). Mr. Carter argues that federal courts must respect the more stringent state law protection of privacy rights.

The Court need not decide whether the taping was illegal under Maryland law because federal law, in the form of Title III, governs. Federal law governs the admissibility of evidence

in a federal criminal case. United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir.), cert. denied, 118 S. Ct. 78 (1997). Evidence obtained from a consensual wiretap conforming to Title III is admissible in federal court proceedings without regard to state law. United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983). Several circuits have held that a more restrictive state law, such as Maryland's, would not affect the admissibility of wiretap evidence in a federal court. See, e.g., Leitman v. McAusland, 934 F.2d 46, 50 (4th Cir. 1991); United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Horton, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Nelligan, 573 F.2d 251, 253 (5th Cir. 1978); United States v. Turner, 558 F.2d 46, 49 (2d Cir. 1977).

Whether or not Maryland law would prohibit the use of these tape recordings in a Maryland court does not affect this Court's determination. Title III controls and the Court may properly consider Ms. Tripp's tapes.

C. Monica Lewinsky's Fifth Amendment Right Against Self-Incrimination

Mr. Carter claims that materials in his possession may not be revealed without violating Ms. Lewinsky's Fifth Amendment rights. The subpoena to Ms. Lewinsky in Jones v. Clinton demanded specific items that she allegedly possessed and allegedly gave to Mr. Carter. Mr. Carter argues that production of those items or documents reflecting their existence would be incriminatory.

The privilege protects against "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972). The Supreme Court has found that the act

of producing a document may fall within the Fifth Amendment privilege. "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." United States v. Doe, 465 U.S. 605, 612 (1984).

The standard set out by the Supreme Court is the following: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Kastigar, 406 U.S. at 486-87. The privilege includes "answers that would in themselves support a conviction under a federal criminal statute" and also included answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Id.

Regarding the particular items specified by Mr. Carter, enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items.

D. Allegations of Prosecutorial Misconduct

Mr. Carter claims that OIC attorneys engaged in various types of misconduct in their handling of this matter.

a. *Department of Justice policy on issuing subpoenas*

Mr. Carter argues that the subpoenas issued to him violate a Department of Justice policy that limits the circumstances under which an attorney may be subpoenaed. See DOJ Manual at § 9-2.161(2). The guidelines provide that, first, before an attorney can be subpoenaed, all

reasonable attempts should have been made to obtain information from alternative sources. Second, there should be an independent evaluation of whether the subpoena is narrowly drawn and directed at material information regarding a limited subject matter. Third, there should also be an evaluation of whether the subpoena seeks information protected by a valid claim of privilege.

The DOJ guidelines do not confer enforceable rights on those who receive subpoenas, as movant concedes. The DOJ Manual "is a publication which, by its own terms, provides 'internal Department of Justice guidance,' and is 'not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.'" Nichols v. Reno, 124 F.3d 1376, 1377 (10th Cir. 1997) (quoting D.O.J. Manual, at § 1-1.00). The government's violation of its internal operating procedures, on its own, does not create a basis for suppressing Carter's subpoena. See United States v. Myers, 123 F.3d 350, 355-56 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997).

Most importantly, the Court has no reason, other than the allegations in Mr. Carter's papers, to believe that the Independent Counsel did not undertake the applicable balancing. Mr. Carter's attempt to apply the DOJ guidelines in this instance must fail.

b. *Contact with represented persons*

Mr. Carter claims that OIC attorneys communicated with Ms. Lewinsky, and sent Ms. Tripp to record her conversations with Ms. Lewinsky, when they knew Ms. Lewinsky was represented by Mr. Carter. Rule 4.2 of the D.C. Rules of Professional Conduct provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the

> prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2(a) (emphasis added). The Comment to the Model Rule states:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Model Rule 4.2 cmt. 2.

The D.C. Circuit has found that non-custodial communications with represented criminal suspects during the investigatory stage are not subject to the anti-contact rule. United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973). In Sutton, government informants recorded inculpatory conversations with the defendant prior to indictment and after the government became aware that the defendant was represented by counsel. The Court of Appeals stated that the disciplinary rule against contact "was never meant to apply to situations like this one" and refused to exclude the taped conversations. Sutton, 801 F.2d at 1366. A similar factual situation occurred in Lemonakis and the D.C. Circuit there stated: "we nevertheless find the actions of the U.S. Attorneys to be consistent with the current ethical standards demanded of the legal profession." Lemonakis, 485 F.2d at 955.

With the exception of the Second Circuit, every court of appeals that has considered a similar case has held that ethical rules such as Rule 4.2 do not apply to pre-indictment criminal investigations by government attorneys or their agents. See United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990); Unit

States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981). These courts have held that the anti-contact rule "is inapplicable to contacts made by prosecutors or their agents with criminal suspects in the course of a pre-indictment investigation." United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983).

Only the Second Circuit has found a prosecutor's conduct to violate the ethical rule against contact with a represented person in a non-custodial, pre-indictment setting. See United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). Even that court held that "the use of informants by government prosecutors in a pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the disciplinary rule] and therefore will not be subject to sanctions." Id. at 839.

The interview with Ms. Lewinsky occurred prior to any indictment and in a non-custodial setting; Mr. Carter has not alleged otherwise. Even if Ms. Tripp did act as an agent of the prosecutors, her undercover recording of Ms. Lewinsky also does not violate the ethical prohibition on contact with a represented party. The Court finds that attorneys from the OIC acted within the ethical rules in questioning Ms. Lewinsky without her attorney present.

However, Department of Justice regulations provide: "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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the

attorney representing such person or party." 28 C.F.R. § 77.8 (1998). The Independent Counsel statute provides: "An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1).

Department of Justice regulations explicitly provide that 28 C.F.R. Part 77 "does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States." 28 C.F.R. § 77.11(b) (1998). Moreover, the regulations provide that "[a]llegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice . . . ." 28 C.F.R. § 77.11(a) (1998).

This Court's supervisory power to control prosecutorial misconduct before the grand jury is quite limited. See United States v. Williams, 504 U.S. 36 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Supreme Court in Williams in essence removed all general supervisory authority over the grand jury from the federal courts. In that case, the district court had dismissed an indictment because the government failed to disclose substantial exculpatory evidence to the grand jury, in violation of a Tenth Circuit rule and provisions in the DOJ manual to the contrary. 504 U.S. at 47. The Supreme Court held that the district court had improperly used its supervisory powers, stating: "[W]e think it clear that, as a general matter at

least, no such 'supervisory' judicial authority [over grand jury functioning] exists . . . ." Id. at 50. It went on to state that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id.

The First, Sixth, and Seventh Circuits have addressed situations in which prosecutors who violated the Department of Justice Manual by failing to provide warnings to targets of a grand jury's investigation where such warnings were not constitutionally mandated. See Myers, 123 F.3d at 355; United States v. Gillespie, 974 F.2d 796, 799 (7th Cir. 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989). In each case, the courts found that they were faced with "the violation of a policy which does not justify a case-related judicial sanction and yet which appears immune to expressions of judicial satisfaction." Myers, 123 F.3d at 357; Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 310-11. The First and Seventh Circuits explicitly warned prosecutors that, in appropriate circumstances, they would consider referring such internal policy violations to the Department of Justice's Office of Professional Responsibility. Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 311.

The Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas. Myers, 123 F.3d at 358. However, as the First Circuit said, "[w]e assume that these policies are meant to be enforced. . . ." Pacheco-Ortiz, 889 F.2d at 311. The Court expresses its concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel but declines to take further action on this particular matter.

c. *Disruption of the attorney-client relationship*

Mr. Carter also claims that Ms. Lewinsky was not permitted to contact him while the Independent Counsel was questioning her. Monica Lewinsky states in her declaration: "I informed the government officials, including Mr. Emmick, that Mr. Carter was my attorney and requested permission to contact him. I was informed that I could contact any other attorney, but I could not contact Mr. Carter." Lewinsky Decl. at ¶¶ 4-5. Ms. Lewinsky's counsel proffered at oral argument that Mr. Emmick told Ms. Lewinsky not to call Mr. Carter because he might "tip off" Vernon Jordan, but that allegation does not appear in Ms. Lewinsky's subsequent declaration. The Independent Counsel has submitted a declaration from an FBI Special Agent who states: "At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter." Fallon Decl. at ¶ 3. The OIC submitted no declaration from Mr. Emmick.

This conduct, if it occurred, did not violate Ms. Lewinsky's Sixth Amendment right to counsel because that right had not yet attached at the time of the interview. Sixth Amendment rights do not "attach until after the initiation of formal charges." Moran v. Burbine, 475 U.S. 412, 431 (1986); see also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) (holding that Sixth Amendment rights do not attach until "the time that adversary judicial proceedings have been initiated" against the suspect). A right Ms. Lewinsky did not possess could not have been violated. This situation also does not appear to be covered by the Rules of Professional Conduct. See Rule 4.2 of the D.C. Rules of Professional Conduct.

Department of Justice regulations, however, state that "An attorney for the government, or anyone acting at his or her direction, may not, when communicating with a represented person or represented party . . . improperly seek to disrupt the relationship between the represented

person or represented party and counsel." 28 C.F.R. § 77.9 (1998). As the Court has found, Department of Justice regulations do not provide a basis for quashing the subpoenas. However, the Court is extremely disturbed by the sworn allegation that an attorney from the Office of Independent Counsel disrupted an existing attorney-client relationship in this fashion. The Court will consider referring this matter to the Department of Justice Office of Professional Responsibility for investigation.

An appropriate Order will issue this date.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: March 31, 1998

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO
FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
APR 28 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

AMENDED MEMORANDUM OPINION

Attorney Frank Carter was retained by Monica Lewinsky to represent her in connection with the Jones v. Clinton civil action pending in the Eastern District of Arkansas. Mr. Carter drafted an affidavit for Ms. Lewinsky's signature stating that she did not have a sexual relationship with the President of the United States. She signed that affidavit under penalty of perjury. Mr. Carter has been served with two subpoenas: one calling for documents and the other seeking his testimony. He seeks to quash those subpoenas.

Before the Court is Mr. Carter's motion to quash, a brief from amici curiae the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers in support of the motion to quash, and Ms. Lewinsky's "Response of the Real Party in Interest" in support of the motion to quash, as well as an opposition from the Office of the Independent Counsel ("OIC").

Mr. Carter makes several arguments in support of his motion to quash the subpoenas: (1) the subpoenas are overbroad; (2) the subpoenas improperly seek to pierce Ms. Lewinsky's attorney-client privilege and work product protection; (3) compliance with the subpoenas would violate Ms. Lewinsky's Fifth Amendment privilege against self-incrimination; (4) issuance of the subpoenas violates Department of Justice policy; and (5) the OIC improperly communicated with Ms. Lewinsky while she was represented by Mr. Carter and prevented her from calling Mr.

Carter when she asked to do so.

A. Overbreadth

Mr. Carter first argues that the subpoenas are too broad. The subpoena duces tecum requests all documents and things relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, as well as all documents relating to any communications with a list of seventeen people. The Court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. 17(c). The law presumes that, "absent a strong showing to the contrary, . . . a grand jury acts within the legitimate scope of its authority." United States v. R. Enterprises, 498 U.S. 292, 301 (1991). Moreover, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." Id.

The Court finds that Mr. Carter has not met that burden. The subpoena duces tecum limits much of its inquiry to documents created after January 1, 1997. The brevity of Mr. Carter's representation of Ms. Lewinsky, no more than a three-month period, also weighs in favor of the reasonableness of the subpoena. The Court finds that the subpoenas are not overbroad or unduly oppressive.

B. The Attorney-Client Privilege and Work Product Doctrine

There is no dispute among the parties that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to documents prepared by Mr. Carter during his representation of Ms. Lewinsky. At issue is whether the crime-fraud exception applies and overcomes the asserted privileges.

1. *The Crime-Fraud Exception*

Mr. Carter asserts that the attorney-client privilege and the work product doctrine bar disclosure of the documents and testimony sought by the subpoena. The OIC claims that the crime-fraud exception to those privileges applies and the Independent Counsel is entitled to production of the documents and testimony. The Court notes that Mr. Carter's papers and that of amici express great concern that the subpoena "impinges on the long-honored respect of the adversarial system for the confidentiality of the attorney-client relationship." Mot. to Quash at 2. However, it is settled law in this Circuit that, where the relationship between attorney and client is abused and the client uses the attorney's legal services to further a crime or fraud, the privileges' protections are overcome. In re Sealed Case, 107 F.3d 46, 49, 51 (D.C. Cir. 1997).

Two conditions must be met for the crime-fraud exception to apply. First, "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." Id. at 49. Second, "the client must have carried out the crime or fraud." Id. The Independent Counsel carries the burden of showing that the crime-fraud exception applies. Id. The attorney does not need to know about his client's potential wrongdoing for the exception to apply, In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982), and there is no suggestion that Mr. Carter knew about any alleged wrongdoing.

This Circuit appears to hold to the following standard for the application of the crime-fraud exception: the proponent must bring forward "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 107 F.3d at 50 (quoting In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985)). The Court of Appeals also notes that the Second Circuit follows a different standard: the proponent must

demonstrate "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." Id. at 50 (quoting In re John Doe Corp., 675 F.2d 482, 491 & n.7 (2d Cir. 1982)). There is some confusion over which of these standards the D.C. Circuit finds controlling.

Nevertheless, the Court finds that, under either of those standards, the OIC has amply demonstrated that the crime-fraud exception applies and overrules the attorney-client privilege. The OIC's in camera submission shows that Ms. Lewinsky made the privileged communications with the intent and the express purpose to further unlawful acts and that she in fact carried out those unlawful acts. The unlawful acts were perjury and obstruction of justice.[1] See 18 U.S.C. §§ 1621 (perjury), 1623 (false declarations), 1503 (obstruction of justice).

The OIC has demonstrated in its in camera materials that there is probable cause to believe that these crimes were committed and that the communications furthered those crimes. If the trier of fact believed the evidence in the submission, that evidence would establish the elements of perjury and obstruction of justice. The OIC's evidence shows that Ms. Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice.[2]

As for the work product doctrine, "the crime-fraud exception calls for a somewhat different inquiry than with the attorney-client privilege. The focus is . . . on the client's intent in consulting the lawyer or in using the materials the lawyer prepared. The question is: Did the

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[1] The Court is not persuaded that the OIC has shown that Ms. Lewinsky used Mr. Carter's legal services to suborn perjury. See 18 U.S.C. § 1622 (subornation of perjury).

[2] The Court finds here that the OIC has met its burden under the crime-fraud exception. It expressly does not find, however, that Ms. Lewinsky in fact committed these crimes.

client consult the lawyer or use the material for the purpose of committing a crime or fraud?" In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). The evidence submitted by the OIC in camera meets the burden of showing an affirmative answer to this question. The Court finds that the OIC's in camera submission shows that Ms. Lewinsky consulted Mr. Carter for the purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice. The OIC has established that the crime-fraud exception applies to the work product subpoenaed in this case.

Because the Court finds that the crime-fraud exception applies, it need not address the issue of whether Ms. Lewinsky waived the attorney-client privilege by disclosing privileged material.

2. *Should the Court extend the crime-fraud exception to this case?*

Amici argue vigorously that the Court should not extend the crime-fraud exception to this case. They express concern that what is at issue here is simply an individual's prior inconsistent statement which should be used at trial to impeach, not to pierce the attorney-client privilege and work product protection. This is not a case, however, where the Court finds mere inconsistencies. It is a case where the OIC's in camera submission shows that Ms. Lewinsky deliberately intended to commit perjury and used her attorney to help her do so.

Amici suggest that perjury is not sufficiently serious to merit the application of the crime-fraud exception. They cite cases stating that the government must make a prima facie case of "a violation sufficiently serious to defeat the privilege." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982). The violation must, amici state, "be of sufficient weight to warrant abridging the privilege." Id. at 815 n.85. Perjury is

plainly of "sufficient weight" to warrant abridging the attorney-client privilege in this instance. "[P]erjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." Nix v. Whiteside, 475 U.S. 157, 169 (1986). This Court takes perjury very seriously and believes it to be a sufficiently weighty offense. It is a felony. Moreover, the evidence suggests that obstruction of justice has also taken place, another plainly weighty offense.

Moreover, case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply. The language in In re Sealed Case, 754 F.2d at 399, states that there must be "a violation" serious enough to defeat the privileges. There need not be "widespread criminal activity," Amici Br. at 18, in order to find that the client has eviscerated her attorney-client privilege and work product protection.

Contrary to amici's suggestions, this is not a situation in which a client confided in an attorney that she committed a crime. Here, the OIC's in camera submission demonstrates that the client utilized the attorney's legal services with the specific purpose of committing a crime, a crime she could not have committed without his services. Thus, it is merely alarmist for amici to warn that "[e]xtending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship." Amici Br. at 3.

The Court finds that the OIC has met its burden under the crime-fraud exception; its in camera submission demonstrates that Ms. Lewinsky consulted Mr. Carter and used his services

to commit perjury, not merely that her statements were inconsistent. There is probable cause to find not only that her testimony in the Jones v. Clinton affidavit was false, but also that Ms. Lewinsky purposefully and actively used Mr. Carter to commit the crimes of perjury and obstruction of justice. The Court does not believe that, by denying Mr. Carter's motion to quash, it will be "sending a message to every client and potential client that embarrassing or even incriminating information confided to their attorneys might, without warning, be disclosed to federal prosecutors." Amici Br. at 14. If this Court does send a message with this decision, that message would be that clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged.

3. *Does the OIC's ex parte in camera submission violate due process and must it be released to movant?*

Mr. Carter argues that the Independent Counsel's ex parte in camera submission violates due process. "[C]ommunications between a judge and one party are not per se deprivations of the due process rights of the opposing party." Clifford v. United States, ___ F.3d ___, 1998 WL 61165, *5 (D.C. Cir. 1998). The Independent Counsel was required to meet its burden of showing that the crime-fraud exception applies and properly did so with its submission to the Court. The Court's in camera inspection of materials upon which the OIC based its showing of the crime-fraud exception does not violate due process. Review of ex parte in camera materials to establish the crime-fraud exception does not violate due process. In re Grand Jury Proceedings, 33 F.3d 342, 351-53 (4th Cir. 1994); In re John Doe, Inc., 13 F.3d 633, 635-37 (2d Cir. 1994); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1989).

Mr. Carter also wants the OIC to disclose the ex parte submission to him.[3] Before the Court is the motion of Francis Carter for production of the ex parte submission. The Court finds that the ex parte submission is properly confidential and the practice of submitting such materials to the Court in camera is well recognized. See, e.g., In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982).

4. Can this Court properly consider Linda Tripp's tapes in deciding whether the crime-fraud exception applies?

As part of its in camera submission, the Independent Counsel provided the Court with transcripts of tape recordings made by Linda Tripp of conversations she had with Monica Lewinsky. Mr. Carter argues that federal law prohibits the use of Ms. Tripp's tape recordings in all judicial proceedings, including those before this Court, and therefore prevents the Court from relying on them to establish the crime-fraud exception. The Court finds that it may properly rely upon the tapes in making its determination of whether the crime-fraud exception applies.

The burden is on Mr. Carter to prove that the tapes are inadmissible. United States v. Dale, 991 F.2d 819, 840 (D.C. Cir.), cert. denied, 510 U.S. 1030 (1993). First, Mr. Carter argues that Ms. Tripp intercepted the communications in order to commit a criminal or tortious act, in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III") and that the tapes are thus inadmissible.

Title III provides that whenever any communication has been intercepted, the communication and any evidence derived therefrom may not be received in evidence in any

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[3] The Court strongly disagrees with movant's suggestion that "[t]he traditional reasons for grand jury secrecy are completely inapplicable in this, the most public of investigations." Reply Br. at 13.

proceeding before any court or before a grand jury "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The federal law also provides that it is lawful for a private party to intercept a communication

> where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Because Ms. Tripp was a party to the conversation, it was lawful for her to tape the conversation unless the communication was intercepted for the purpose of committing a criminal or tortious act as described in the statute.

This Circuit has held that "a violation of Title III is established when 'it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act.'" Dale, 991 F.2d at 841 (quoting United States v. Vest, 639 F. Supp. 899, 904 (D. Mass. 1986), aff'd, 813 F.2d 477 (1st Cir. 1987), cert. denied, 488 U.S. 965 (1988)). Mr. Carter has not sustained his burden of proving that Ms. Tripp acted with an impermissible purpose. In fact, he has not suggested that Ms. Tripp was motivated by a desire to commit an act that was criminal or tortious.

Under Title III, the relevant inquiry is whether the communication was intercepted for the purpose of committing a criminal or tortious act, not whether the interception itself constituted a criminal or tortious act. 18 U.S.C. § 2511(2)(d). Assuming that Ms. Tripp's recordings violated Maryland law, that fact by itself does not establish that she intercepted the conversations "for the purpose of committing [a] criminal or tortious act in violation of the . . . laws of . . . any State."

See United States v. DiFelice, 837 F. Supp. 81, 82 (S.D.N.Y. 1993). If Ms. Tripp had made the tapes in order to blackmail Ms. Lewinsky, for example, then that would have been for the purpose of committing a crime. Instead, she intercepted the communications for the purpose of bringing her conversations with Ms. Lewinsky to light, which Mr. Carter does not allege is a criminal or tortious act. The D.C. Circuit has found that "[t]aping phone calls to make an accurate record of a conversation 'in order to prevent future distortions by a participant' is not illegal, even when the recording is made in the hopes of producing evidence of an illegal conspiracy." Dale, 991 F.2d at 841 (citations omitted).

Mr. Carter does not allege that Ms. Tripp made these tapes for the purpose of violating Maryland's law against taping without both parties' consent. "[T]he legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communications intercepted." United States v. Underhill, 813 F.2d 105, 110 (6th Cir.), cert. denied, 482 U.S. 906 (1987). The Court finds that Title III does not prohibit it from considering the tapes in ruling on this motion.

Second, Mr. Carter argues that the taping was illegal under Maryland law and therefore the Court should apply the more stringent state standards and prevent disclosure of the tapes. Maryland law governing the interception of communications is more stringent than federal law. Even if one party consents, taping of wire communications is illegal under Maryland law. Md. Code Ann., Cts. & Jud. Proc. §§ 10-402 & 10-410 (1997). Mr. Carter argues that federal courts must respect the more stringent state law protection of privacy rights.

The Court need not decide whether the taping was illegal under Maryland law because federal law, in the form of Title III, governs. Federal law governs the admissibility of evidence

in a federal criminal case. United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir.), cert. denied, 118 S. Ct. 78 (1997). Evidence obtained from a consensual wiretap conforming to Title III is admissible in federal court proceedings without regard to state law. United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983). Several circuits have held that a more restrictive state law, such as Maryland's, would not affect the admissibility of wiretap evidence in a federal court. See, e.g., Leitman v. McAusland, 934 F.2d 46, 50 (4th Cir. 1991); United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Horton, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Nelligan, 573 F.2d 251, 253 (5th Cir. 1978); United States v. Turner, 558 F.2d 46, 49 (2d Cir. 1977).

Whether or not Maryland law would prohibit the use of these tape recordings in a Maryland court does not affect this Court's determination. Title III controls and the Court may properly consider Ms. Tripp's tapes.

C. Monica Lewinsky's Fifth Amendment Right Against Self-Incrimination

Mr. Carter claims that materials in his possession may not be revealed without violating Ms. Lewinsky's Fifth Amendment rights. The subpoena to Ms. Lewinsky in Jones v. Clinton demanded specific items that she allegedly possessed and allegedly gave to Mr. Carter. Mr. Carter argues that production of those items or documents reflecting their existence would be incriminatory.

The privilege protects against "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972). The Supreme Court has found that the act

of producing a document may fall within the Fifth Amendment privilege. "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." United States v. Doe, 465 U.S. 605, 612 (1984).

The standard set out by the Supreme Court is the following: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Kastigar, 406 U.S. at 486-87. The privilege includes "answers that would in themselves support a conviction under a federal criminal statute" and also included answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Id.

Regarding the particular items specified by Mr. Carter, enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items.

D. Allegations of Prosecutorial Misconduct

Mr. Carter claims that OIC attorneys engaged in various types of misconduct in their handling of this matter.

a. *Department of Justice policy on issuing subpoenas*

Mr. Carter argues that the subpoenas issued to him violate a Department of Justice policy that limits the circumstances under which an attorney may be subpoenaed. See DOJ Manual at § 9-2.161(2). The guidelines provide that, first, before an attorney can be subpoenaed, all

reasonable attempts should have been made to obtain information from alternative sources. Second, there should be an independent evaluation of whether the subpoena is narrowly drawn and directed at material information regarding a limited subject matter. Third, there should also be an evaluation of whether the subpoena seeks information protected by a valid claim of privilege.

The DOJ guidelines do not confer enforceable rights on those who receive subpoenas, as movant concedes. The DOJ Manual "is a publication which, by its own terms, provides 'internal Department of Justice guidance,' and is 'not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.'" Nichols v. Reno, 124 F.3d 1376, 1377 (10th Cir. 1997) (quoting D.O.J. Manual, at § 1-1.00). The government's violation of its internal operating procedures, on its own, does not create a basis for suppressing Carter's subpoena. See United States v. Myers, 123 F.3d 350, 355-56 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997).

Most importantly, the Court has no reason, other than the allegations in Mr. Carter's papers, to believe that the Independent Counsel did not undertake the applicable balancing. Mr. Carter's attempt to apply the DOJ guidelines in this instance must fail.

b. *Contact with represented persons*

Mr. Carter claims that OIC attorneys communicated with Ms. Lewinsky, and sent Ms. Tripp to record her conversations with Ms. Lewinsky, when they knew Ms. Lewinsky was represented by Mr. Carter. Rule 4.2 of the D.C. Rules of Professional Conduct provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the

> prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2(a) (emphasis added). The Comment to the Model Rule states:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Model Rule 4.2 cmt. 2.

The D.C. Circuit has found that non-custodial communications with represented criminal suspects during the investigatory stage are not subject to the anti-contact rule. United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973). In Sutton, government informants recorded inculpatory conversations with the defendant prior to indictment and after the government became aware that the defendant was represented by counsel. The Court of Appeals stated that the disciplinary rule against contact "was never meant to apply to situations like this one" and refused to exclude the taped conversations. Sutton, 801 F.2d at 1366. A similar factual situation occurred in Lemonakis and the D.C. Circuit there stated: "we nevertheless find the actions of the U.S. Attorneys to be consistent with the current ethical standards demanded of the legal profession." Lemonakis, 485 F.2d at 955.

With the exception of the Second Circuit, every court of appeals that has considered a similar case has held that ethical rules such as Rule 4.2 do not apply to pre-indictment criminal investigations by government attorneys or their agents. See United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990); United

States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981). These courts have held that the anti-contact rule "is inapplicable to contacts made by prosecutors or their agents with criminal suspects in the course of a pre-indictment investigation." United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983).

Only the Second Circuit has found a prosecutor's conduct to violate the ethical rule against contact with a represented person in a non-custodial, pre-indictment setting. See United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). Even that court held that "the use of informants by government prosecutors in a pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the disciplinary rule] and therefore will not be subject to sanctions." Id. at 839.

The interview with Ms. Lewinsky occurred prior to any indictment and in a non-custodial setting; Mr. Carter has not alleged otherwise. Even if Ms. Tripp did act as an agent of the prosecutors, her undercover recording of Ms. Lewinsky also does not violate the ethical prohibition on contact with a represented party. The Court finds that attorneys from the OIC acted within the ethical rules in questioning Ms. Lewinsky without her attorney present.

However, Department of Justice regulations provide: "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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the

attorney representing such person or party." 28 C.F.R. § 77.8 (1998). The Independent Counsel statute provides: "An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1).

Department of Justice regulations explicitly provide that 28 C.F.R. Part 77 "does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States." 28 C.F.R. § 77.11(b) (1998). Moreover, the regulations provide that "[a]llegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice . . . ." 28 C.F.R. § 77.11(a) (1998).

This Court's supervisory power to control prosecutorial misconduct before the grand jury is quite limited. See United States v. Williams, 504 U.S. 36 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Supreme Court in Williams in essence removed all general supervisory authority over the grand jury from the federal courts. In that case, the district court had dismissed an indictment because the government failed to disclose substantial exculpatory evidence to the grand jury, in violation of a Tenth Circuit rule and provisions in the DOJ manual to the contrary. 504 U.S. at 47. The Supreme Court held that the district court had improperly used its supervisory powers, stating: "[W]e think it clear that, as a general matter at

least, no such 'supervisory' judicial authority [over grand jury functioning] exists . . . ." Id. at 50. It went on to state that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id.

The First, Sixth, and Seventh Circuits have addressed situations in which prosecutors who violated the Department of Justice Manual by failing to provide warnings to targets of a grand jury's investigation where such warnings were not constitutionally mandated. See Myers, 123 F.3d at 355; United States v. Gillespie, 974 F.2d 796, 799 (7th Cir. 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989). In each case, the courts found that they were faced with "the violation of a policy which does not justify a case-related judicial sanction and yet which appears immune to expressions of judicial satisfaction." Myers, 123 F.3d at 357; Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 310-11. The First and Seventh Circuits explicitly warned prosecutors that, in appropriate circumstances, they would consider referring such internal policy violations to the Department of Justice's Office of Professional Responsibility. Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 311.

The Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas. Myers, 123 F.3d at 358. However, as the First Circuit said, "[w]e assume that these policies are meant to be enforced. . . ." Pacheco-Ortiz, 889 F.2d at 311. The Court expresses its concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel but declines to take further action on this particular matter.

c. *Disruption of the attorney-client relationship*

Mr. Carter also claims that Ms. Lewinsky was not permitted to contact him while the Independent Counsel was questioning her. Ms. Lewinsky's counsel proffered at oral argument that Mr. Emmick told Ms. Lewinsky not to call Mr. Carter because he might "tip off" Vernon Jordan, but that allegation does not appear in Ms. Lewinsky's subsequent declaration. The Independent Counsel has submitted a declaration from an FBI Special Agent who states: "At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter." Fallon Decl. at ¶ 3.

Even if this conduct had occurred, it did not violate Ms. Lewinsky's Sixth Amendment right to counsel because that right had not yet attached at the time of the interview. Sixth Amendment rights do not "attach until after the initiation of formal charges." Moran v. Burbine, 475 U.S. 412, 431 (1986); see also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) (holding that Sixth Amendment rights do not attach until "the time that adversary judicial proceedings have been initiated" against the suspect). A right Ms. Lewinsky did not possess could not have been violated. This situation also does not appear to be covered by the Rules of Professional Conduct. See Rule 4.2 of the D.C. Rules of Professional Conduct.

Department of Justice regulations state that "An attorney for the government, or anyone acting at his or her direction, may not, when communicating with a represented person or represented party . . . improperly seek to disrupt the relationship between the represented person or represented party and counsel." 28 C.F.R. § 77.9 (1998). As the Court has found, Department of Justice regulations do not provide a basis for quashing the subpoenas. Further, it appears to the Court that no OIC attorney disrupted the attorney-client relationship between Ms. Lewinsky and Mr. Carter by refusing to give her permission to contact him. See Declaration of Michael

Emmick at ¶ 3; Second Declaration of Patrick Fallon, Jr. at ¶ 6; Declaration of Steven Irons at ¶¶ 4, 6; Declaration of Stephen Binhak at ¶ 5. She was given several unsupervised opportunities to contact anyone she chose, see Emmick Decl. at ¶ 14; Declaration of Bruce Udolf at ¶.6; Irons Decl. at ¶ 6; Binhak Decl. at ¶¶ 6-8, and an FBI Special Agent working with the OIC called Mr. Carter to determine if he would be available if Ms. Lewinsky decided she wished to contact him. Second Fallon Decl. at ¶ 5. The Court will not refer this matter to the Department of Justice Office of Professional Responsibility for investigation.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: April 28, 1998

NOTICE OF APPEAL - CRIMINAL

United States District Court for the District of Columbia

IN RE GRAND JURY SUBPOENA	Misc. No. 98-068 (HHJ)
	UNDER SEAL

NOTICE OF APPEAL

APR [illegible] 1998

Name and address of appellant

Monica Lewinsky

Name and address of appellant's attorney

Nathaniel H. Speights, 1511 K Street N.W., Ste 811, Washinton D.C. 20005

SPEIGHTS & MITCHELL 202 783 6300

Offense Motion to Quash.

Concise statement of judgment or order, giving date, and any sentence

Order dated March 31, 1998 allowing partial intrusion on the attorney client relationship as to work product and permitting ex parte communication. The order also violated Title III.

Name of institution where now confined, if not on bail

Not Applicable

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Monica Lewinsky

[redacted]

DATE 09 April 1998

Nathaniel H. Speights
ATTORNEY FOR APPELLANT.

CJA, NO FEE
PAID USDC FEE
PAID USCA FEE
Does counsel wish to appear on appeal? (Yes)/No
Has counsel ordered transcripts? (Yes)/No
Is this appeal pursuant to the 1984 Sentencing Reform Act? Yes/(No)

FEE PAC. 4/9/98 10:30

NOTICE OF APPEAL, CRIMINAL — New 12/71

United States District Court for the District of Columbia

UNITED STATES OF AMERICA vs. In Re: Grand Jury Subpoenas to FRANCIS D. CARTER	Misc. Action No. 98-068 (NHJ) UNDER SEAL

NOTICE OF APPEAL

Name and address of appellant Francis D. Carter, 1341 G Street, N.W. Suite 510, Washington, D.C. 20005

Name and address of appellant's attorney Charles J. Ogletree, Esq. and Jamie S. Gardner, Esq., Harvard Law School, 320 Hauser Hall, Cambridge, MA 02138

Offense None

Concise statement of judgment or order, giving date, and any sentence
Motion to Quash Grand Jury Subpoena denied 3-31-98.
Motion for Production of Ex Parte Submission denied 3-31-98.

Name of institution where now confined, if not on bail N/A

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

4-10-98
Date

Francis D. Carter
Appellant

CJA, NO FEE
PAID USDC FEE
PAID USCA FEE
Does counsel wish to appear on appeal? Yes/No
Has counsel ordered transcripts? Yes/No

Charles J. Ogletree, Jr.
Attorney for Appellant.

Transcript has been ordered by counsel for Monica S. Lewinsky.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

RECEIVED
APR 30 1998
U.S. DISTRICT COURT

IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (RMU)
	)	
	)	(Under Seal)

NOTICE OF APPEAL

Notice is hereby given this 30th day of April, 1998, that the United States of America, by Kenneth W. Starr, Independent Counsel, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31st day of March, 1998, as amended on the 28th day of April, 1998, in favor of Monica S. Lewinsky and Francis D. Carter, Esq. against said United States of America.

Respectfully submitted,

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Notice of Appeals, was served via hand delivery or Federal Express next business day delivery on this the 30th day of April, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

These are all the parties requiring service by the Clerk of the District Court under Fed. R. App. P. 3(d).

J. Forrest Norman

RECEIVED
MAY 11 P 4:20
OFFICE OF
INDEPENDENT COUNSEL

In The United States Court of Appeals For The District Of Columbia Circuit

No. 98-3052
Consolidated with Nos. 98-3053, 98-3059

In Re: Sealed Case, No. 98-3052

On Appeal From The United States District Court
For The District Of Columbia
Misc. Action No. 98-068 (NHJ)

REQUEST FOR JUDICIAL NOTICE BY APPELLANT MONICA LEWINSKY

SPEIGHTS & MITCHELL
NATHANIEL H. SPEIGHTS
(D.C. BAR No. 952036)
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER & RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR No. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Appellant MONICA LEWINSKY

INDEX TO REQUEST FOR JUDICIAL NOTICE*

Description	Page No.
Order on Application by Independent Counsel Kenneth W. Starr to Authorize Disclosure of Jurisdictional Expansion Order, *In Re Madison Guaranty Savings & Loan Association*, U.S.Ct.App., D.C. Cir., Special Division No. 94-1, filed Jan. 29, 1998 with the following attachments:	RJN 0001
Order On Oral Application For Expansion of Jurisdiction of Independent Counsel filed Jan. 16, 1998	RJN 0002
Notification To The Court Of The Initiation Of A Preliminary Investigation And Application To The Court For Expansion Of The Jurisdiction Of An Independent Counsel, filed under seal by the Attorney General on Jan. 16, 1998	RJN 0004
Notification of Recusal Determination, filed under seal by the Attorney General on Jan. 16, 1998	RJN 0007
Order on Motion of the Office of Independent Counsel for Limited Intervention and a Stay of Discovery in the case of *Jones v. Clinton*, Civil Action No. LR-C-94-290 (E.D.Ark.) filed Jan. 29, 1998	RJN 0008
Memorandum Opinion and Order granting summary judgment and dismissing the case of *Jones v. Clinton*, Civil Action No. LR-C-94-290 (E.D.Ark.) filed Apr. 1, 1998	RJN 0012

* Appellant Monica Lewinsky requests pursuant to Federal Evidence Rule 201 that the Court take judicial notice of the public records appended hereto and referenced in her Opening Brief. Judicial notice shall be taken of court records entered in a prior related proceeding, whether the request is made in the trial court or on appeal, when such notice requested by a party and the Court supplied with the necessary information. F.R.E. 201(d), (f); *Wilson v. Huffman*, 712 F.2d 206, 211 (5th Cir. 1983); *U.S. v. Verlinsky*, 459 F.2d 1085, 1989 (5th Cir. 1972) (notice of records from district court or Court of Appeal properly taken at any time).

United States Court of Appeals
For the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JAN 29 1998

Division for the Purpose of
Appointing Independent Counsels

Special Division

Ethics in Government Act of 1978, As Amended

In re: Madison Guaranty Savings & Loan Association

Division No. 94-1

Before: SENTELLE, *Presiding Judge*, BUTZNER and FAY, *Senior Circuit Judges*.

ORDER

Upon consideration of the "Application to Authorize Disclosure of Jurisdictional Expansion Order," filed by Independent Counsel Kenneth W. Starr on January 28, 1998, the Court finds that disclosure of the Court's order of January 16, 1998, expanding the jurisdiction of the Independent Counsel would be in the best interests of justice. Accordingly, it is

ORDERED that the application be granted. The Court's order expanding the prosecutorial jurisdiction of the Independent Counsel in this matter, filed under seal on January 16, 1998, is hereby unsealed. It is

FURTHER ORDERED that the "Notification to the Court of the Initiation of a Preliminary Investigation and Application to the Court for the Expansion of the Jurisdiction of an Independent Counsel" and the "Notification of Recusal Determination," filed under seal by the Attorney General on January 16, 1998, are also hereby unsealed.

Per Curiam
For the Court:
Mark J. Langer, Clerk

by Marilyn R. Sargent
Chief Deputy Clerk

RJN0001

United States Court of Appeals
For the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

FILED JAN 16 1998

Special Division

In re: Madison Guaranty Savings & Loan Association — Division No. 94-1

Before: Sentelle, Presiding, Butzner and Fay, Senior Circuit Judges

ORDER

Upon consideration of an oral application for the expansion of jurisdiction of an Independent Counsel provided to this Court on behalf of the Attorney General on January 16, 1998, it is hereby

ORDERED that the investigative and prosecutorial jurisdiction over the following matters be referred to Independent Counsel Kenneth W. Starr and to the Office of the Independent Counsel as an expansion of prosecutorial jurisdiction in lieu of the appointment of another Independent Counsel pursuant to 593(c)(1):

> (1) The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon him as a result of the August 5, 1994, order of the Special Division of the Court and all subsequent orders concerning jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:
>
> (2) The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Monica Lewinsky or others suborned perjury, obstructed justice, intimidated witnesses, or otherwise violated federal law other than a Class B or C misdemeanor or infraction in dealing with witnesses, potential witnesses,

attorneys, or others concerning the civil case Jones v. Clinton.

(3) The Independent Counsel shall have jurisdiction and authority to investigate related violations of federal criminal law, other than a Class B or C misdemeanor or infraction, including any person or entity who has engaged in unlawful conspiracy or who has aided or abetted any federal offense, as necessary to resolve the matter described above.

(4) The Independent Counsel shall have jurisdiction and authority to investigate crimes, such as any violation of 28 U.S.C. § 1826, any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of his investigation of the matter described above.

(5) The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994.

It is further ORDERED that this document and its contents be and remain UNDER SEAL absent further Order of this Court.

This the 16th day of January, 1998.

Per Curiam
For the Court:

Marilyn Sargent
Chief Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 16 1998

Special Division

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

In re Monica Lewinsky	)	No.

NOTIFICATION TO THE COURT OF THE INITIATION OF A PRELIMINARY INVESTIGATION AND APPLICATION TO THE COURT FOR THE EXPANSION OF THE JURISDICTION OF AN INDEPENDENT COUNSEL

In accordance with the Independent Counsel Reauthorization Act of 1994, I hereby notify in writing the Special Division of the Court that I have commenced a preliminary investigation, 28 U.S.C. § 592(a)(1), into whether violations of federal criminal law were committed by Monica Lewinsky or any other individual, as described below. As a result of my inquiry into this matter, I request expansion of the jurisdiction of Independent Counsel Kenneth Starr to further investigate and determine whether prosecution is warranted. 28 U.S.C. § 593(c)(1). The Court has already been informed of this matter and my request orally.

The Department of Justice has received information from Independent Counsel Kenneth Starr that Monica Lewinsky, a former White House employee and witness in the civil case Jones v. Clinton, may have submitted a false affidavit and suborned perjury from another witness in the case. In a taped

conversation with a cooperating witness. Ms. Lewinsky states that she intends to lie when deposed. In the same conversation, she urges the cooperating witness to lie in her own upcoming deposition.

I have determined that it would be a conflict of interest for the Department of Justice to investigate Ms. Lewinsky for perjury and suborning perjury as a witness in this civil suit involving the President, in light of the allegations involved in the lawsuit. 28 U.S.C. § 591(c)(1).

I have also determined that the taped conversation establishes that further investigation of this matter is warranted. 28 U.S.C. § 592(c)(1).

It would be appropriate for Independent Counsel Starr to handle this matter because he is currently investigating similar allegations involving possible efforts to influence witnesses in his own investigation. Some potential subjects and witnesses in this matter overlap with those in his ongoing investigation. Independent Counsel Starr has requested that this matter be referred to him.

Attached is a recommended draft Order expanding Independent Counsel Starr's jurisdiction to include this matter.

Respectfully submitted,

Janet Reno
Attorney General of the United States

Date January 16, 1998

United States Court of Appeals
For the District of Columbia Circuit

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

FILED JAN 16 1998

Special Division

In re Monica Lewinsky) No.

NOTIFICATION OF RECUSAL DETERMINATION

Section 591(e)(2) of the Independent Counsel Reauthorization Act of 1994 (the Act) requires that the Attorney General determine whether she must recuse herself because information received involves "a person with whom the Attorney General has a current or recent personal or financial relationship," and that the determination be filed with this Court. Accordingly, I hereby notify the Special Division of the Court that I have no current or recent personal or financial relationship with Monica Lewinsky such as would require my recusal from discharging my responsibilities under the Act.

Respectfully submitted,

Janet Reno
Attorney General of the United States

DATED: January 16, 1998

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JAN 29 1998
JAMES W. McCORMACK, CLERK
By: [illegible]
DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAULA CORBIN JONES,

Plaintiff,

vs. No. LR-C-94-290

WILLIAM JEFFERSON CLINTON and DANNY FERGUSON,

Defendants.

ORDER

Before the Court is a motion by the United States, through the Office of the Independent Counsel ("OIC"), for limited intervention and a stay of discovery in the case of *Jones v. Clinton*, No. LR-C-94-290 (E.D.Ark.). The Court held a telephone conference on this motion on the morning of January 29, 1998, during which the views of counsel for the plaintiff, counsel for the defendants, and the OIC were expressed. Having considered the matter, the Court hereby grants in part and denies in part OIC's motion.

In seeking limited intervention and a stay of discovery, OIC states that counsel for the plaintiff, in a deliberate and calculated manner, are shadowing the grand jury's investigation of the Monica Lewinsky matter. Motion of OIC, at 2. OIC states that "the pending criminal investigation is of such gravity and paramount importance that this Court would do a disservice to the Nation if it were to permit the unfettered – and extraordinarily aggressive – discovery

efforts currently underway to proceed unabated." Id. at 3.[1] CEC's motion comes with less than 48 hours left in the period for conducting discovery, the cutoff date being January 30, 1998. Given the timing of CEC's motion and the possible impact that this motion could have on the proceedings in this matter, the Court is required to rule at this time on the admissibility at trial of evidence concerning Monica Lewinsky.

Rule 403 of the Federal Rules of Civil Procedure provides that evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This weighing process compels the conclusion that evidence concerning Monica Lewinsky should be excluded from the trial of this matter.

The Court acknowledges that evidence concerning Monica Lewinsky might be relevant to the issues in this case. This Court would await resolution of the criminal investigation currently underway if the Lewinsky evidence were essential to the plaintiff's case. The Court determines, however, that it is not essential to the core issues in this case. In fact, some of this evidence might even be inadmissible as extrinsic evidence under Rule 608(b) of the Federal Rules of Evidence. Admitting any evidence of the Lewinsky matter would frustrate the timely resolution of this case and would undoubtedly cause undue expense and delay.

This Court's ruling today does not preclude admission of any other evidence of alleged improper conduct occurring in the White House.

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[1] For the record, counsel for the plaintiff [illegible] with CEC's characterization of their discovery efforts.

In addition, and perhaps more importantly, the substantial interests of the Presidency militate against any undue delay in this matter that would be occasioned by allowing plaintiff to pursue the Monica Lewinsky matter. Under the Supreme Court's ruling in *Clinton v. Jones*, 117 S.Ct. 1636, 1651 (1997), "[t]he high respect that is owed to the Office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." There can be no doubt that a speedy resolution of this case is in everyone's best interests, including that of the Office of the President, and the Court will therefore direct that the case stay on course.

One final basis for the Court's ruling is the integrity of the criminal investigation. This Court must consider the fact that the government's proceedings could be impaired and prejudiced were the Court to permit inquiry into the Lewinsky matter by the parties in this civil case. *See, e.g., Arden Way Associates v. Ivan F. Boesky*, 660 F.Supp. 1494 (S.D.N.Y. 1987). In that regard, it would not be proper for this Court, given that it must generally yield to the interests of an ongoing grand jury investigation, to give counsel for the plaintiff or the defendants access to witnesses' statements in the government's criminal investigation. *See* Fed.R.Crim.P. 16(a)(2), which generally prohibits the discovery of government witnesses. That being so, and because this case can in any event proceed without evidence concerning Monica Lewinsky, the Court will exclude evidence concerning her from the trial of this matter.

In sum, the plaintiff and defendants may not continue with discovery of those matters that concern Monica Lewinsky. In that regard, OSC's motion for limited intervention and stay of discovery is granted. Further, any evidence concerning Ms. Lewinsky shall be excluded

from the trial of this matter. With respect to matters that do not involve Monica Lewinsky, OIC's motion is denied and the parties may continue with discovery. Because the telephone conference underlying today's ruling involved a discussion of discovery matters, the transcript of the conference shall remain under seal in accordance with the Court's Confidentiality Order on Consent of all Parties.

IT IS SO ORDERED this 20th day of January 1998.

UNITED STATES DISTRICT JUDGE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
APR 0 1 1998
JAMES W. McCORMACK, CLERK
By: [signature]
DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

PAULA CORBIN JONES,

Plaintiff,

vs. No. LR-C-94-290

WILLIAM JEFFERSON CLINTON and DANNY FERGUSON,

Defendants.

MEMORANDUM OPINION AND ORDER

The plaintiff in this lawsuit, Paula Corbin Jones, seeks civil damages from William Jefferson Clinton, President of the United States, and Danny Ferguson, a former Arkansas State Police Officer, for alleged actions beginning with an incident in a hotel suite in Little Rock, Arkansas. This case was previously before the Supreme Court of the United States to resolve the issue of Presidential immunity but was remanded to this Court following the Supreme Court's determination that there is no constitutional impediment to allowing plaintiff's case to proceed while the President is in office. *See Clinton v. Jones*, 117 S.Ct. 1636 (1997). Following remand, the President filed a motion for judgment on the pleadings and dismissal of the complaint pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Ferguson joined in the President's motion. By Memorandum Opinion and Order dated August 22, 1997, this Court granted in part and denied in part the President's motion. *See Jones v.*

Clinton, 974 F.Supp. 712 (E.D.Ark. 1997). The Court dismissed plaintiff's defamation claim against the President, dismissed her due process claim for deprivation of a property interest in her State employment, and dismissed her due process claims for deprivation of a liberty interest based on false imprisonment and injury to reputation, but concluded that the remaining claims in plaintiff's complaint stated viable causes of action. *See id.* Plaintiff subsequently obtained new counsel and filed a motion for leave to file a first amended complaint, which the Court granted, albeit with several qualifications. *See* Order of November 24, 1997.[1] The matter is now before the Court on motion of both the President and Ferguson for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has responded in opposition to these motions, and the President and Ferguson have each filed a reply to plaintiff's response to their motions. For the reasons that follow, the Court finds that the President's and Ferguson's motions for summary judgment should both be and hereby are granted.[2]

I.

This lawsuit is based on an incident that is said to have taken place on the afternoon of May 8, 1991, in a suite at the Excelsior Hotel in Little Rock, Arkansas. President Clinton was

---

[1] Among other things, the Court allowed plaintiff to drop her remaining defamation claim against Ferguson and allowed her to drop her remaining loss-of-reputation claims. The Court also allowed plaintiff to clarify her constitutional and civil rights claims and conform them more fully to the facts previously pled, but only to the extent that plaintiff was not thereby asserting new causes of action or attempting to add Ferguson as a defendant on any cause of action where he was not previously considered a defendant.

[2] All other pending motions in this case, including the motion filed on Saturday, March 28, 1998, in Pine Bluff, Arkansas, have no bearing on the issues raised by the President's and Ferguson's motions for summary judgment and are therefore not addressed.

Governor of the State of Arkansas at the time, and plaintiff was a State employee with the Arkansas Industrial Development Commission ("AIDC"), having begun her State employment on March 11, 1991. Ferguson was an Arkansas State Police officer assigned to the Governor's security detail.

According to the record, then-Governor Clinton was at the Excelsior Hotel on the day in question delivering a speech at an official conference being sponsored by the AIDC. Am. Compl. ¶ 7.[3] Plaintiff states that she and another AIDC employee, Pamela Blackard, were working at a registration desk for the AIDC when a man approached the desk and informed her and Blackard that he was Trooper Danny Ferguson, the Governor's bodyguard. Pl.'s Statement of Mat. Facts, ¶¶ 1-2. She states that Ferguson made small talk with her and Blackard and that they asked him if he had a gun as he was in street clothes and they "wanted to know." Pl.'s Depo. at 101. Ferguson acknowledged that he did and, after being asked to show the gun to them, left the registration desk to return to the Governor. *Id.*; Pl.'s Statement of Mat. Facts, ¶ 2. The conversation between plaintiff, Blackard, and Ferguson lasted approximately five minutes and consisted of light, friendly banter; there was nothing intimidating, threatening, or coercive about it. Pl.'s Depo. at 226-27.

Upon leaving the registration desk, Ferguson apparently had a conversation with the Governor about the possibility of meeting with plaintiff, during which Ferguson states the

---

[3] In addressing the issues in this case, the Court has viewed the record in the light most favorable to plaintiff and given her the benefit of all reasonable factual inferences, which is required at this stage of the proceedings. *See Christopher v. Adam's Mark Hotel*, — F.3d —, 1998 WL 92202, *1 (8th Cir. March 5, 1998). The Court has, however, deemed admitted those facts set forth by the President in his statement of material facts that plaintiff has not specifically controverted in her statement of material facts. See Rule 56.1(c) of the Rules of the United States District Court for the Eastern and Western Districts of Arkansas, which provides that "[a]ll material facts set forth in the statement filed by the moving party ... shall be deemed admitted unless controverted by the statement filed by the non-moving party...."

Governor remarked that plaintiff had "that come-hither look," *i.e.* "a sort of [sexually] suggestive appearance from the look or dress." Ferguson Depo. at 50; Pl.'s Statement of Mat. Facts, ¶ 3; President's Depo. at 109.[4] He states that "some time later" the Governor asked him to "get him a room, that he was expecting a call from the White House and ... had several phone calls that he needed to make," and asked him to go to the car and get his briefcase containing the phone messages. Ferguson Depo. at 50, 67. Ferguson states that upon obtaining the room, the Governor told him that if plaintiff wanted to meet him, she could "come up." *Id.* at 50.

Plaintiff states that Ferguson later reappeared at the registration desk, delivered a piece of paper to her with a four-digit number written on it, and said that the Governor would like to meet with her in this suite number. Pl.'s Statement of Mat. Facts, ¶ 6. She states that she, Blackard, and Ferguson talked about what the Governor could want and that Ferguson stated, among other things, "We do this all the time." *Id.* Thinking that it was an honor to be asked to meet the Governor and that it might lead to an enhanced employment opportunity, plaintiff states that she agreed to the meeting and that Ferguson escorted her to the floor of the hotel upon which the Governor's suite was located. Am. Compl. ¶¶ 11-13.

Plaintiff states that upon arriving at the suite and announcing herself, the Governor shook her hand, invited her in, and closed the door. Pl.'s Statement of Mat. Facts, ¶¶ 7-8. She states that a few minutes of small talk ensued, which included the Governor asking her about her job and him mentioning that Dave Harrington, plaintiff's ultimate superior within

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[4] Ferguson states that plaintiff informed him that she would like to meet the Governor, remarking that she thought the Governor "was good-looking [and] had sexy hair," Ferguson Depo. at 50, while plaintiff states that Ferguson asked her if she would like to meet the Governor and that she was "excited" about the possibility, Pl.'s Depo. at 101.

the AIDC and a Clinton appointee, was his "good friend." *Id.* ¶ 8; Am. Compl. ¶ 17. Plaintiff states that the Governor then "unexpectedly reached over to [her], took her hand, and pulled her toward him, so that their bodies were close to each other." Pl.'s Statement of Mat. Facts, ¶ 9. She states she removed her hand from his and retreated several feet, but that the Governor approached her again and, while saying, "I love the way your hair flows down your back" and "I love your curves," put his hand on her leg, started sliding it toward her pelvic area, and bent down to attempt to kiss her on the neck, all without her consent. *Id.* ¶¶ 9-10; Pl.'s Depo. at 237-38.[5] Plaintiff states that she exclaimed, "What are you doing?," told the Governor that she was "not that kind of girl," and "escaped" from the Governor's reach "by walking away from him." Pl.'s Statement of Mat. Facts, ¶ 11; Pl.'s Depo. at 237. She states she was extremely upset and confused and, not knowing what to do, attempted to distract the Governor by chatting about his wife. Pl.'s Statement of Mat. Facts, ¶ 11. Plaintiff states that she sat down at the end of the sofa nearest the door, but that the Governor approached the sofa where she had taken a seat and, as he sat down, "lowered his trousers and underwear, exposed his penis (which was erect) and told [her] to 'kiss it.'" *Id.*[6] She states that she was "horrified" by this and that she "jumped up from the couch" and told the Governor that she had to go, saying something to the effect that she had to get back to the registration desk. *Id.* ¶ 12. Plaintiff states that the Governor, "while fondling his penis," said, "Well, I don't want to

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[5] In her amended complaint, plaintiff states that the Governor "put his hand on [her] leg and started sliding it toward the hem of [her] culottes, apparently attempting to reach [her] pelvic area." Am. Compl. ¶ 20. In her original complaint, plaintiff states that the Governor "put his hand on [her] leg and started sliding it toward the hem of [her] culottes," with no reference to her "pelvic area." Compl. ¶ 20.

[6] Plaintiff states in her amended complaint that the Governor "asked" her to "kiss it" rather than telling her to do so. Am. Compl. ¶ 21. She states in her deposition that the Governor's specific words to her were, "Would you kiss it for me?" Pl.'s Depo. at 108.

make you do anything you don't want to do," and then pulled up his pants and said, "If you get in trouble for leaving work, have Dave call me immediately and I'll take care of it." *Id.* She states that as she left the room (the door of which was not locked), the Governor "detained" her momentarily, "looked sternly" at her, and said, "You are smart. Let's keep this between ourselves." *Id.*; Pl.'s Depo. at 94, 96-97.[7]

Plaintiff states that the Governor's advances to her were unwelcome, that she never said or did anything to suggest to the Governor that she was willing to have sex with him, and that during the time they were together in the hotel suite, she resisted his advances although she was "stunned by them and intimidated by who he was." Pl.'s Statement of Mat. Facts, ¶ 14. She states that when the Governor referred to Dave Harrington, she "understood that he was telling her that he had control over Mr. Harrington and over her job, and that he was willing to use that power." *Id.* ¶ 13. She states that from that point on, she was "very fearful" that her refusal to submit to the Governor's advances could damage her career and even jeopardize her employment. *Id.*

Plaintiff states that when she left the hotel suite, she was in shock and upset but tried to maintain her composure. *Id.* ¶ 15. She states she saw Ferguson waiting outside the suite but that he did not escort her back to the registration desk and nothing was said between them. *Id.* Ferguson states that five or ten minutes after plaintiff exited the suite he joined the Governor for their return to the Governor's Mansion and that the Governor, who was working on some papers that he had spread out on the desk, said, "She came up here, and nothing happened."

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[7] Plaintiff's allegation that the Governor momentarily "detained" her was not included in either her original or amended complaint.

Id. ¶ 16; Ferguson Depo. at 63.

Plaintiff states she returned to the registration desk and told Blackard some of what had happened. Blackard Depo. at 68. Blackard states that plaintiff was shaking and embarrassed. *Id.* Following the Conference, plaintiff states she went to the workplace of a friend, Debra Ballentine, and told her of the incident as well. Pl.'s Statement of Mat. Facts, ¶ 18. Ballentine states that plaintiff was upset and crying. Ballentine Depo. at 48. Later that same day, plaintiff states she told her sister, Charlotte Corbin Brown, what had happened and, within the next two days, also told her other sister, Lydia Corbin Cathey, of the incident. *Id.* ¶ 20. Brown's observations of plaintiff's demeanor apparently are not included in the record. Cathey, however, states that plaintiff was "bawling" and "squalling," and that she appeared scared, embarrassed, and ashamed. Cathey Depo. at 52.

Ballentine states that she encouraged plaintiff to report the incident to her boss or to the police, but that plaintiff declined, pointing out that her boss was friends with the Governor and that the police were the ones who took her to the hotel suite. Ballentine Depo. at 50. Ballentine further states that plaintiff stated she did not want her fiancé to know of the incident and that she "just want[ed] this thing to go away." *Id.* Plaintiff states that what the Governor and Ferguson had said and done made her "afraid" to file charges. Pl.'s Statement of Mat. Facts, ¶ 19.

Plaintiff continued to work at AIDC following the alleged incident in the hotel suite. *Id.* ¶ 22. One of her duties was to deliver documents to and from the Office of the Governor, as well as other offices around the Arkansas State Capitol. *Id.* She states that in June 1991, while performing these duties for the AIDC, she encountered Ferguson who told her that Mrs.

Clinton was out of town often and that the Governor wanted her phone number and wanted to see her. *Id.* Plaintiff states she refused to provide her phone number to Ferguson. *Id.* She states that Ferguson also asked her how her fiancé, Steve, was doing, even though she had never told Ferguson or the Governor his name, and that this "frightened" her. *Id.* ¶ 23. Plaintiff states that she again encountered Ferguson following her return to work from maternity leave and that he said he had "told Bill how good looking you are since you've had the baby." *Id.* ¶ 25. She also states that she was "accosted" by the Governor in the Rotunda of the Arkansas State Capitol when he "draped his arm over her, pulled her close to him and held her tightly to his body," and said to his bodyguard, "Don't we make a beautiful couple: Beauty and the Beast?" *Id.* ¶ 24. Plaintiff additionally states that on an unspecified date, she was waiting in the Governor's outer office on a delivery run when the Governor entered the office, patted her on the shoulder, and in a "friendly fashion" said, "How are you doing, Paula?" Pl.'s Depo. at 244-45.

Plaintiff states that she continued to work at AIDC "even though she was in constant fear that [the Governor] would retaliate against her because she had refused to have sex with him." *Id.* ¶ 27. She states this fear prevented her from enjoying her job. *Id.* Plaintiff states that she was treated "very rudely" by certain superiors in AIDC, including her direct supervisor, Clydine Pennington, and that this "rude treatment" had not happened prior to her encounter with the Governor. *Id.* She states that after her maternity leave, she was transferred to a position which had much less responsibility and that much of the time she had nothing to do. *Id.* ¶ 28; Pl.'s Depo. at 53. Plaintiff states that she was not learning anything, that her work could not be fairly evaluated, and that as a result, she could not be fairly

considered for advancement and other opportunities. Pl.'s Statement of Mat. Facts, ¶ 28. She states that Pennington told her the reason for the transfer was that her prior position had been eliminated, but that she later learned this was untrue, as her former position was being occupied by another employee. *Id.* Plaintiff states that she repeatedly expressed to Pennington an interest in transferring to particular positions at a higher "grade" which involved more challenging duties, more potential for advancement, and more compensation, but that Pennington always discouraged her from doing so and told her she should not bother to apply for those positions. *Id.* ¶ 29. She goes on to state that her superiors exhibited hostility toward her by moving her work location, refusing to give her meaningful work, watching her constantly, and failing to give her flowers on Secretary's Day in 1992, even though all the other women in the office received flowers. *Id.* ¶ 30.

Plaintiff voluntarily terminated her employment with AIDC on February 20, 1993, in order to move to California with her husband, who had been transferred. Am. Compl. ¶ 40; Pl.'s Depo. at 48. She states that in January 1994, while visiting family and friends in Arkansas, she was informed of an article in *The American Spectator* magazine that she claims referred to her alleged encounter with the Governor at the Excelsior Hotel and incorrectly suggested that she had engaged in sexual relations with the Governor. Pl.'s Statement of Mat. Facts, ¶ 33. Plaintiff states that she also encountered Ferguson in a restaurant during this same time and that he indicated he was the source for the article and that he knew she had refused the Governor's alleged advances because, he said, "Clinton told me you wouldn't do anything anyway, Paula." *Id.* ¶ 35.

On February 11, 1994, at an event attended by the media, plaintiff states that she

publicly asked President Clinton to acknowledge the incident mentioned in the article in *The American Spectator*, to state that she had rejected his advances, and to apologize to her, but that the President responded to her request for an apology by having his press spokespersons deliver a statement on his behalf that the incident never happened and that he never met plaintiff. Am. Compl. ¶¶ 47-48. Thereafter, on May 6, 1994, plaintiff filed this lawsuit.

Plaintiff's amended complaint contains several claims, three of which remain at issue. *See Jones*, 974 F.Supp. 712; Order of November 24, 1997. The first is a claim under 42 U.S.C. § 1983 in which plaintiff alleges that Governor Clinton, acting under color of state law, deprived her of her constitutional right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution by sexually harassing her. The second is a claim under 42 U.S.C. § 1985(3) in which plaintiff alleges that Governor Clinton and Ferguson conspired to deprive her of her rights to equal protection of the laws and of equal privileges and immunities under the laws. The third is a state law claim in which plaintiff asserts a claim of intentional infliction of emotional distress or outrage against Governor Clinton, based primarily on the alleged incident at the hotel but also encompassing subsequent alleged acts.

II.

The President moves for summary judgment on the following grounds: (1) plaintiff cannot show either *quid pro quo* or hostile work environment sexual harassment under § 1983 because (a) the record plainly demonstrates that plaintiff did not suffer any tangible job detriment for purposes of establishing a *quid pro quo* claim, let alone one caused by her

purported rejection of Mr. Clinton's alleged sexual advances, and (b) the alleged actions as described by plaintiff, even resolving all inferences and factual disputes in her favor, do not constitute severe or pervasive abusive conduct for purposes of establishing a hostile work environment claim; (2) if plaintiff's § 1983 claim fails, so too does her § 1985 conspiracy claim because (a) plaintiff has failed to show that any such conspiracy actually resulted in a deprivation of her constitutional rights, and (b) the undisputed facts do not show any agreement between Governor Clinton and Trooper Ferguson to deprive plaintiff of her constitutional rights; and (3) plaintiff's claim of intentional infliction of emotional distress or outrage fails because (a) by plaintiff's own testimony, the conduct at issue does not constitute intentional infliction of emotional distress or outrage under Arkansas law, and (b) plaintiff did not as a result of the alleged conduct suffer emotional distress so severe that no reasonable person could endure it. Ferguson, in turn, moves for summary judgment on grounds that (1) even if everything plaintiff has alleged were true, she does not have evidence to show either *quid pro quo* or hostile work environment sexual harassment, and (2) there was no conspiracy between the President and Ferguson to violate plaintiff's constitutional rights by sexually harassing her. The President and Ferguson both argue that there are no genuine issues of material fact with respect to any of these issues and that they are entitled to summary judgment as a matter of law.

A.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The nonmoving party may not rest on mere allegations or denials of his pleading, but must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Id.* at 587 (quoting Fed.R.Civ.P. 56(e) and adding emphasis). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (citations omitted). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* (citation omitted).

B.

As a preliminary matter, the Court rejects plaintiff's contention that this case involves equal protection claims based not only on sexual harassment, but also on sexual assault and offensive conduct in violation of laws other than Title VII, 42 U.S.C. §§ 2000e *et seq.* Pl.'s Opp'n to Def. Clinton's Mot. for Summ. J. at 23. In its August 22 Memorandum Opinion and Order, this Court recognized that a sexual assault can be a constitutional violation under § 1983, but concluded that plaintiff's allegations, even if true, were insufficient to state such a

claim. *See Jones*, 974 F.Supp. at 724-25 (citing *Habenhur v. City of Raymore, Mo.*, 119 F.3d 720 (8th Cir. 1997); *Reeve v. Oliver*, 41 F.3d 381 (8th Cir. 1994) (per curiam)). Notwithstanding the unequivocal ruling of this Court, plaintiff, citing Fed.R.Evid. 413(d)(2), (3), and (5),[8] now contends that she has an actionable claim of criminal sexual assault based on the Governor's alleged actions in the Excelsior Hotel and cites as authority for this proposition an Arkansas criminal statute proscribing sexual abuse in the first degree, Ark. Code Ann. § 5-14-108.[9] Pl.'s Opp'n to Def. Clinton's Mot. for Summ. J. at 23-24.

The Court finds plaintiff's attempt to restate her sexual assault claim in the guise of an equal protection claim to be no more meritorious now than when it was raised in the context of a due process claim. Although the Governor's alleged conduct, if true, may certainly be characterized as boorish and offensive, even a most charitable reading of the record in this case fails to reveal a basis for a claim of criminal sexual assault as there is no alleged conduct that could be characterized as "forcible compulsion" or "sexual contact" for purposes of establishing a claim under the provision cited by plaintiff. *See* Ark. Code Ann. § 5-14-101 (2), (8) (defining "forcible compulsion" as "physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person," and defining "sexual contact" as "any act of sexual gratification involving the touching, directly or through clothing, of the sex

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[8] These provisions state that an "offense of sexual assault" includes a crime under the law of a state that involved "contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person," "contact, without consent, between the genitals or anus of the defendant and any part of another person's body," or "an attempt or conspiracy to engage in" such conduct.

[9] Under Ark. Code Ann. § 5-14-108(a)(1), a person commits sexual abuse in the first degree if "[h]e engages in sexual contact with another person by forcible compulsion."

organs, or buttocks, or anus of a person or the breast of a female").[10] There being no actionable claim of criminal sexual assault under the facts of this case, the Court will proceed to a determination of the issues relevant to plaintiff's claim of sexual harassment.

1.

The Equal Protection Clause of the Fourteenth Amendment confers a right to be free from gender discrimination that is not substantially related to important governmental objectives. *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994) (citing *Davis v. Passman*, 442 U.S. 228, 234-35 (1979)). Applying this precept, courts have found that intentional sexual harassment of employees by persons acting under color of state law violates the Fourteenth Amendment and is actionable under § 1983. *Id.* (citing *Ponsurelli v. Stone*, 930 F.2d 104, 113-14 (1st Cir. 1991); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986)). *See also Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997); *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174 (10th Cir. 1997); *Kern v. City of Rochester*, 93 F.3d 38, 43 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 1335 (1997). A plaintiff wishing to sustain an equal protection claim of sexual harassment under the Fourteenth Amendment must show both "sexual harassment" and an "intent" to harass based upon that plaintiff's membership in a particular class of citizens -- *i.e.*, male or female. *Trauvetter v. Quick*, 916 F.2d 1140, 1149-50 (7th Cir. 1990). An individual plaintiff may pursue a sexual

[10] Plaintiff also cites *West v. State*, 719 S.W.2d 684 (Ark. 1986), as authority for her claim of criminal sexual assault. Plaintiff's reliance on *West* is misplaced as the defendant in that case "came up behind" the 15-year-old victim, "put his arms around her, put his hand over her left breast [cupping her breast firmly and squeezing it], and kissed the back of her neck." *Id.* at 686. The facts alleged by plaintiff in this case bear no material resemblance to those that were at issue in *West* and do not give rise to a claim of criminal sexual assault.

harassment claim under the Fourteenth Amendment based solely upon acts of harassment directed towards her, but such a claim must show an intent to harass because of her status as a female and not because of characteristics of her gender which are personal to her. *Id.* at 1151. *See also Bohen*, 799 F.2d at 1187; *Stafford v. State of Missouri*, 835 F.Supp. 1136, 1141 (W.D.Mo. 1993).

Although the President contends that plaintiff cannot establish that he acted under color of state law with the intent to discriminate against her on the basis of her gender, he states that he reserves those issues for trial, if necessary, and seeks summary judgment solely on the grounds of plaintiff's failure to prove that she was subjected to conduct that corresponds to sexual harassment under Title VII. Before discussing that issue, however, the Court must address plaintiff's argument that the essential elements of a sexual harassment claim under § 1983 do not correspond to those under Title VII (although she acknowledges there is some overlap) and that her burden of proof is something less than that required under Title VII. The Court rejects this argument.

Throughout the pendency of this lawsuit, this Court and the parties have been operating under the assumption, based on the clear weight of authority, that a § 1983 sexual harassment claim should be analyzed under the standards developed in similar Title VII litigation. *See, e.g., Trautvetter*, 916 F.2d at 1149 (noting that a claim of sexual harassment under § 1983 must generally satisfy the contours of a sexual harassment claim under Title VII); *Southard*, 114 F.3d 539 (applying Title VII standards to a § 1983 claim); *Cross v. State of Alabama*, 49 F.3d 1490, 1508 (11th Cir. 1995) (noting that when § 1983 is used as a parallel remedy for violations of Title VII, the elements of the two causes of action are the same); *Beardsley*, 30

F.3d at 529 (noting that courts may apply the standards developed in Title VII litigation to similar litigation under § 1983); *Boutros v. Canton Reg'l Transit Auth.*, 997 F.2d 198, 202 (6th Cir. 1993) (noting that § 1983 and Title VII are largely parallel remedies in employment discrimination suits and applying the same elements of *prima facie* proof for racially hostile work environment to both Title VII and § 1983 claim). Indeed, in her memorandum in opposition to the President's motion for judgment on the pleadings (filed July 29, 1997), plaintiff stated that "[a] sexual harassment claim brought pursuant to § 1983 is similar to a Title VII sexual harassment claim" and cited *King v. Board of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990), for the proposition that a § 1983 sexual harassment claim generally follows the contours of a Title VII claim. *See* Pl. Opp'n to Mot. for J. on the Pleadings at 8. In this regard, plaintiff recognized that courts have separated sexual harassment claims into two categories — *quid pro quo* cases and hostile work environment cases — and represented to this Court that her allegations, as analyzed under Title VII, were sufficient to state claims under both categories. Specifically, plaintiff stated with respect to her *quid pro quo* claim that sexual harassment occurs when, among other things, "rejection of such conduct by an individual is used as the basis for employment decisions," citing as support for this claim Title VII cases and guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC"), *see* Pl. Opp'n to Mot. for J. on the Pleadings at 26, and stated with respect to her hostile environment claim, again citing Title VII cases and EEOC guidelines, that "[u]nder section 1983, as under Title VII, it is unlawful to create a sexually hostile or abusive work environment," *see id.* at 18. Several of this Court's discovery rulings in favor of plaintiff were premised on this Court's understanding and plaintiff's representations (in her complaint and elsewhere) that she was

asserting workplace harassment as understood in reference to Title VII standards, *i.e.*, that she suffered tangible job detriments for her refusal to submit to Governor Clinton's alleged advances. Based on plaintiff's prior representations and the clear weight of authority, the Court will look to Title VII in addressing plaintiff's *quid pro quo* and hostile work environment sexual harassment claims.[11]

a.

To make a prima facie case of *quid pro quo* sexual harassment, this plaintiff must show, among other things, that her refusal to submit to unwelcome sexual advances or requests for sexual favors resulted in a tangible job detriment. *Craw v. Lawson & Sexsions Co.*, 49 F.3d 466, 473 (8th Cir. 1995) (citing *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992)). *See also Sanderi v. Casa View Baptist Church*, 134 F.3d 331, 339 (5th Cir. 1998) (noting that to withstand summary judgment on *quid pro quo* claims, plaintiffs were required to produce evidence showing that the harassment complained of affected tangible aspects of their compensation, terms, conditions, or privileges of employment). "[A] supervisor's mere threat or promise of job-related harm or benefits in exchange for sexual favors does not constitute *quid pro quo* harassment ...." *Gary v. Long*, 59 F.3d 1391, 1396 (D.C.Cir. 1995).

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[11] This is not to say that the standards under both § 1983 and Title VII are exactly the same. Among other things, a plaintiff under § 1983 must demonstrate that the defendant was acting under color of state law while Title VII requires no such showing. Thus, contrary to plaintiff's suggestion that her burden of proof under § 1983 is something less than what would be required of her under Title VII, a plaintiff's burden under § 1983 exceeds that under Title VII in most cases. *See, e.g., Guy v. State of Illinois*, 958 F.Supp. 1300, 1307 (N.D.Ill. 1997). Here, however, the President is not at this time contesting the issues of whether he acted under color of state law with the intent to discriminate against plaintiff on the basis of her gender.

i.

Apparently recognizing the infirm ground upon which her assertion of tangible job detriments rest (which will be discussed *infra*), plaintiff *first* argues that a showing of a tangible job detriment is not an essential element of an action for *quid pro quo* sexual harassment under Title VII.[12] The Court rejects this argument as it conflicts with the Eighth Circuit's requirement that a refusal to submit to unwelcome sexual advances or requests for sexual favors resulted in a tangible job detriment, *see Crum*, 49 F.3d at 473, and conflicts with the majority of the other circuits on this point as well, including the recent decisions cited previously from the Fifth Circuit in *Sanders*, 134 F.3d 331, and the District of Columbia Circuit in *Gary*, 59 F.3d 1391. *See also Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (concluding that it is the essence of *quid pro quo* harassment when an employee is subjected to unwelcome sexual advances by a supervisor and her reaction to these advances affects tangible aspects of her compensation, terms, conditions, or privileges of employment); *Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990) (*quid pro quo* claim requires that the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 579 (2nd Cir. 1989) (noting that the gravamen of a *quid pro quo* claim is that a tangible job benefit or privilege is conditioned on an employee's submission to

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[12] Plaintiff's contention that she is not required to show a tangible job detriment is at odds with her representation made in her opposition to the President's motion for judgment on the pleadings (filed July 29, 1997), that sexual harassment occurs when, among other things, "rejection of such conduct by an individual is used as the basis for employment decisions." *See* Pl. Opp'n to Mot. for J. on the Pleadings at 26 (citing Title VII cases and guidelines promulgated by the EEOC). Indeed, the primary basis of plaintiff's original and amended complaint is her contention that she suffered reprisals for her rejection of the Governor's alleged advances.

sexual blackmail and that adverse consequences follow from the employee's refusal); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987) (*quid pro quo* sexual harassment exists when adverse job consequences result from employee's refusal to submit to sexual advances); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11th Cir. 1987) (*quid pro quo* claim requires that the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 649 (6th Cir. 1986) (no cause of action for *quid pro quo* sexual harassment where "the record [is] totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [defendant]").

Even without benefit of the settled authority requiring a showing of a tangible job detriment in *quid pro quo* cases, the three cases upon which plaintiff relies in support of her argument, *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), *Karibian v. Columbia Univ.*, 14 F.3d 773 (2nd Cir. 1994), and *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997) (en banc) (plurality), *cert. granted sub nom. Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 876 (Jan. 23, 1998), do not obviate the need for a showing of a tangible job detriment under the facts of this case. First, *Nichols* and *Karibian* were "submission" cases in which the victims of sexual harassment submitted to the unwelcome sexual advances. Plaintiff, by contrast, alleges that she *resisted* Governor Clinton's alleged advances and thereby suffered reprisals in her workplace. The court in *Karibian* recognized the distinction between so-called "submission" and "refusal" cases, noting that "[i]n the nature of things, evidence of economic harm will not be available to support the claim of the employee who submits to the

supervisor's demands." 14 F.3d at 778. Both *Nichols* and *Karibian* were addressing the narrow situations before them in which the victim submitted to the demands for sexual favors and do not stand for the proposition that a showing of a tangible job detriment is unnecessary in a *quid pro quo* sexual harassment case where, as here, it is claimed that the alleged advances were resisted.

While it is true that the Seventh Circuit in *Jansen* concluded that a "clear and unambiguous" *quid pro quo* threat that "clearly conditions concrete job benefits or detriments on compliance with sexual demands" can constitute an actionable claim "even if the threat remains unfulfilled," 123 F.3d at 499, plaintiff acknowledges that no one, including Governor Clinton, ever told her that if she refused to submit to his alleged advances it would have a negative effect on her job, that she had to submit to his alleged advances in order to receive job benefits, or that the Governor would use his relationship with AIDC Director Dave Harrington to penalize her in her job. Pl.'s Depo. at 74-75. She merely states that "read[ing] between the lines," she "knew what [the Governor] meant" when he allegedly indicated in the hotel suite that Harrington was his good friend. *Id.* at 75-76. Be that as it may, the Governor's alleged statements do not in any way constitute a clear threat that clearly conditions concrete job benefits or detriments on compliance with sexual demands.[13] Plaintiff's claim therefore would not survive a *Jansen* analysis, her "read[ing] between the

[13] For this reason, had plaintiff demonstrated adverse employment action, which she has not, the Court would not find the Governor's alleged statements to be sufficient evidence of a causal link between that harm and any alleged *quid pro quo* demands. *Cf. Crum*, 49 F.3d at 474 (statement by harasser that, "I'll get you for this," held to be insufficient to show enforcement of *quid pro quo* demand where there was no reference to plaintiff's job); *Hawkins v. McNeilab, Inc.*, 83 F.3d 767, 775-76 (6th Cir. 1996) (statement from harasser that he was "close friends" with individual who had impact on claimed adverse employment decisions held to be too attenuated to establish causation).

lines" notwithstanding. 123 F.3d at 499.[14]

Based on the foregoing, the Court finds that a showing of a tangible job detriment is an essential element of plaintiff's *quid pro quo* sexual harassment claim. It is that issue to which the Court now turns.

ii.

As evidence of tangible job detriments (or adverse employment action),[15] plaintiff claims the following occurred after she resisted Governor Clinton's alleged advances on May 8, 1991: (1) she was discouraged from applying for more attractive jobs and seeking reclassification at a higher pay grade within the AIDC; (2) her job was changed to one with fewer responsibilities, less attractive duties and less potential for advancement – and the reason given for the change proved to be untrue; (3) she was effectively denied access to grievance procedures that would otherwise have been available to victims of sexual harassment; and (4) she was mistreated in ways having tangible manifestations, such as isolating her physically, making her sit in a location from which she was constantly watched, making her sit at her workstation with no work to do, and singling her out as the only female employee not to be

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[14] Of course, it remains to be seen whether the holding of *Jensen* will survive review by the Supreme Court.

[15] Title VII prohibits an employer from discriminating "against any individual with respect to the compensation, terms, conditions, or privileges of employment" on the basis of sex, or from limiting, segregating, or classifying employees on the basis of sex "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee...." 42 U.S.C. § 2000e-2(a)(1)-(2). The concept of "tangible job detriment" as used in *quid pro quo* cases and the concept of "adverse employment action" as used in retaliation cases both derive from the basic prohibition of employment discrimination set forth in § 2000e-2(a)(1)-(2), *see Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997), and thus correspond to one another. *See Sanchez*, 134 F.3d at 339; *Bryant v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996); *Blake v. Goose Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). Accordingly, this Court has looked to cases discussing both concepts in addressing the issues in this case.

given flowers on Secretary's Day. The Court has carefully reviewed the record in this case and finds nothing in plaintiff's employment records, her own testimony, or the testimony of her supervisors showing that plaintiff's reaction to Governor Clinton's alleged advances affected tangible aspects of her compensation, terms, conditions, or privileges of employment.

1.

Plaintiff's claim that she was discouraged from applying for more attractive jobs and seeking reclassification at a higher pay grade within the AIDC does not demonstrate any "tangible" job detriment as she has not identified a single specific job which she desired or applied for at AIDC but which she had been discouraged from seeking. Pl.'s Depo. at 37-40. When asked for such specific information, plaintiff merely testified that the unidentified jobs she sought were "a grade higher" but that her supervisor "would always discourage me and make me believe that I could grow within the administrative services, which in fact I didn't. I got degrade – downgraded." *Id.* at 38, 42. She further states that those "few" times that she would talk to her supervisor and receive discouragement, she "would go ahead and fill out an application maybe or something." *Id.* at 41. There is no record of plaintiff ever applying for another job within AIDC, however, and the record shows that not only was plaintiff never downgraded, her position was reclassified *upward* from a Grade 9 classification to a Grade 11 classification, thereby increasing her annual salary. Pennington Aff. ¶ 6; Arkansas Human Resources Management System Payroll Data Form for P. R. Jones, Ex. B-7. Indeed, it is undisputed that plaintiff received every merit increase and cost-of-living allowance for which she was eligible during her nearly two-year tenure with the AIDC and consistently received

satisfactory job evaluations. *See id.* Specifically, on July 1, 1991, less than two months after the alleged incident that is the subject of this lawsuit, plaintiff received a cost-of-living increase and her position was reclassified from Grade 9 to Grade 11; on August 28, 1991, plaintiff received a satisfactory job evaluation from her supervisor, Clydine Pennington; on March 11, 1992, the one-year anniversary of her hire date with AIDC, plaintiff received another satisfactory evaluation from Pennington and Cherry Duckett, Deputy Director of AIDC, which entitled her to a merit raise. *Id.* In addition, plaintiff was given a satisfactory job review in an evaluation covering the period of March 1992 until her voluntary departure from the AIDC in February 1993. Ex. B-6. Plaintiff signed this review on February 16, 1993, *see id.*, and would have received another merit increase one month later in accordance with this review had she elected to continue her employment at AIDC. Pennington Aff. ¶ 8.

It is plaintiff's burden to come forward with "specific facts" showing that there is a genuine issue for trial, *see Matsushita*, 475 U.S. at 587, and the Court finds that her testimony on this point, being of a most general and non-specific nature (and in some cases contradictory to the record), simply does not suffice to create a genuine issue of fact regarding any tangible job detriment as a result of her having allegedly been discouraged from seeking more attractive jobs and reclassification. *Cf. Splunge v. Shoney's, Inc.*, 874 F.Supp. 1258, 1271 (M.D.Ala. 1994) (where plaintiff claimed that she never specifically requested a promotion or raise because it would have been futile as she had not surrendered to supervisor's harassment, court held this was insufficient to create a genuine issue of material fact regarding denial of economic benefits as it was "a mere inference based on speculation and conjecture").

2.

Equally without merit is plaintiff's assertion that following her return from maternity leave in September 1992, she suffered a tangible job detriment when her job was changed to one with fewer responsibilities, less attractive duties and less potential for advancement.[16] These matters do not constitute a tangible job detriment as it is undisputed that there was no diminution in plaintiff's salary or change in her job classification following her return from maternity leave and, further, that her last review at AIDC following her return was positive and would have entitled her to another merit increase had she not resigned her position in order to move to California with her husband. Changes in duties or working conditions that cause no materially significant disadvantage, such as diminution in title, salary, or benefits, are insufficient to establish the adverse conduct required to make a *prima facie* case. *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994).

Although plaintiff states that her job title upon returning from maternity leave was no longer that of purchasing assistant and that this change in title impaired her potential for promotion, her job duties prior to taking maternity leave and her job duties upon returning to work both involved data input; the difference being that instead of responsibility for data entry of AIDC purchase orders and driving records, she was assigned data entry responsibilities for employment applications. Pl.'s Depo. at 56; Pennington Aff. ¶ 16. That being so, plaintiff

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[16] Plaintiff originally claimed that the job in which she was placed called for a higher grade and pay, but that she was not paid more money than she received in her previous position and never received a raise beyond a cost of living increase, even though other employees received merit increases. Am. Compl. ¶ 39. That claim apparently has been abandoned as it is not mentioned in plaintiff's response to the President's motion for summary judgment. The Court notes that plaintiff apparently never reviewed her employment records at AIDC prior to filing suit in May 1994 and had not done so prior to her deposition. Pl.'s Depo. at 33, 76.

cannot establish a tangible job detriment. A transfer that does not involve a demotion in form or substance and involves only minor changes in working conditions, with no reduction in pay or benefits, will not constitute an adverse employment action, "[o]therwise every trivial personnel action that an irritable ... employee did not like would form the basis of a discrimination suit." *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996)). *See also Montandon v. Farmland Indus. Inc.*, 116 F.3d 355, 359 (8th Cir. 1997) (requirement that an employee move to another town with the same employer did not rise to the level of an adverse employment action, irrespective of how unpalatable it may have been to the employee, where there was no change in position, title, salary, or any other aspect of his employment). Whether or not the reasons given for the change were untrue, plaintiff's allegations describe nothing "more disruptive than a mere inconvenience or an alteration of job responsibilities." *See Harlston*, 37 F.3d at 382 (quoting *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).[17]

3.

The Court also rejects plaintiff's claim that she was effectively denied access to grievance procedures that would otherwise have been available to victims of sexual harassment. Plaintiff merely states that from her "perspective," it "appeared very unlikely that any good would come from pursuing a grievance," and that "it was natural for her to conclude

[17] Plaintiff offers no evidence that her previous position conferred some type of status or prestige not conferred in her subsequent position, and she offers no evidence that the change in her duties impaired her ability to advance in her career.

that invoking the grievance procedure would be futile and perhaps worse." Pl.'s Opp'n to Def. Clinton's Mot. for Summ. J. at 40-41, 47. As the Court has previously noted, however, plaintiff acknowledges that she was never threatened with adverse employment action if she did not submit to the Governor's alleged advances, but that she was only "read[ing] between the lines." Pl.'s Depo. at 75-76. Such subjective perceptions and beliefs regarding the efficacy of invoking any grievance procedures are nothing more than "speculation and conjecture" and do not constitute a tangible job detriment. *Splunge*, 874 F.Supp. at 1271. *See also Crew*, 49 F.3d at 474 (plaintiff's subjective belief that defendant had threatened job retaliation did not state a claim of *quid pro quo* sexual harassment).

4.

Finally, the Court rejects plaintiff's claim that she was subjected to hostile treatment having tangible effects when she was isolated physically, made to sit in a location from which she was constantly watched, made to sit at her workstation with no work to do, and singled out as the only female employee not to be given flowers on Secretary's Day. Plaintiff may well have perceived hostility and animus on the part of her supervisors,[18] but these perceptions are merely conclusory in nature and do not, without more, constitute a tangible job detriment. Absent evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage, of which the Court has already determined does not exist, general allegations of hostility and personal animus are not sufficient to demonstrate any

[18] Plaintiff states "there was a lot of hostility it seemed like between Cherry Dunbott and I," and that Pennington was "not as friendly as she used to have been." Pl.'s Depo. at 35, 45.

adverse employment action that constitutes the sort of ultimate decision intended to be actionable under Title VII. *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692-93 (8th Cir. 1997) (citing *Ledergerber*, 122 F.3d at 1144; *Montandon*, 116 F.3d at 359).

Similarly, plaintiff's allegations regarding her work station being moved so that she had to sit directly outside Pennington's office and, at times, not having work to do,[19] describe nothing more than minor or *de minimis* personnel matters which, again without more, are insufficient to constitute a tangible job detriment or adverse employment action. *Cf. Hicks v. Brown*, 929 F.Supp. 1184, 1190 (E.D.Ark. 1996) (case in which this Court found no adverse employment action, notwithstanding allegations of a pattern of negative or adverse actions taken against the plaintiff – including a critical E-Mail from plaintiff's supervisor, verbal counseling of plaintiff by her supervisor, and a low rating on plaintiff's proficiency report – where no financial harm, termination, or suspension had occurred).

Although it is not clear why plaintiff failed to receive flowers on Secretary's Day in 1992, such an omission does not give rise to a federal cause of action in the absence of evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage. *See Manning*, 127 F.3d at 692-93.

iii.

In sum, the Court finds that a showing of a tangible job detriment or adverse employment action is an essential element of plaintiff's § 1983 *quid pro quo* sexual harassment

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[19] Plaintiff makes this allegation even though she testified that following her return from maternity leave, she input data pursuant to her new responsibilities "all day long." Pl.'s Depo. at 56.

The Court now turns to plaintiff's hostile work environment claim. Unlike *quid pro quo* sexual harassment, hostile work environment harassment arises when "sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Crum*, 49 F.3d at 474 (quoting *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988)). To prevail on a hostile work environment cause of action, a plaintiff must establish, among other things, that she was subjected to unwelcome sexual harassment based upon her sex that affected a term, condition, or privilege of employment. *Callanan v. Runyan*, 75 F.3d 1293, 1296 (8th Cir. 1996). *See also Todd v. Ortho Biotech, Inc.*, — F.3d —, 1998 WL 92207, *2 (8th Cir. March 5, 1998); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996). The behavior creating the hostile working environment need not be overtly sexual in nature, but it must be "'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." *Crum*, 49 F.3d at 474 (quoting *Hall*, 842 F.2d at 1014). The harassment must also be sufficiently severe or pervasive "to alter the conditions of employment and create an abusive working environment." *Id.* (quoting *Meritor Sav. Bank v. Vinson*, 477

U.S. 57, 67 (1986)). *See also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

The President essentially argues that aside from the alleged incident at the Excelsior Hotel, plaintiff alleges only two other contacts with him, alleges only a few additional contacts with Ferguson, and contains conclusory claims that plaintiff's supervisors were rude. He argues that taken individually or as a whole, these contacts do not in any way constitute the kind of pervasive, intimidating, abusive conduct that courts require to establish a hostile work environment claim. The Court agrees.

In assessing the hostility of an environment, a court must look to the totality of the circumstances. *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1327 (8th Cir. 1994). Circumstances to be considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. No single factor is determinative, *see id.*, and the court "should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992).

First, the Court finds plaintiff's reliance on her assertions of tangible job detriment as establishing a hostile work environment, *see* Pl.'s Opp'n to Def. Clinton's Mot. for Summ. J. at 51, to be misplaced. In its August 22 Memorandum Opinion and Order, the Court noted that although the President's argument for outright dismissal of plaintiff's hostile work environment claim had "some force," further development of the record was nevertheless necessary. *Jones*, 974 F.Supp. at 724. The Court based this conclusion in large part on plaintiff's representations that her rejection of the President's alleged advances caused her to

suffer adverse employment actions, including being transferred to a position that had no responsible duties for which she could be adequately evaluated to earn advancement and failing to receive raises and merit increases. *Id.* In this regard, the Court determined that the "totality" of the allegations alleged in this case were such that they could be said to have altered the conditions of plaintiff's employment and created an abusive work environment. *Id.* However, development of the record has now established that plaintiff's allegations of adverse employment actions are without merit, *see* Section II(b)(2)(a)(ii), *supra*, with her claim of failing to receive cost of living increases apparently having even been abandoned. *See id.* at n.16. Plaintiff received every merit increase and cost-of-living allowance for which she was eligible during her nearly two-year tenure with the AIDC, her job was upgraded from Grade 9 to Grade 11 (thereby increasing her salary), she consistently received satisfactory job evaluations, and her job responsibilities upon her return from maternity leave were not significantly different from prior to her taking leave and did not cause her any materially significant disadvantage. These facts are clearly established by the record and dispel the notion that she was subjected to a hostile work environment.

Plaintiff certainly has not shown under the totality of the circumstances that the alleged incident in the hotel and her additional encounters with Ferguson and the Governor were so severe or pervasive that it created an abusive working environment. *Callaman*, 75 F.3d at 1296. She admits that she never missed a day of work following the alleged incident in the hotel, she continued to work at AIDC another nineteen months (leaving only because of her husband's job transfer), she continued to go on a daily basis to the Governor's Office to deliver items and never asked to be relieved of that duty, she never filed a formal complaint or

told her supervisors of the incident while at AIDC, and she never consulted a psychiatrist, psychologist, or incurred medical bills as a result of the alleged incident. Pl.'s Depo. at 44-45, 48, 62, 121-23. In addition, plaintiff has not shown how Ferguson's alleged comments, whether considered alone or in conjunction with the other alleged conduct in this case, interfered with her work, and she acknowledges that the Governor's statement about him and her looking like "beauty and the beast" was made "in a light vein" and that his putting her on the shoulder and asking her how she was doing was done in a "friendly fashion." Pl.'s Depo. at 243, 245.

While the alleged incident in the hotel, if true, was certainly boorish and offensive, the Court has already found that the Governor's alleged conduct does not constitute sexual assault. *See* Section II(B), *infra*. This is thus not one of those exceptional cases in which a single incident of sexual harassment, such as an assault, was deemed sufficient to state a claim of hostile work environment sexual harassment. *Cf. Crisonino v. New York City Housing Auth.*, 985 F.Supp. 385 (S.D.N.Y. 1997) (supervisor called plaintiff a "dumb bitch" and "shoved her so hard that she fell backward and hit the floor, sustaining injuries from which she has yet to fully recover").

Considering the totality of the circumstances, it simply cannot be said that the conduct to which plaintiff was allegedly subjected was frequent, severe, or physically threatening, and the Court finds that defendants' actions as shown by the record do not constitute the kind of sustained and nontrivial conduct necessary for a claim of hostile work environment. *Cf. Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654, 656-57 (8th Cir. 1997) (noting that single exposure to offensive videotape was not severe or pervasive enough to create hostile

environment); *Monsanton*, 116 F.3d at 358 (exposure to offensive behavior by supervisor on one instance does not satisfy "severe or pervasive" requirement under Title VII); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1366 (7th Cir. 1997) (five sexually-oriented incidents spread out over the course of 16 months not sufficiently severe or pervasive enough to create hostile work environment); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 534 (7th Cir. 1993) ("relatively limited" instances of unwanted sexual advances, which included the supervisor placing his hand on plaintiff's leg above the knee several times, rubbing his hand along her upper thigh, kissing her several seconds, and "lurch[ing] at her from behind some bushes," did not create an objectively hostile work environment).

In sum, the Court finds that the record does not demonstrate conduct that was so severe or pervasive that it can be said to have altered the conditions of plaintiff's employment and created an abusive working environment. Accordingly, the President is entitled to summary judgment on plaintiff's claim of hostile work environment sexual harassment.

2.

The Court now turns to plaintiff's § 1985(3) conspiracy claim. In order to prove the existence of a civil rights conspiracy under § 1985(3), a plaintiff must prove, among other things, that another person was injured in his person or property or deprived of having and exercising any right or privilege of a citizen in the United States. *Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996) (en banc). "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great American Fed. Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979).

Plaintiff does not have a viable § 1985(3) claim in this case as the Court has determined that her § 1983 *quid pro quo* and hostile work environment sexual harassment claims are without merit and warrant a grant of summary judgment. Absent an underlying violation of federal law, there can be no actionable claim alleging a conspiracy to achieve that end. *See Larson*, 76 F.3d at 1456 (noting that where there was no evidence from which a jury could conclude that any injury to or deprivation of the plaintiff's constitutional rights actually occurred, there was no § 1985(3) conspiracy claim); *Wiggins v. Hitchens*, 853 F.Supp. 505, 511 (D.D.C. 1994) (noting that "[t]here can be no recovery under section 1985(3) absent a violation of a substantive federal right"); *Escamilla v. City of Santa Ana*, 606 F.Supp. 928, 934 (C.D.Ca. 1985) (noting that "[t]here can be no action for conspiracy under 42 U.S.C. § 1985 or for failure to prevent a conspiracy under 42 U.S.C. § 1986 when no civil rights violation has occurred"), *aff'd*, 796 F.2d 266 (9th Cir. 1986); *Garrison v. Burks*, 1997 WL 37909, *10 (N.D.Ill. Jan. 27, 1997) (where there was no underlying deprivation of equal protection, plaintiff was precluded from establishing § 1985(3) claim as there was no showing of injury to person or property).

3.

Finally, the Court addresses plaintiff's state law claim of intentional infliction of emotional distress or outrage.[20] Arkansas recognizes a claim of intentional infliction of emotional distress based on sexual harassment. *Davis v. Tri-State Mack Distribs., Inc.*, 981

[20] Under Arkansas law, the tort of intentional infliction of emotional distress and the tort of outrage are essentially the same causes of action and are governed by the same standards. *See, e.g., Hamaker v. Ivy*, 51 F.3d 108, 110 n. 2 (8th Cir. 1995); *Ross v. Patterson*, 817 S.W.2d 418, 420 (Ark. 1991).

F.2d 340, 342 (8th Cir. 1992) (citing *Hale v. Ladd*, 826 S.W.2d 244 (Ark. 1992)). To establish a claim of intentional infliction of emotional distress, a plaintiff must prove that: (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized community; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the plaintiff's emotional distress was so severe in nature that no reasonable person could be expected to endure it. *Milam v. Bank of Cabot*, 937 S.W.2d 653, 658 (Ark. 1997); *Hollomon v. Keadle*, 931 S.W.2d 413, 415 (Ark. 1996); *Cherepski v. Walker*, 913 S.W.2d 761, 767 (Ark. 1996); *Crown v. Younts*, 913 S.W.2d 283, 286 (Ark. 1996).

The President argues that the alleged conduct of which plaintiff complains was brief and isolated; did not result in any physical harm or objective symptoms of the requisite severe distress; did not result in distress so severe that no reasonable person could be expected to endure it; and he had no knowledge of any special condition of plaintiff that would render her particularly susceptible to distress. He argues that plaintiff has failed to identify the kind of clear cut proof that Arkansas courts require for a claim of outrage and that he is therefore entitled to summary judgment. The Court agrees.[21]

One is subject to liability for the tort of outrage or intentional infliction of emotional

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[21] In denying the President's motion for judgment on the pleadings on this claim, the Court noted that the totality of the alleged conduct on which plaintiff based her lawsuit, including her claim that her rejection of the President's alleged advances caused her to suffer adverse employment actions, could, if true, be regarded as sufficient to state a claim of intentional infliction of emotional distress. *See Jones*, 974 F.Supp. at 730. For the reasons previously stated, however, it is now apparent that plaintiff's claims have not borne fruit. The record upon which this Court is now addressing plaintiff's claim of outrage – indeed, all her claims – is far different from the record that was before the Court last August.

distress if he or she wilfully or wantonly causes severe emotional distress to another by extreme and outrageous conduct. *Sterling Drug Inc. v. Oxford*, 743 S.W.2d 380, 382 (Ark. 1988). *See also Ingram v. Pirelli Cable Corp.*, 747 S.W.2d 103, 105 (Ark. 1988). In *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 687 (Ark. 1980), the Arkansas Supreme Court stated that "[b]y extreme and outrageous conduct, we mean conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society." Whether conduct is "extreme and outrageous" is determined by looking at "the conduct at issue; the period of time over which the conduct took place; the relation between plaintiff and defendant; and defendant's knowledge that plaintiff is particularly susceptible to emotional distress by reason of some physical or mental peculiarity." *Doe v. Wright*, 82 F.3d 265, 269 (8th Cir. 1996) (citing *Hamaker*, 51 F.3d at 111). The tort is clearly not intended to provide legal redress for every slight insult or indignity that one must endure. *Manning*, 127 F.3d at 690 (citing *Hamaker*, 51 F.3d at 110). The Arkansas courts take a strict approach and give a narrow view to claims of outrage, *see id.*, and merely describing conduct as outrageous does not make it so. *Ross*, 817 S.W.2d at 420.

Plaintiff seems to base her claim of outrage on her erroneous belief that the allegations she has presented are sufficient to constitute criminal sexual assault. She states that "Mr. Clinton's outrageous conduct includes offensive language, an offensive proposition, offensive touching (constituting sexual assault under both federal and state definitions), and *actual exposure of an intimate private body part*," and that "[t]here are few more outrageous acts than a criminal sexual assault followed by unwanted exposure, coupled with a demand for oral sex

by the most powerful man in the state against a very young, low-level employee." Pl.'s Opp'n to Def. Clinton's Mot. for Summ. J. at 66 (emphasis in original).

While the Court will certainly agree that plaintiff's allegations describe offensive conduct, the Court, as previously noted, has found that the Governor's alleged conduct does not constitute sexual assault. Rather, the conduct as alleged by plaintiff describes a mere sexual proposition or encounter, albeit an odious one, that was relatively brief in duration, did not involve any coercion or threats of reprisal, and was abandoned as soon as plaintiff made clear that the advance was not welcome. The Court is not aware of any authority holding that such a sexual encounter or proposition of the type alleged in this case, without more, gives rise to a claim of outrage. *Cf. Croom*, 913 S.W.2d 287 (use of wine and medication by a vastly older relative to foist sex on a minor cousin went "beyond a mere sexual encounter" and offended all sense of decency).

Moreover, notwithstanding the offensive nature of the Governor's alleged conduct, plaintiff admits that she never missed a day of work following the alleged incident, she continued to work at AIDC another nineteen months (leaving only because of her husband's job transfer), she continued to go on a daily basis to the Governor's Office to deliver items and never asked to be relieved of that duty, she never filed a formal complaint or told her supervisors of the incident while at AIDC, she never consulted a psychiatrist, psychologist, or incurred medical bills as a result of the alleged incident, and she acknowledges that her two subsequent contacts with the Governor involved comments made "in a light vein" and nonsexual contact that was done in a "friendly fashion." Further, despite earlier claiming that she suffered marital discord and humiliation, plaintiff stated in her deposition that she was not

claiming damages to her marriage as a result of the Governor's alleged conduct, *see* Pl.'s Depo. at 122, and she acknowledged the request to drop her claim of injury to reputation by stating, "I didn't really care if it was dropped or not personally." *Id.* at 261-62. Plaintiff's actions and statements in this case do not portray someone who experienced emotional distress so severe in nature that no reasonable person could be expected to endure it. *Cf. Hamaker*, 51 F.3d 108 (no claim of outrage where plaintiff, who had a speech impediment and an I.Q. of between 75 and 100, was "red-faced and angry," had an "increased heart rate and blood pressure," and had trouble sleeping four days after incident involving "rather nasty" practical joke).

Nevertheless, plaintiff submits a declaration from a purported expert with a Ph.D in education and counseling, Patrick J. Carnes, who, after a 3.5 hour meeting with plaintiff and her husband a mere four days prior to the filing of President Clinton's motion for summary judgment, opines that her alleged encounter with Governor Clinton in 1991, "and the ensuing events," have caused plaintiff to suffer severe emotional distress and "consequent sexual aversion." The Court does not credit this declaration.

In *Angle v. Alexander*, 945 S.W.2d 933 (Ark. 1997), the Arkansas Supreme Court noted that absent physical harm, courts look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious. *Id.* at 936-37. In that case, the plaintiffs offered their own testimony that they had experienced emotional distress, thoughts of death, fear, anger, and worry, but little else. *Id.* In concluding that there was no evidence of extreme emotional distress required to prevail on an outrage claim, the Court found it significant that none had seen a physician or mental health professional for these concerns. *Id.* The Court did not

allow the fact that one plaintiff "on the advice of her attorney, spoke to a psychologist," to overcome her failure of proof on this point. *Id.* at 937 n.3.

Aside from other deficiencies with the Carnes' declaration (including the fact that the substance of this declaration apparently was not disclosed in accordance with rules governing pre-trial discovery), the opinions stated therein are vague and conclusory and, as in *Angle*, do not suffice to overcome plaintiff's failure of proof on her claim of outrage. *Cf. Crenshaw v. Georgia-Pacific Corp.*, 915 F.Supp. 93, 99 (W.D.Ark. 1995) (affidavit prepared after opposing motion for summary judgment filed detailing symptoms of weight loss, lack of sleep, headache, worry, and nausea, failed to present sufficient evidence of emotional distress).

In sum, plaintiff's allegations fall far short of the rigorous standards for establishing a claim of outrage under Arkansas law and the Court therefore grants the President's motion for summary judgment on this claim.

III.

One final matter concerns alleged suppression of pattern and practice evidence. Whatever relevance such evidence may have to prove other elements of plaintiff's case, it does not have anything to do with the issues presented by the President's and Ferguson's motions for summary judgment, *i.e.*, whether plaintiff *herself* was the victim of alleged *quid pro quo* or hostile work environment sexual harassment, whether the President and Ferguson conspired to deprive *her* of her civil rights, or whether *she* suffered emotional distress so severe in nature that no reasonable person could be expected to endure it. Whether other women may have been subjected to workplace harassment, and whether such evidence has allegedly been

suppressed, does not change the fact that plaintiff has failed to demonstrate that she has a case worthy of submitting to a jury. Reduced to its essence, the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party and the Court therefore finds that there are no genuine issues for trial in this case.

IV.

For the foregoing reasons, the Court finds that the President's and Ferguson's motions for summary judgment should both be and hereby are granted. There being no remaining issues, the Court will enter judgment dismissing this case.

IT IS SO ORDERED this 1st day of April 1998.

UNITED STATES DISTRICT JUDGE

UNDER SEAL

ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF CROSS APPELLANT UNITED STATES

KENNETH W. STARR
Independent Counsel

ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Attorneys for Appellee-
Cross Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The parties to the proceedings in the district court and on appeal are (a) the United States, represented by Kenneth W. Starr, Independent Counsel; (b) Monica S. Lewinsky; and (c) Francis D. Carter, Esq. The National Association of Criminal Defense Lawyers and its local affiliate the District of Columbia Association of Criminal Defense Lawyers filed an amicus brief in the district court.

Under review in this consolidated appeal is the district court's order of March 31, 1998, reproduced at App. 14. The accompanying memorandum opinion, as amended on April 28, 1998, is reproduced at App. 17-35.

This case was not previously before this Court or any other court. There are no other related cases, as that term is defined in D.C. CIR. R. 28(a)(1)(C).

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ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF CROSS APPELLANT UNITED STATES

STATEMENT OF JURISDICTION

These three appeals, consolidated by this Court's orders of April 23, 1998, and May 1, 1998, are from the order under seal by the United States District Court for the District of Columbia, Chief Judge Norma Holloway Johnson. On March 31, 1998, the district court issued an order granting in part and denying in part the motion of Francis D. Carter, Esq., supported by Monica S. Lewinsky, to quash two grand jury subpoenas. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and FED. R. CRIM P. 6.

On April 9, 1998, Lewinsky filed a notice of appeal (No. 98-

3052). This Court has jurisdiction over Lewinsky's appeal under the authority of *In re Sealed Case*, 107 F.3d 46, 48 n.1 (D.C. Cir. 1997). On April 10, 1998, Carter filed a notice of appeal (No. 98-3053). Because Carter is a grand jury witness who has not been cited for contempt, this Court does not have jurisdiction over his appeal.[1]

On April 28, 1998, the district court amended its memorandum opinion, altering portions relating to a collateral matter. The court had jurisdiction to do so, notwithstanding the notices of appeal. *See Alberti v. Klevenhagen*, 46 F.3d 1347, 1358 (5th Cir. 1995); *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31 (4th Cir. 1987).

On April 30, 1998, the United States filed a notice of appeal (No. 98-3059). This Court has jurisdiction over this appeal under 18 U.S.C. § 3731.[2] The United States filed its § 3731 certificate on May 1, 1998. *See United States v. Smith*, 135 F.3d 963, 967-68 (5th Cir. 1988) (holding that the § 3731 need not be filed on the same day as the notice of appeal or within the time to appeal).

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[1] *See, e.g., United States v. Ryan*, 402 U.S. 530, 532 (1971); *Sealed Case*, 107 F.3d at 48 n.1; *In re Sealed Case*, 655 F.2d 1298, 1300 (D.C. Cir. 1981).

[2] *See, e.g., United States v. Smith*, 135 F.3d 963, 967 (5th Cir. 1998); *United States v. Hirsch (In re Grand Jury Subpoenas)*, 803 F.2d 493, 495-96 (9th Cir. 1986); *In re Grand Jury Empanelled Feb. 14, 1978*, 597 F.2d 851, 854-55 (3d Cir. 1979); *Nixon v. Sirica*, 487 F.2d 700, 721 n.100 (D.C. Cir. 1973).

STATEMENT OF THE ISSUE

Whether the district court erred in holding that, in the absence of a valid attorney-client privilege, an attorney can derivatively invoke a client's Fifth Amendment right against compelled self-incrimination and refuse to produce documents and other items belonging to the client.

STATEMENT OF THE CASE

A. Statement of Facts

In late 1997, Monica S. Lewinsky, a former White House intern, received a subpoena to produce items and to testify in *Paula Jones v. William Jefferson Clinton*, a civil matter then pending in the Eastern District of Arkansas. The subpoena requested, among other things, documents evidencing a relationship between the President and Lewinsky and any gifts that may have been given her by the President. On the recommendation of Vernon Jordan, Esq., she retained Francis D. Carter, Esq., to represent her regarding the subpoena.

Lewinsky hired Carter with the intent and express purpose of furthering perjury and obstruction of justice.[3] The evidence presented to the district court shows that Lewinsky repeatedly

[3] The district court found that, as a factual matter, the evidence presented by the Office of the Independent Counsel demonstrates that this was Lewinsky's purpose. *See* App. 20-21. The court made no finding that Carter was a knowing participant in Lewinsky's effort.

stated her intention to lie in the affidavit. *See* In Camera Submission of U.S. at 6-11.

Carter drafted an affidavit for Lewinsky, which was signed under penalty of perjury on January 7, 1998, and submitted to the district court in Arkansas as an exhibit to a motion to quash the subpoena. The affidavit states in relevant part:

> I have never had a sexual relationship with the President, [and] he did not propose that we have a sexual relationship . . . . The occasions that I saw the President after I left my employment at the White House in April, 1996, were official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time. There were other people present on those occasions.

App. 1-2. Lewinsky used the affidavit to suborn perjury and to obtain benefits from third parties in the form of employment. *See* In Camera Submission of U.S. at 11-16. In addition, Lewinsky turned over to Carter certain items that she felt were responsive to the *Jones v. Clinton* subpoena.

On January 16, 1998, at the request of the Attorney General, a Special Division of this Court expanded the jurisdiction of the Office of the Independent Counsel ("OIC") to include "authority to investigate . . . whether Monica Lewinsky or others suborned perjury, 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." Order of the Special Division, Jan. 16, 1998. On February 2 and 9, 1998, as part of that investigation, the grand

jury issued subpoenas to Carter, one for documents and other items and the other for his testimony. *See* App. 4-13.

B. Course of Proceedings in the District Court

Carter filed a motion to quash the grand jury subpoenas on February 17, 1998, arguing, *inter alia*, that the documents, testimony, and other items are protected from disclosure by the attorney-client privilege, the work-product doctrine, and purportedly, under *Fisher v. United States*, 425 U.S. 391, 405 (1976), by Lewinsky's Fifth Amendment privilege against self-incrimination.[4] Lewinsky filed a "Response of the Real Party in Interest" in support of the motion to quash.

The United States opposed the motion, *inter alia*, on the grounds that the crime-fraud exception vitiated any attorney-client or work product doctrine claims and that, under *Fisher*, the Fifth Amendment is not a bar to producing the requested documents and other items. The district court held a hearing on this matter on March 4, 1998.

On March 31, 1998, the district court denied the motion to quash. App. 14. The court made the following factual finding:

> The OIC's evidence shows that Ms. Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false

[4] Carter also argued that the subpoenas were "overbroad" and that they violated Department of Justice guidelines relating to the subpoenaing of attorneys. He also suggested that the United States engaged in inappropriate conduct with respect to its initial interview with Lewinsky.

> affidavit as part of a broader scheme to obstruct justice.

App. 20. The court rejected the movants' other arguments, except for ruling that items or documents that Lewinsky possessed and gave Carter were, in fact, protected by Lewinsky's Fifth Amendment privilege against self-incrimination. App. 27-28. All parties appealed.

SUMMARY OF ARGUMENT

Generally, when a person voluntarily gives items to an agent, the government may compel production of those documents from the agent without violating the owner's Fifth Amendment right against self-incrimination. *See Couch v. United States*, 409 U.S. 322, 329 (1973); *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 (11th Cir. 1991).

When the items are given to an attorney, however, the attorney client privilege is implicated. "Where the transfer to the attorney is for the purpose of obtaining legal advice," the attorney-client privilege, rather than the Fifth Amendment, may forbid compelled production. *Fisher v. United States*, 425 U.S. 391, 404 (1976). But because items do not become privileged by the mere fact of having been given to an attorney, the privilege applies only when the items would have been protected from compelled disclosure under the Fifth Amendment if the client had retained them. *See id.* at 405. In sum, items are protected from

compelled production only where (1) they are given to an attorney for the purpose of obtaining legal advice; *and* (2) the items would have been privileged under the Fifth Amendment if the client had retained them.

The district court's opinion concentrated on the second prong, *see* App. 27-28, but overlooked the first prong and the fact that the court had ruled that the attorney-client privilege was vitiated by the crime-fraud exception. *See* App. 19-21. In the absence of a valid claim of attorney-client privilege, there can be no privilege against compelled production under *Fisher*.

ARGUMENT

I. MS. LEWINSKY'S FIFTH AMENDMENT RIGHT DOES NOT BAR PRODUCTION HERE BECAUSE SHE HAS NO VALID CLAIM OF ATTORNEY-CLIENT PRIVILEGE.

A. The standard of review is *de novo*.

Normally, this Circuit reviews a district court's ruling on a subpoena for the production of documentary evidence only for arbitrariness. *See In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992). When, however, the district court's order "rests upon a misapprehension of the relevant legal standard," it is "not entitled to deference." *Id.*; *accord Schreiber v. Society for Sav. Bancorp, Inc.*, 11 F.3d 217, 220 (D.C. Cir. 1993) ("We deem a district court's ruling 'arbitrary,' regardless of how well-reasoned it might be, if it

proceeds from a misapprehension of the relevant legal standard."). The rule is the same for an order involving a grand jury subpoena. *See In re Sealed Case*, 121 F.3d 729, 740 (D.C. Cir. 1997).

In the instant appeal, the United States challenges only the district court's apprehension of the relevant legal standard, specifically the two-prong test of *Fisher*. If this Court finds that the district court misapprehended the *Fisher* standard, the court's order is entitled to no deference, and the standard of review is *de novo*.

B. The Fifth Amendment alone does not protect a client from compelled production of documents and items from an attorney.

In *Fisher v. United States*, 425 U.S. 391 (1976), the United States brought an action to enforce summonses issued to attorneys to produce documents that were turned over to them by their clients. Those clients were being investigated for violations of tax law and the documents at issue were prepared by their accountants. *Id.* at 393-95. The United States Supreme Court ordered that the documents be produced. *Id.* at 396.

The Supreme Court began its analysis with the well-settled premise, based on the express words of the Fifth Amendment,[5] that only compelled *self*-incrimination is prohibited. *See id.* at 397

[5] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

(citing, *inter alia*, *Couch*, 409 U.S. at 329). Based on this premise, the Court reasoned that a client's Fifth Amendment privilege is not violated by summonses issued to his or her attorney because the *client* is not being compelled to do anything:

> Here, the taxpayers are compelled to do no more than was the taxpayer in *Couch*. The taxpayers' Fifth Amendment privilege is therefore not violated by enforcement of the summonses directed toward their attorneys. This is true whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands.

Id. at 397. Once the client gives documents to another person, his or her Fifth Amendment rights are irrelevant because he or she no longer has possession of the documents. This principal has been affirmed numerous times by many courts; a person's Fifth Amendment rights are not violated by the compelled production of documents and items from another.[6]

C. In the absence of a valid claim of attorney-client privilege, the grand jury may compel the production of documents and other items voluntarily given by a client to his or her attorney.

The Court in *Fisher* found that materials turned over by a client to an attorney, although not protected by the Fifth Amendment, may be protected from disclosure under another privilege: the attorney-client privilege. *See* 425 U.S. at 402;

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[6] *See, e.g., Couch*, 409 U.S. at 329; *United States v. Sindel*, 53 F.3d 874, 877 (8th Cir. 1995); *In re Grand Jury Investigation*, 921 F.2d 1184, 1187 (11th Cir. 1991).

United States v. Doe (*In re Grand Jury Subpoenas*), 959 F.2d 1158, 1162-63 (2d Cir. 1992). The Court noted that "since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403. That purpose, according to the Court, is to protect "only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Id.*

If otherwise Fifth Amendment-privileged material could lose its protection by disclosure to an attorney, the Court reasoned, a client might be discouraged from making such disclosures even if they were necessary to obtain informed legal advice. *See id.* at 403-04. Accordingly, the Court held that, if a transfer of material is "made for the purpose of obtaining legal advice," the attorney-client privilege, but not the Fifth Amendment, forbids compelled production. *Id.* at 404.[7] But because documents or other items do not become privileged by the mere fact of being given to an attorney, the Court also held that the attorney-client privilege applies only when the materials would have been protected from compelled disclosure under the Fifth Amendment if the client had retained them. *See id.* at 405.

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[7] *See Chase Manhattan Corp. v. Sarrio, S.A.* (*In re Sarrio, S.A.*), 119 F.3d 143, 146 (2d Cir. 1997); *United States v. Ritchie*, 15 F.3d 592, 602 & n.11 (6th Cir. 1994); *In re Grand Jury Subpoena Duces Tecum*, 754 F.2d 918, 919-20 (11th Cir. 1985).

Consequently, *Fisher* establishes a two-pronged test. First, the documents or other items must have been transferred to obtain legal advice. Second, the documents or other items must be such that they would have been privileged if the client had retained them. *See United States v. Clark*, 847 F.2d 1467, 1471 (10th Cir. 1988). Unless both prongs are satisfied, the documents or other items must be produced.

In the case at bar, there is no attorney-client privilege, because the privilege is defeated by the crime-fraud exception. *See* App. 19-21. The district court correctly found that Lewinsky did not consult with Carter for purposes of obtaining legal advice but rather "for the purpose of committing perjury and obstructing justice." App. 21. Consequently, the first prong of *Fisher* is not met.

In a very similar fact pattern to the instant case, the Seventh Circuit concluded that, if the crime-fraud exception applies, an attorney must disclose information even if the clients would have had a Fifth Amendment right not to disclose certain information had they kept it to themselves. *See Feldberg v. Walters*, 862 F.2d 622, 629 (7th Cir. 1988). In that case, the clients argued that, to the extent that they committed obstruction of justice in responding to a grand jury subpoena, any incriminating information given to their attorney is protected by their Fifth Amendment privilege. *See id.*

The Seventh Circuit rejected that argument, noting that the crime-fraud exception would eliminate any attorney-client privilege if the client committed obstruction of justice:

> What a client voluntarily reveals to a lawyer is not "compulsory self-incrimination." Statements might be protected by the attorney-client privilege, but if they reveal the contemporaneous commission of a crime, that privilege does not apply. To the extent [the clients] maintain that [the attorney] has a derivative privilege against self-incrimination, they not only fail on that claim but also plead themselves out of court with respect to the attorney-client privilege by admitting that a crime was afoot.

Id. Like the attorney in *Feldberg*, Carter cannot claim a derivative self-incrimination privilege because there is no such privilege. Nor can Carter claim, any more than the attorney in *Feldberg* could, attorney-client privilege because it was "amply demonstrated" that Lewinsky consulted with him, not "for the purpose of obtaining legal advice" but rather for the purpose of committing a crime.

D. The district court's opinion did not apply the correct legal standard and, therefore, its order must be reversed.

The district court held that "enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination." App. 28. The court's opinion did not recognize, as it was required to under *Fisher*, that only the attorney-client privilege, and not the Fifth Amendment, could act as a bar to compelled production

once Lewinsky voluntarily gave the materials to Carter.

The district court's opinion failed to cite *Fisher* or to apply *Fisher*'s two-prong test. The court did not explain how Lewinsky's Fifth Amendment rights are relevant in the absence of an attorney-client privilege and the items being given to Carter to obtain legal advice. In short, the district court made a mistake of law by failing to apply the correct legal test. Because the district court misapprehended the relevant legal standard, it erred as a matter of law and its order must be reversed. *See Schreiber*, 11 F.3d at 222.

II. THE MANDATE SHOULD ISSUE WITH THE OPINION, BECAUSE THE PUBLIC HAS A STRONG INTEREST IN A PROMPT RESOLUTION OF THE GRAND JURY'S INVESTIGATION AND PROMPT DISPOSITION OF THIS APPEAL.

Until the Office of Independent Counsel can complete its investigation of high public officials, the state faces vast uncertainty and the consequent distractions from the proper administration of the government. As a result, there is tremendous public pressure on this office to complete its investigation as soon as possible. *See, e.g.*, Peter Baker & Susan Schmidt, *Lott Urges Starr to End Probe Soon*, WASH. POST, Mar. 7, 1998, at A1; *Lingering Questions*, WASH. POST, Apr. 5, 1998, at C6 ("Mr. Starr should, like all independent counsels, conduct his probe as quickly as he can . . . ."); Christopher Ogden, *Case Dismissed*, TIME, Apr. 13, 1998, at 22 (describing

hopes of presidential aides that the investigation will meet a "quick end"); Richard A. Serrano, *Whitewater Witness James McDougal Dies*, L.A. TIMES, Mar. 9, 1998, at A1 (describing television appearances in which "the special prosecutor's detractors demanded that he quickly wrap up his lengthy investigation"). The public, quite justifiably, desires a prompt resolution to the grand jury's investigation and prompt disposition of this appeal is integral to that goal. This Court appropriately has ordered an extremely expedited briefing schedule to meet this concern.

Under FED. R. APP. P. 41(a) and D.C. CIR. R. 41(a)(1), this Court may order that the mandate issue with the opinion. Because of the public's need for expeditious action, the United States respectfully requests that the Court issue the mandate with its opinion. *See Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1159 n.31 (D.C. Cir. 1983) ("Because of the need to expedite this case, we decline to follow our usual practice of delaying issuance of the mandate, and we issue the mandate with this opinion.") (citations omitted).

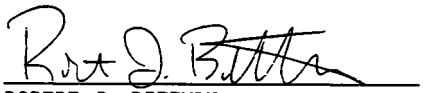
CONCLUSION

For all the foregoing reasons, the United States respectfully requests that this Court reverse that part of the district court's order allowing Carter to withhold certain

documents and other items responsive to the grand jury subpoenas and issue the mandate with the Court's opinion.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel



ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

May 11, 1998

CERTIFICATE OF WORD COUNT

I hereby certify that this brief contains no more than 5000 words (as specified in this Court's order of May 5, 1998).

Joseph M. Ditkoff
Associate Independent Counsel

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing brief were served via hand delivery on this the 11th day of May, 1998, to:

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

Francis D. Carter, Esq.
Suite 510
Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005

and via facsimile and Federal Express priority overnight delivery on this the 11th day of May, 1998, to:

Prof. Charles J. Ogletree, Jr., Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

J. Forrest Norman

UNDER SEAL

ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CROSS APPELLANT'S APPENDIX

KENNETH W. STARR
Independent Counsel

ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Attorneys for Appellee-
Cross Appellant

APPENDIX

Affidavit of Jane Doe #6 (Monica S. Lewinsky)
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Section 3731 Certificate
(May 1, 1998) 36-38

AFFIDAVIT OF JANE DOE # 6

1. My name is Jane Doe #6 . I am 24 years old and I currently reside at 700 New Hampshire Avenue, N.W., Washington, D.C. 20037.

2. On December 19, 1997, I was served with a subpoena from the plaintiff to give a deposition and to produce documents in the lawsuit filed by Paula Corbin Jones against President William Jefferson Clinton and Danny Ferguson.

3. I can not fathom any reason that the plaintiff would seek information from me for her case.

4. I have never met Ms. Jones, nor do I have any information regarding the events she alleges occurred at the Excelsior Hotel on May 8, 1991 or any other information concerning any of the allegations in her case.

5. I worked at the White House in the summer of 1995 as a White House intern. Beginning in December, 1995, I worked in the Office of Legislative Affairs as a staff assistant for correspondence. In April, 1996, I accepted a job as assistant to the Assistant Secretary for Public Affairs at the U.S. Department of Defense. I maintained that job until December 26, 1997. I am currently unemployed but seeking a new job.

6. In the course of my employment at the White House I met President Clinton several times. I also saw the President at a number of social functions held at the White House. When I worked as an intern, he appeared at occasional functions attended by me and several other interns. The correspondence I drafted while I worked at the Office of Legislative Affairs was seen and edited by supervisors who either had the President's signature affixed by mechanism or, I believe, had the President sign the correspondence itself.

7. I have the utmost respect for the President who has always behaved appropriately in my presence.

8. I have never had a sexual relationship with the President, he did not propose that we have a sexual relationship, he did not offer me employment or other benefits in exchange for a sexual relationship, he did not deny me employment or other benefits for rejecting a sexual relationship. I do not know of any

other person who had a sexual relationship with the President, was offered employment or other benefits in exchange for a sexual relationship, or was denied employment or other benefits for rejecting a sexual relationship. The occasions that I saw the President after I left my employment at the White House in April, 1996, were official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time. There were other people present on those occasions.

9. Since I do not possess any information that could possibly be relevant to the allegations made by Paula Jones or lead to admissible evidence in this case, I asked my attorney to provide this affidavit to plaintiff's counsel. Requiring my deposition in this matter would cause disruption to my life, especially since I am looking for employment, unwarranted attorney's fees and costs, and constitute an invasion of my right to privacy.

I declare under the penalty of perjury that the foregoing is true and correct.

Monica S. Lewinsky

MONICA S. LEWINSKY

849-DC-00000315

DISTRICT OF COLUMBIA, ss:

MONICA S. LEWINSKY, being first duly sworn on oath according to law, deposes and says that she has read the foregoing AFFIDAVIT OF JANE DOE # 6 by her subscribed, that the matters stated herein are true to the best of her information, knowledge and belief.

Monica S Lewinsky
MONICA S. LEWINSKY

SUBSCRIBED AND SWORN to before me this 7th day of January, 1998.

Kathleen M. Grimes
NOTARY PUBLIC, D.C.
My Commission expires: My commission expires August 31, 1998

849-DC-00000316

CO 210 (Rev. 6/91) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE DISTRICT OF COLUMBIA

TO: Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Court for the District of Columbia Third & Constitution Avenue, N.W. Washington, D.C.	Grand Jury, Third Floor
	DATE AND TIME
	February 17, 1998/9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

See attached rider.

☐ Please see additional information on reverse.

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT	DATE
Nancy M. Mayer-Whittington, Clerk (BY) DEPUTY CLERK	February 2, 1998 (D902)
This subpoena is issued upon application of the United States of America.	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY Darrell M. Joseph, Associate Independent Counsel Office of the Independent Counsel 1001 Pennsylvania Avenue, N.W., Suite 490-North Washington, D.C. 20004 (202) 514-8688

* If not applicable, enter "none."

APPENDIX-PAGE 4

RETURN OF SERVICE (1)

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		
SERVED BY (PRINT NAME)		TITLE

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER (2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a summons see Rule 4(c) of the Federal Rules of Civil Procedure or Rule 4(d) of the Federal Rules of Criminal Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1915, Rule 17(b) Federal Rules of Criminal Procedure)".

1030

Subpoena # D902

To: Francis Carter, Esq.
1341 G St., NW
Washington, D.C.

SUBPOENA RIDER

A. Produce any and all documents and things referring or relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, including but not limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings, and memoranda. Such documents should include, but are not limited to, any documents referring or relating to the financial terms and arrangements for payment in your representation of Monica Lewinsky.

B. Produce all telephone records for long distance and local calls made by you, your secretary, and anyone working on your behalf, from June 1, 1997 to the present, related or referring to the following persons:

Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asmes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

C. Produce any and all documents referring or relating to travel in a limousine or other chauffeur service by you or Vernon Jordan since June 1, 1997.

D. Produce any and all documents referring or relating to any communication since January 1, 1997 with any of the following persons or their representatives. These documents should include, but are not limited to, calendars, appointment books, telephone messages, telephone and toll records, correspondence, courier records/logs, and visitor records/logs:

- 1 -

Vernon Jordan
Marsha Lewis a/k/a Marsha Lewinsky
Fred Carter
Betty Currie
Monica Lewinsky
William Jefferson Clinton
Bruce Lindsey
Robert Bennett
Norma Asnes
Debi Schiff
Susan Brophy
Walter Kaye
Ron Perelman
Howard Gittes
Barry Schwartz
William Richardson
Kathleen Willey

E. Produce any and all documents referring or relating to Monica Lewinsky and any communication with McAndrews & Forbes or Revlon, Inc. and their employees, agents, or representatives, including, but not limited to, Ron Perelman, Howard Gittes, and Barry Schwartz.

F. Produce any and all documents referring or relating to Monica Lewinsky and any communication with the United Nations, or the office of the United States Ambassador to the United Nations, including but not limited to any communications with William Richardson, from January 1, 1997 to the present.

Definitions and Instructions

1. Definitions

a. The term "document" or "documents" as used in this subpoena means all records of any nature whatsoever within your possession, custody or control or the possession, custody or control of any agent, employee, representative (including, without limitation, attorneys, investment advisors, investment bankers, bankers and accountants), or other person acting or purporting to act for or on your behalf or in concert with you, including, but not limited to, draft, pending or executed contracts and/or agreements, sample documents, insurance policies, financial guarantee bonds, letters of credit, communications, correspondence, calendars, DayTimers, date books, telegrams, facsimiles, telexes, telefaxes, electronic mail, memoranda, records, reports, books, files (computer or paper), summaries or records of personal conversations, meetings or

interviews, logs, summaries or records of telephone conversations and/or telefax communications, diaries, forecasts, statistical statements, financial statements (draft or finished), work papers, drafts, copies, bills, records of payments for bills, retainer records, attorney time sheets, telephone bills and records, telefax bills and records, tax returns and return information, employee time sheets, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, consultants' reports and/or records, appraisals, records, reports or summaries of negotiations, brochures, pamphlets, circulars, maps, plats, trade letters, depositions, statements, interrogatories and answers thereto, pleadings, docket sheets, discovery materials, audit letters, audit reports, materials underlying audits, document productions, transcripts, exhibits, settlement materials, judgments, press releases, notes, marginal notations, invoices, documents regarding collateral or security pledged, settlement statements, checks disbursed or received at settlement, inspection reports, title policies, financial statements and/or federal tax returns submitted by any person in support of any loan application, items related the repayment, if any, of any interest or principal on the loan, items relating to any default on the loan, commission records, evidence of liens, documents relating to filings under the Uniform Commercial Code and/or its equivalent, foreclosure and mortgage documentation, cashiers checks, bank drafts, money orders, bank and brokerage account statements, debit and credit memoranda, wire transfer documentation, opening account cards, signature cards, loan applications, any employment and bank account deposit verification documents, loan histories, loan files, records of loan repayment or any and all efforts to secure repayment, including foreclosure or records of lawsuits, credit references, board resolutions, minutes of meetings of boards of directors, opinion letters, purchases and sales agreements, real estate contracts, brokerage agreements, escrow agreements, loan agreements, offer and acceptance contracts, or any other contracts or agreements, deeds or other evidence of title, escrow accounts and any other escrow documentation, savings account transcripts, savings account deposit slips, savings account withdrawal slips, checks deposited in savings accounts, checking account statements, canceled checks drawn on checking accounts, deposit slips and checks deposited into checking accounts, credit card accounts, debit and credit documentation, safe deposit records, currency transaction reports (IRS Forms 4789), photographs, brochures, lists, journals, advertising, computer tapes and cards, audio and video tapes, computerized records stored in the form of magnetic or electronic coding on computer media or on media capable of being read by computer or with the aid of computer related equipment, including but not limited to floppy disks or diskettes, disks, diskettes, disk packs, fixed hard drives, removable hard disk cartridges, mainframe computers, Bernoulli boxes, optical disks, WORM disks, magneto/optical

disks, floptical disks, magnetic tape, tapes, laser disks, video cassettes, CD-ROMs and any other media capable of storing magnetic coding, microfilm, microfiche and other storage devices, voicemail recordings and all other written, printed or recorded or photographic matter or sound reproductions, however produced or reproduced.

The term "document" or "documents" also includes any earlier, preliminary, preparatory or tentative version of all or part of a document, whether or not such draft was superseded by a later draft and whether or not the terms of the draft are the same as or different from the terms of the final document.

b. The term "communication" or "communications" is used herein in its broadest sense to encompass any transmission or exchange of information, ideas, facts, data, proposals, or any other matter, whether between individuals or between or among the members of a group, whether face-to-face, by telephone or by means of electronic or other medium.

c. "Possession, custody or control" means in your physical possession and/or if you have the right to secure or compile the production of the document or a copy from another person or entity having physical possession, including, but not limited to, your counsel.

d. The term "referring or relating" to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject including, but not limited to, documents concerning the preparation of other documents.

e. The term "you" means yourself and any of your companies, partnerships and business entities with which you have been affiliated and any employees, partners, associates or members of any firm with which you have been affiliated in the course of your work for any of the persons or entities named in this rider, and any such firms and the affiliates of those firms.

2. Instructions

a. The originals of all documents and communications must be produced, as well as copies within your possession, custody, or control.

b. If any original document cannot be produced in full, produce such document to the extent possible and indicate specifically the reason for your inability to produce the remainder.

c. Documents shall be produced as they are kept in the usual course of business, as organized in the files.

d. File folders, labels, and indices identifying documents called for shall be produced intact with such documents. Documents attached to each other should not be separated.

e. In reading this rider, the plural shall include the singular and the singular shall include the plural.

f. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The use of the word "including" shall be construed without limitation.

g. In the event that any document, or portion thereof, called for by this subpoena is withheld on the basis of any claim of privilege or similar claim, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; [a] addressee; (d) the position or title of the addressee; (e) any indicated or blind copies; (f) date; (g) a description of the subject matter of the document; (h) number of pages; (I) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, has been disclosed, distributed, shown, or explained; and (k) present custodian. Each basis you contend justifies the withholding of the document shall also be specified. With respect to those documents or records as to which you may claim privilege, or attorneys' work product, set forth as to each such document the basis for such claim, including the purpose and circumstances surrounding the creation of the document, the identity of each person who has been privy to such communication reflected in the document, the identity of any person or entity instructing the subpoena recipient or the attorney of the subpoena recipient to withhold production of the document, and whether you will submit the document to the Court for an in camera determination as to the validity of the claim. If the existence of a joint defense agreement or any agreement as to common interest is relevant to the assertion of any claim of privilege or similar claim, please provide a copy of that agreement; if any such agreement is not in writing, please set forth the date of the creation of the agreement, the identities of all parties to the agreement and the specific individuals who entered into the agreement on behalf of those parties, and the objects, purposes, and scope of the agreement.

h. In the event that any document called for by this subpoena has been lost, destroyed, deleted, altered, or otherwise disposed of, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; [a]

addressee; (d) the position or title of the addressee; (e) indicated or blind copies; (f) date; (g) a brief description of the subject matter of the document; (h) number of pages; (I) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, had been disclosed, distributed, shown or explained; (k) the date of the loss, destruction, deletion, alteration, or disposal and the circumstances thereof; and (l) the reasons, if any, for the loss, destruction, deletion, alteration, or disposal and the person or persons responsible.

i. If any information or data is withheld because such information or data is stored electronically, it is to be identified by the subject matter of the information or data and the place or places where such information is maintained.

CO 233 (Rev. 8/91) Subpoena to Testify Before Grand Jury

United States District Court

FOR THE DISTRICT OF COLUMBIA

TO:
Francis D. Carter, Esq.
1341 G St., NW
Washington, DC

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Court for the District of Columbia Third & Constitution Avenue, N.W. Washington, D.C.	Grand Jury, Third Floor
	DATE AND TIME February 17, 1998/9:15 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

☐ *Please see additional information on reverse.*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE / CLERK OF COURT	DATE
Nancy M. Mayer-Whittington, Clerk	February 9, 1998
(BY) DEPUTY CLERK	(D937)

COURT FOR THE DISTRICT OF COLUMBIA

This subpoena was issued upon application of the United States of America.

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Paul Rosenzweig, Associate Independent Counsel
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-North
Washington, D.C. 20004
(202) 514-8688

1037

GO 293 (Rev. 8/91) Supplied to Trinity Before Grand Jury

RETURN OF SERVICE (1)

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE

SERVED ON (PRINT NAME)

SERVED BY (PRINT NAME)	TITLE

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER (2)

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and attached defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO
FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED

MAR 31 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Upon consideration of the motion of Francis D. Carter to quash grand jury subpoenas, supporting and opposing memoranda, and the oral argument of counsel thereon, it is this 31st day of March 1998,

ORDERED that the motion of Francis Carter for production of the ex parte submission of the Office of the Independent Counsel be, and hereby is, denied; it is further

ORDERED that the motion of Francis D. Carter to quash grand jury subpoenas be, and hereby is, granted in part and denied in part; and it is further

ORDERED that Mr. Carter must comply with the two subpoenas at issue except for those portions of the subpoenas that call for him to disclose materials in his possession that may not be revealed without violating Monica Lewinsky's Fifth Amendment rights.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO
FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
APR 26 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the Office of Independent Counsel ("OIC") for the Court to reconsider a portion of its Memorandum Opinion of March 31, 1998, along with oppositions from Monica Lewinsky and Francis Carter. In its Memorandum Opinion, the Court expressed concern that the OIC had improperly disrupted the attorney-client relationship between Ms. Lewinsky and Mr. Carter and suggested that it might refer this matter to the Department of Justice Office of Professional Responsibility ("OPR"). The OIC requests that the Court reconsider that portion of its Memorandum Opinion.

The Court notes first that notices of appeal from that Memorandum Opinion have been filed. The Supreme Court has found that "[t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam) (emphasis added). However, the issue of whether the Court should refer this matter to the OPR is wholly collateral to the issue on appeal: whether the subpoena to Frank Carter should be quashed. In its Memorandum Opinion, the Court held that "[t]he Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas." Mem. Op. at 17. Later, the Court reiterated: "As the Court has found,

Department of Justice regulations do not provide a basis for quashing the subpoenas." Mem. Op. at 18. Reconsideration of what the Court stated in dicta after ruling on the motion to quash is distinct from those aspects of the case involved in the appeal. The Court finds that it retains jurisdiction to reconsider the portion of its Opinion to which the OIC objects.

Along with its motion for reconsideration, the OIC submits several affidavits stating that no attorney from the OIC informed Ms. Lewinsky that she could not contact Mr. Carter and that Ms. Lewinsky was given unsupervised opportunities to contact anyone she chose. Moreover, the OIC submitted a telephone record showing that it attempted to contact Mr. Carter in order to determine whether he would be reachable in the event Ms. Lewinsky decided to discuss the matter with him. In addition, the OIC correctly points out that Ms. Lewinsky's affidavit was submitted along with a supplemental brief that was filed in contravention of the local rules, which do not allow filings in support of a motion other than a reply which may be filed no later than five days after any opposition. See Local Rule 108(d).

In light of the additional evidence presented and the tardiness of Ms. Lewinsky's affidavit, the Court will grant the OIC's motion for reconsideration.

Accordingly, it is this 29th day of April 1998,

ORDERED that the motion of the OIC for the Court to reconsider a portion of its Memorandum Opinion of March 31, 1998, be, and hereby is, granted; and it is further

ORDERED that the Clerk of Court file the attached Amended Memorandum Opinion in this matter.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

UNDER SEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA TO
FRANCIS D. CARTER

Misc. Action No. 98-068 (NHJ)

UNDER SEAL

FILED
APR 28 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

AMENDED MEMORANDUM OPINION

Attorney Frank Carter was retained by Monica Lewinsky to represent her in connection with the Jones v. Clinton civil action pending in the Eastern District of Arkansas. Mr. Carter drafted an affidavit for Ms. Lewinsky's signature stating that she did not have a sexual relationship with the President of the United States. She signed that affidavit under penalty of perjury. Mr. Carter has been served with two subpoenas: one calling for documents and the other seeking his testimony. He seeks to quash those subpoenas.

Before the Court is Mr. Carter's motion to quash, a brief from amici curiae the National Association of Criminal Defense Lawyers and the District of Columbia Association of Criminal Defense Lawyers in support of the motion to quash, and Ms. Lewinsky's "Response of the Real Party in Interest" in support of the motion to quash, as well as an opposition from the Office of the Independent Counsel ("OIC").

Mr. Carter makes several arguments in support of his motion to quash the subpoenas: (1) the subpoenas are overbroad; (2) the subpoenas improperly seek to pierce Ms. Lewinsky's attorney-client privilege and work product protection; (3) compliance with the subpoenas would violate Ms. Lewinsky's Fifth Amendment privilege against self-incrimination; (4) issuance of the subpoenas violates Department of Justice policy; and (5) the OIC improperly communicated with Ms. Lewinsky while she was represented by Mr. Carter and prevented her from calling Mr.

Carter when she asked to do so.

A. Overbreadth

Mr. Carter first argues that the subpoenas are too broad. The subpoena duces tecum requests all documents and things relating to Monica Lewinsky, Kathleen Willey, and Linda Tripp, as well as all documents relating to any communications with a list of seventeen people. The Court may "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. 17(c). The law presumes that, "absent a strong showing to the contrary, . . . a grand jury acts within the legitimate scope of its authority." United States v. R. Enterprises, 498 U.S. 292, 301 (1991). Moreover, "a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." Id.

The Court finds that Mr. Carter has not met that burden. The subpoena duces tecum limits much of its inquiry to documents created after January 1, 1997. The brevity of Mr. Carter's representation of Ms. Lewinsky, no more than a three-month period, also weighs in favor of the reasonableness of the subpoena. The Court finds that the subpoenas are not overbroad or unduly oppressive.

B. The Attorney-Client Privilege and Work Product Doctrine

There is no dispute among the parties that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to documents prepared by Mr. Carter during his representation of Ms. Lewinsky. At issue is whether the crime-fraud exception applies and overcomes the asserted privileges.

1. *The Crime-Fraud Exception*

Mr. Carter asserts that the attorney-client privilege and the work product doctrine bar disclosure of the documents and testimony sought by the subpoena. The OIC claims that the crime-fraud exception to those privileges applies and the Independent Counsel is entitled to production of the documents and testimony. The Court notes that Mr. Carter's papers and that of amici express great concern that the subpoena "impinges on the long-honored respect of the adversarial system for the confidentiality of the attorney-client relationship." Mot. to Quash at 2. However, it is settled law in this Circuit that, where the relationship between attorney and client is abused and the client uses the attorney's legal services to further a crime or fraud, the privileges' protections are overcome. In re Sealed Case, 107 F.3d 46, 49, 51 (D.C. Cir. 1997).

Two conditions must be met for the crime-fraud exception to apply. First, "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." Id. at 49. Second, "the client must have carried out the crime or fraud." Id. The Independent Counsel carries the burden of showing that the crime-fraud exception applies. Id. The attorney does not need to know about his client's potential wrongdoing for the exception to apply, In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982), and there is no suggestion that Mr. Carter knew about any alleged wrongdoing.

This Circuit appears to hold to the following standard for the application of the crime-fraud exception: the proponent must bring forward "evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." In re Sealed Case, 107 F.3d at 50 (quoting In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985)). The Court of Appeals also notes that the Second Circuit follows a different standard: the proponent must

demonstrate "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." Id. at 50 (quoting In re John Doe Corp., 675 F.2d 482, 491 & n.7 (2d Cir. 1982)). There is some confusion over which of these standards the D.C. Circuit finds controlling.

Nevertheless, the Court finds that, under either of those standards, the OIC has amply demonstrated that the crime-fraud exception applies and overrules the attorney-client privilege. The OIC's in camera submission shows that Ms. Lewinsky made the privileged communications with the intent and the express purpose to further unlawful acts and that she in fact carried out those unlawful acts. The unlawful acts were perjury and obstruction of justice.[1] See 18 U.S.C. §§ 1621 (perjury), 1623 (false declarations), 1503 (obstruction of justice).

The OIC has demonstrated in its in camera materials that there is probable cause to believe that these crimes were committed and that the communications furthered those crimes. If the trier of fact believed the evidence in the submission, that evidence would establish the elements of perjury and obstruction of justice. The OIC's evidence shows that Ms. Lewinsky committed perjury when she signed her affidavit, procured as a result of Mr. Carter's legal advice, and used her false affidavit as part of a broader scheme to obstruct justice.[2]

As for the work product doctrine, "the crime-fraud exception calls for a somewhat different inquiry than with the attorney-client privilege. The focus is . . . on the client's intent in consulting the lawyer or in using the materials the lawyer prepared. The question is: Did the

---

[1] The Court is not persuaded that the OIC has shown that Ms. Lewinsky used Mr. Carter's legal services to suborn perjury. See 18 U.S.C. § 1622 (subornation of perjury).

[2] The Court finds here that the OIC has met its burden under the crime-fraud exception. It expressly does not find, however, that Ms. Lewinsky in fact committed these crimes.

client consult the lawyer or use the material for the purpose of committing a crime or fraud?" In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997). The evidence submitted by the OIC in camera meets the burden of showing an affirmative answer to this question. The Court finds that the OIC's in camera submission shows that Ms. Lewinsky consulted Mr. Carter for the purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice. The OIC has established that the crime-fraud exception applies to the work product subpoenaed in this case.

Because the Court finds that the crime-fraud exception applies, it need not address the issue of whether Ms. Lewinsky waived the attorney-client privilege by disclosing privileged material.

2. *Should the Court extend the crime-fraud exception to this case?*

Amici argue vigorously that the Court should not extend the crime-fraud exception to this case. They express concern that what is at issue here is simply an individual's prior inconsistent statement which should be used at trial to impeach, not to pierce the attorney-client privilege and work product protection. This is not a case, however, where the Court finds mere inconsistencies. It is a case where the OIC's in camera submission shows that Ms. Lewinsky deliberately intended to commit perjury and used her attorney to help her do so.

Amici suggest that perjury is not sufficiently serious to merit the application of the crime-fraud exception. They cite cases stating that the government must make a prima facie case of "a violation sufficiently serious to defeat the privilege." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982). The violation must, amici state, "be of sufficient weight to warrant abridging the privilege." Id. at 815 n.85. Perjury is

plainly of "sufficient weight" to warrant abridging the attorney-client privilege in this instance. "[P]erjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." Nix v. Whiteside, 475 U.S. 157, 169 (1986). This Court takes perjury very seriously and believes it to be a sufficiently weighty offense. It is a felony. Moreover, the evidence suggests that obstruction of justice has also taken place, another plainly weighty offense.

Moreover, case law on the crime-fraud exception nowhere indicates that there must be a particular quantity of crime committed for the exception to apply. The language in In re Sealed Case, 754 F.2d at 399, states that there must be "a violation" serious enough to defeat the privileges. There need not be "widespread criminal activity," Amici Br. at 18, in order to find that the client has eviscerated her attorney-client privilege and work product protection.

Contrary to amici's suggestions, this is not a situation in which a client confided in an attorney that she committed a crime. Here, the OIC's in camera submission demonstrates that the client utilized the attorney's legal services with the specific purpose of committing a crime, a crime she could not have committed without his services. Thus, it is merely alarmist for amici to warn that "[e]xtending the crime-fraud exception under these circumstances would eviscerate the privilege in garden-variety civil and criminal proceedings. The use of prior inconsistent statements to impeach a witness is a proper and frequently used tool in civil and criminal proceedings; it should not, however, become a means for invading the attorney-client relationship." Amici Br. at 3.

The Court finds that the OIC has met its burden under the crime-fraud exception; its in camera submission demonstrates that Ms. Lewinsky consulted Mr. Carter and used his services

to commit perjury, not merely that her statements were inconsistent. There is probable cause to find not only that her testimony in the Jones v. Clinton affidavit was false, but also that Ms. Lewinsky purposefully and actively used Mr. Carter to commit the crimes of perjury and obstruction of justice. The Court does not believe that, by denying Mr. Carter's motion to quash, it will be "sending a message to every client and potential client that embarrassing or even incriminating information confided to their attorneys might, without warning, be disclosed to federal prosecutors." Amici Br. at 14. If this Court does send a message with this decision, that message would be that clients may not use their attorneys for the express purpose of committing a crime or fraud and expect their communications with the attorney to remain privileged.

3. *Does the OIC's ex parte in camera submission violate due process and must it be released to movant?*

Mr. Carter argues that the Independent Counsel's ex parte in camera submission violates due process. "[C]ommunications between a judge and one party are not per se deprivations of the due process rights of the opposing party." Clifford v. United States, ___ F.3d ___, 1998 WL 61165, *5 (D.C. Cir. 1998). The Independent Counsel was required to meet its burden of showing that the crime-fraud exception applies and properly did so with its submission to the Court. The Court's in camera inspection of materials upon which the OIC based its showing of the crime-fraud exception does not violate due process. Review of ex parte in camera materials to establish the crime-fraud exception does not violate due process. In re Grand Jury Proceedings, 33 F.3d 342, 351-53 (4th Cir. 1994); In re John Doe, Inc., 13 F.3d 633, 635-37 (2d Cir. 1994); In re Grand Jury Proceedings, 867 F.2d 539, 540-41 (9th Cir. 1989).

Mr. Carter also wants the OIC to disclose the ex parte submission to him.[3] Before the Court is the motion of Francis Carter for production of the ex parte submission. The Court finds that the ex parte submission is properly confidential and the practice of submitting such materials to the Court in camera is well recognized. See, e.g., In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982).

4. *Can this Court properly consider Linda Tripp's tapes in deciding whether the crime-fraud exception applies?*

As part of its in camera submission, the Independent Counsel provided the Court with transcripts of tape recordings made by Linda Tripp of conversations she had with Monica Lewinsky. Mr. Carter argues that federal law prohibits the use of Ms. Tripp's tape recordings in all judicial proceedings, including those before this Court, and therefore prevents the Court from relying on them to establish the crime-fraud exception. The Court finds that it may properly rely upon the tapes in making its determination of whether the crime-fraud exception applies.

The burden is on Mr. Carter to prove that the tapes are inadmissible. United States v. Dale, 991 F.2d 819, 840 (D.C. Cir.), cert. denied, 510 U.S. 1030 (1993). First, Mr. Carter argues that Ms. Tripp intercepted the communications in order to commit a criminal or tortious act, in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III") and that the tapes are thus inadmissible.

Title III provides that whenever any communication has been intercepted, the communication and any evidence derived therefrom may not be received in evidence in any

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[3] The Court strongly disagrees with movant's suggestion that "[t]he traditional reasons for grand jury secrecy are completely inapplicable in this, the most public of investigations." Reply Br. at 13.

proceeding before any court or before a grand jury "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The federal law also provides that it is lawful for a private party to intercept a communication

> where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Because Ms. Tripp was a party to the conversation, it was lawful for her to tape the conversation unless the communication was intercepted for the purpose of committing a criminal or tortious act as described in the statute.

This Circuit has held that "a violation of Title III is established when 'it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act.'" Dale, 991 F.2d at 841 (quoting United States v. Vest, 639 F. Supp. 899, 904 (D. Mass. 1986), aff'd, 813 F.2d 477 (1st Cir. 1987), cert. denied, 488 U.S. 965 (1988)). Mr. Carter has not sustained his burden of proving that Ms. Tripp acted with an impermissible purpose. In fact, he has not suggested that Ms. Tripp was motivated by a desire to commit an act that was criminal or tortious.

Under Title III, the relevant inquiry is whether the communication was intercepted for the purpose of committing a criminal or tortious act, not whether the interception itself constituted a criminal or tortious act. 18 U.S.C. § 2511(2)(d). Assuming that Ms. Tripp's recordings violated Maryland law, that fact by itself does not establish that she intercepted the conversations "for the purpose of committing [a] criminal or tortious act in violation of the . . . laws of . . . any State."

See United States v. DiFelice, 837 F. Supp. 81, 82 (S.D.N.Y. 1993). If Ms. Tripp had made the tapes in order to blackmail Ms. Lewinsky, for example, then that would have been for the purpose of committing a crime. Instead, she intercepted the communications for the purpose of bringing her conversations with Ms. Lewinsky to light, which Mr. Carter does not allege is a criminal or tortious act. The D.C. Circuit has found that "[t]aping phone calls to make an accurate record of a conversation 'in order to prevent future distortions by a participant' is not illegal, even when the recording is made in the hopes of producing evidence of an illegal conspiracy." Dale, 991 F.2d at 841 (citations omitted).

Mr. Carter does not allege that Ms. Tripp made these tapes for the purpose of violating Maryland's law against taping without both parties' consent. "[T]he legality of an interception is determined by the purpose for which the interception is made, not by the subject of the communications intercepted." United States v. Underhill, 813 F.2d 105, 110 (6th Cir.), cert. denied, 482 U.S. 906 (1987). The Court finds that Title III does not prohibit it from considering the tapes in ruling on this motion.

Second, Mr. Carter argues that the taping was illegal under Maryland law and therefore the Court should apply the more stringent state standards and prevent disclosure of the tapes. Maryland law governing the interception of communications is more stringent than federal law. Even if one party consents, taping of wire communications is illegal under Maryland law. Md. Code Ann., Cts. & Jud. Proc. §§ 10-402 & 10-410 (1997). Mr. Carter argues that federal courts must respect the more stringent state law protection of privacy rights.

The Court need not decide whether the taping was illegal under Maryland law because federal law, in the form of Title III, governs. Federal law governs the admissibility of evidence

in a federal criminal case. United States v. Brazel, 102 F.3d 1120, 1154 (11th Cir.), cert. denied, 118 S. Ct. 78 (1997). Evidence obtained from a consensual wiretap conforming to Title III is admissible in federal court proceedings without regard to state law. United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983). Several circuits have held that a more restrictive state law, such as Maryland's, would not affect the admissibility of wiretap evidence in a federal court. See, e.g., Leitman v. McAusland, 934 F.2d 46, 50 (4th Cir. 1991); United States v. Butera, 677 F.2d 1376, 1380 (11th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); United States v. Horton, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Nelligan, 573 F.2d 251, 253 (5th Cir. 1978); United States v. Turner, 558 F.2d 46, 49 (2d Cir. 1977).

Whether or not Maryland law would prohibit the use of these tape recordings in a Maryland court does not affect this Court's determination. Title III controls and the Court may properly consider Ms. Tripp's tapes.

C. Monica Lewinsky's Fifth Amendment Right Against Self-Incrimination

Mr. Carter claims that materials in his possession may not be revealed without violating Ms. Lewinsky's Fifth Amendment rights. The subpoena to Ms. Lewinsky in Jones v. Clinton demanded specific items that she allegedly possessed and allegedly gave to Mr. Carter. Mr. Carter argues that production of those items or documents reflecting their existence would be incriminatory.

The privilege protects against "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972). The Supreme Court has found that the act

of producing a document may fall within the Fifth Amendment privilege. "A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect." United States v. Doe, 465 U.S. 605, 612 (1984).

The standard set out by the Supreme Court is the following: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." Kastigar, 406 U.S. at 486-87. The privilege includes "answers that would in themselves support a conviction under a federal criminal statute" and also included answers "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Id.

Regarding the particular items specified by Mr. Carter, enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self-incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items.

D. Allegations of Prosecutorial Misconduct

Mr. Carter claims that OIC attorneys engaged in various types of misconduct in their handling of this matter.

a. *Department of Justice policy on issuing subpoenas*

Mr. Carter argues that the subpoenas issued to him violate a Department of Justice policy that limits the circumstances under which an attorney may be subpoenaed. See DOJ Manual at § 9-2.161(2). The guidelines provide that, first, before an attorney can be subpoenaed, all

reasonable attempts should have been made to obtain information from alternative sources. Second, there should be an independent evaluation of whether the subpoena is narrowly drawn and directed at material information regarding a limited subject matter. Third, there should also be an evaluation of whether the subpoena seeks information protected by a valid claim of privilege.

The DOJ guidelines do not confer enforceable rights on those who receive subpoenas, as movant concedes. The DOJ Manual "is a publication which, by its own terms, provides 'internal Department of Justice guidance,' and is 'not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.'" Nichols v. Reno, 124 F.3d 1376, 1377 (10th Cir. 1997) (quoting D.O.J. Manual, at § 1-1.00). The government's violation of its internal operating procedures, on its own, does not create a basis for suppressing Carter's subpoena. See United States v. Myers, 123 F.3d 350, 355-56 (6th Cir.), cert. denied, 118 S. Ct. 611 (1997).

Most importantly, the Court has no reason, other than the allegations in Mr. Carter's papers, to believe that the Independent Counsel did not undertake the applicable balancing. Mr. Carter's attempt to apply the DOJ guidelines in this instance must fail.

b. *Contact with represented persons*

Mr. Carter claims that OIC attorneys communicated with Ms. Lewinsky, and sent Ms. Tripp to record her conversations with Ms. Lewinsky, when they knew Ms. Lewinsky was represented by Mr. Carter. Rule 4.2 of the D.C. Rules of Professional Conduct provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the

> prior consent of the lawyer representing such other party or is authorized by law to do so.

Rule 4.2(a) (emphasis added). The Comment to the Model Rule states:

> Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.

Model Rule 4.2 cmt. 2.

The D.C. Circuit has found that non-custodial communications with represented criminal suspects during the investigatory stage are not subject to the anti-contact rule. United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973). In Sutton, government informants recorded inculpatory conversations with the defendant prior to indictment and after the government became aware that the defendant was represented by counsel. The Court of Appeals stated that the disciplinary rule against contact "was never meant to apply to situations like this one" and refused to exclude the taped conversations. Sutton, 801 F.2d at 1366. A similar factual situation occurred in Lemonakis and the D.C. Circuit there stated: "we nevertheless find the actions of the U.S. Attorneys to be consistent with the current ethical standards demanded of the legal profession." Lemonakis, 485 F.2d at 955.

With the exception of the Second Circuit, every court of appeals that has considered a similar case has held that ethical rules such as Rule 4.2 do not apply to pre-indictment criminal investigations by government attorneys or their agents. See United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990); United

States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981). These courts have held that the anti-contact rule "is inapplicable to contacts made by prosecutors or their agents with criminal suspects in the course of a pre-indictment investigation." United States v. Balter, 91 F.3d 427, 436 (3d Cir. 1996); United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983).

Only the Second Circuit has found a prosecutor's conduct to violate the ethical rule against contact with a represented person in a non-custodial, pre-indictment setting. See United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990). Even that court held that "the use of informants by government prosecutors in a pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to [the disciplinary rule] and therefore will not be subject to sanctions." Id. at 839.

The interview with Ms. Lewinsky occurred prior to any indictment and in a non-custodial setting; Mr. Carter has not alleged otherwise. Even if Ms. Tripp did act as an agent of the prosecutors, her undercover recording of Ms. Lewinsky also does not violate the ethical prohibition on contact with a represented party. The Court finds that attorneys from the OIC acted within the ethical rules in questioning Ms. Lewinsky without her attorney present.

However, Department of Justice regulations provide: "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 civil enforcement claims, or sentences or penalties with a represented person or represented party who the attorney for the government knows is represented by an attorney without the consent of the

attorney representing such person or party." 28 C.F.R. § 77.8 (1998). The Independent Counsel statute provides: "An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f)(1).

Department of Justice regulations explicitly provide that 28 C.F.R. Part 77 "does not create substantive rights on behalf of criminal or civil defendants, targets or subjects of investigations, witnesses, counsel for represented parties or represented persons, or any other person other than an attorney for the government, and shall not be a basis for dismissing criminal or civil charges or proceedings against represented parties or for excluding relevant evidence in any proceeding in any court of the United States." 28 C.F.R. § 77.11(b) (1998). Moreover, the regulations provide that "[a]llegations of violations of this part shall be reviewed exclusively by the Office of Professional Responsibility of the Department of Justice . . . ." 28 C.F.R. § 77.11(a) (1998).

This Court's supervisory power to control prosecutorial misconduct before the grand jury is quite limited. See United States v. Williams, 504 U.S. 36 (1992); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). The Supreme Court in Williams in essence removed all general supervisory authority over the grand jury from the federal courts. In that case, the district court had dismissed an indictment because the government failed to disclose substantial exculpatory evidence to the grand jury, in violation of a Tenth Circuit rule and provisions in the DOJ manual to the contrary. 504 U.S. at 47. The Supreme Court held that the district court had improperly used its supervisory powers, stating: "[W]e think it clear that, as a general matter at

least, no such 'supervisory' judicial authority [over grand jury functioning] exists . . . ." Id. at 50. It went on to state that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id.

The First, Sixth, and Seventh Circuits have addressed situations in which prosecutors who violated the Department of Justice Manual by failing to provide warnings to targets of a grand jury's investigation where such warnings were not constitutionally mandated. See Myers, 123 F.3d at 355; United States v. Gillespie, 974 F.2d 796, 799 (7th Cir. 1992); United States v. Pacheco-Ortiz, 889 F.2d 301, 307 (1st Cir. 1989). In each case, the courts found that they were faced with "the violation of a policy which does not justify a case-related judicial sanction and yet which appears immune to expressions of judicial satisfaction." Myers, 123 F.3d at 357; Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 310-11. The First and Seventh Circuits explicitly warned prosecutors that, in appropriate circumstances, they would consider referring such internal policy violations to the Department of Justice's Office of Professional Responsibility. Gillespie, 974 F.2d at 802; Pacheco-Ortiz, 889 F.2d at 311.

The Independent Counsel's failure to follow its own regulations does not justify the Court's use of the limited supervisory power it has over the grand jury to quash the instant subpoenas. Myers, 123 F.3d at 358. However, as the First Circuit said, "[w]e assume that these policies are meant to be enforced. . . ." Pacheco-Ortiz, 889 F.2d at 311. The Court expresses its concern that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel but declines to take further action on this particular matter.

c. *Disruption of the attorney-client relationship*

Mr. Carter also claims that Ms. Lewinsky was not permitted to contact him while the Independent Counsel was questioning her. Ms. Lewinsky's counsel proffered at oral argument that Mr. Emmick told Ms. Lewinsky not to call Mr. Carter because he might "tip off" Vernon Jordan, but that allegation does not appear in Ms. Lewinsky's subsequent declaration. The Independent Counsel has submitted a declaration from an FBI Special Agent who states: "At no time was Ms. Lewinsky refused permission to call her attorney, Mr. Carter." Fallon Decl. at ¶ 3.

Even if this conduct had occurred, it did not violate Ms. Lewinsky's Sixth Amendment right to counsel because that right had not yet attached at the time of the interview. Sixth Amendment rights do not "attach until after the initiation of formal charges." Moran v. Burbine, 475 U.S. 412, 431 (1986); see also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion) (holding that Sixth Amendment rights do not attach until "the time that adversary judicial proceedings have been initiated" against the suspect). A right Ms. Lewinsky did not possess could not have been violated. This situation also does not appear to be covered by the Rules of Professional Conduct. See Rule 4.2 of the D.C. Rules of Professional Conduct.

Department of Justice regulations state that "An attorney for the government, or anyone acting at his or her direction, may not, when communicating with a represented person or represented party . . . improperly seek to disrupt the relationship between the represented person or represented party and counsel." 28 C.F.R. § 77.9 (1998). As the Court has found, Department of Justice regulations do not provide a basis for quashing the subpoenas. Further, it appears to the Court that no OIC attorney disrupted the attorney-client relationship between Ms. Lewinsky and Mr. Carter by refusing to give her permission to contact him. See Declaration of Michael

Emmick at ¶ 3; Second Declaration of Patrick Fallon, Jr. at ¶ 6; Declaration of Steven Irons at ¶¶ 4, 6; Declaration of Stephen Binhak at ¶ 5. She was given several unsupervised opportunities to contact anyone she chose, see Emmick Decl. at ¶ 14; Declaration of Bruce Udolf at ¶ 6; Irons Decl. at ¶ 6; Binhak Decl. at ¶¶ 6-8, and an FBI Special Agent working with the OIC called Mr. Carter to determine if he would be available if Ms. Lewinsky decided she wished to contact him. Second Fallon Decl. at ¶ 5. The Court will not refer this matter to the Department of Justice Office of Professional Responsibility for investigation.

Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
CHIEF JUDGE

Dated: April 28, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

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IN RE GRAND JURY PROCEEDINGS	)	Misc. No. 98-68 (NHJ)
	)	
	)	(Under Seal)

SECTION 3731 CERTIFICATE

On April 30, 1998, the United States of America, by Kenneth W. Starr, Independent Counsel, appealed to the United States Court of Appeals for the District of Columbia Circuit from the judgment of this Court entered on the 31st day of March, 1998, as amended on the 28th day of April, 1998, in favor of Monica S. Lewinsky and Francis D. Carter, Esq. against said United States of America. This appeal was pursuant to 18 U.S.C. § 3731. The § 3731 certificate need not accompany the notice of appeal. See United States v. Smith, 135 F.3d 963, 967-68 (5th Cir. 1998).

I hereby certify that this appeal is not taken for the purpose of delay and that, to the best of my knowledge and belief, the evidence suppressed by the Court's order is a substantial proof of a fact material in the proceeding.

KENNETH W. STARR
INDEPENDENT COUNSEL

Robert J. Bittman
Deputy Independent Counsel

1

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, Section 3731 Certificate, was served via hand delivery or facsimile and Federal Express next business day delivery on this the 1st day of May, 1998, to:

Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005-1419

William H. Ginsburg, Esq.
Ginsburg, Stephen, Oringher & Richman
10100 Santa Monica Boulevard
Los Angeles, CA 90067

Caitlin C. Antowicz

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing appendix was served via hand delivery on this the 11th day of May, 1998, to:

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

Francis D. Carter, Esq.
Suite 510
Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005

and via facsimile and Federal Express priority overnight delivery on this the 11th day of May, 1998, to:

Prof. Charles J. Ogletree, Jr., Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

J. Forrest Norman

UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CROSS-APPELLEE FRANCIS D. CARTER, ESQUIRE

Charles J. Ogletree, Jr.
Jamie S. Gardner
Harvard Law School*
Hauser 320
Cambridge MA 02138
617-495-5097

Counsel for Francis D. Carter, Esquire

*For identification and mailing purposes only

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

All parties, intervenors and *amici* appearing before the district court and this Court are listed in the Brief for Appellant Francis D. Carter, Esquire.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Appellant Francis D. Carter, Esquire.

(C) Related Cases

In re: Motions of Dow Jones & Co., Inc., et al., No. 98-3033 (D.C. Cir. May 5, 1998), vacating and remanding the portion of the district court's order denying a motion by the press for access to redacted papers and orders concerning Mr. Carter's motion to quash and a redacted transcript of the hearing. Other cases involving the investigation by the Office of the Independent Counsel may be pending with this Court, but Mr. Carter is not involved in and has no information about those cases.

Charles J. Ogletree, Jr.

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UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CROSS-APPELLEE
FRANCIS D. CARTER, ESQUIRE

STATUTES AND REGULATIONS

Except for the statutes attached as a statutory appendix, all other applicable statutes and regulations are contained in the statutory appendix to Mr. Carter's Brief for Appellant (No. 98-3053).

COUNTERSTATEMENT OF THE CASE

Appellee, Francis D. Carter, Esquire, adopts the statement of the case in his Brief for Appellant, No. 98-3053. As explained in Mr. Carter's brief, he was retained to represent Monica Lewinsky, who had been subpoenaed to testify in Jones v. Clinton, LR-C-94-290. App. 196.[1/] On January 16, 1998, while Mr. Carter was still her lawyer, Ms. Lewinsky was contacted by

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1/ References are to the Appendix to Mr. Carter's Brief for Appellant.

OIC. Within days of the government's more than 10 hour effort to enlist Ms. Lewinsky to cooperate in exchange for immunity, OIC subpoenaed Mr. Carter to the grand jury in the Eastern District of Virginia.[2/] That subpoena was ultimately withdrawn and a new subpoena was issued for a grand jury in the District of Columbia some two weeks later. App. 156, 179. The suggestion in the government's brief that OIC waited until February 2, 1998, to subpoena Mr. Carter is incorrect.

Furthermore, contrary to the government's assertion that the district court "made no finding that [Mr.] Carter was a knowing participant" in any alleged criminal conduct by Ms. Lewinsky, the district court found that Mr. Carter had *nothing* to do with any wrongdoing by Ms. Lewinsky. The district court ultimately found probable cause[3/] to believe that Ms. Lewinsky retained Mr. Carter with an improper purpose, App. 5, but there has never been the slightest suggestion that Mr. Carter had any knowledge whatsoever of any criminal or fraudulent intent or conduct by Ms. Lewinsky. The government has consistently represented both to the court and to counsel that Mr. Carter had no knowledge of any purported wrongdoing by Ms. Lewinsky. See, e.g., App. 95, 98, 228. As the district court made clear: "there is *no suggestion* that Mr. Carter knew about *any* wrongdoing." App. 4 (emphasis added).[4/]

2/ Although the Jones case was then pending in Arkansas, Ms. Lewinsky was subpoenaed to testify in the District of Columbia. App. 191. Mr. Carter practices law in the District of Columbia where he maintains his only law office. App. 199.

3/ The district court did not distinguish between probable cause and a prima facie showing. App. 4. See In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985). However, the district did not find that Ms. Lewinsky had, in fact, committed any crime. App. 5.

4/ Furthermore, contrary to OIC's assertion in its brief, Brief for Appellant (OIC) at 4, the district court did *not* find that Ms. Lewinsky used Mr. Carter's services to suborn perjury. App. 5.

Finally, Mr. Carter respectfully requests that this Court strike the representations in OIC's statement of the case that rely on ex parte evidence.[5/] For the reasons Mr. Carter set forth in his Brief for Appellant,[6/] the district court erred in considering secret evidence, not subjected to adversarial testing. The procedure violated Mr. Carter's and Ms. Lewinsky's due process rights to a full and fair hearing on the issue of the attorney-client and work-product privileges. OIC's brief in this Court appears to be relying on the same secret evidence. See Brief for Appellant (OIC) at 4. This Court cannot consider such evidence, any more than the district court could, and Mr. Carter respectfully requests that the factual allegations in OIC's brief relying on such evidence be excluded from the record before this Court and from the Court's consideration of the case.

SUMMARY OF ARGUMENT

The district court properly found that information protected by the Fifth Amendment privilege against self-incrimination when in possession of a client, remains protected in the hands of her lawyer. Fisher v. U.S., 425 U.S. 391 (1976). OIC's contention, for the first time in this Court, that the crime-fraud exception effectively waives the protections of the constitution when a client seeks legal advice and assistance in compliance with a subpoena must be

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5/ It is impossible to tell from OIC's brief whether it has provided the ex parte submission to this Court, or is merely referring to the ex parte submission to the district court. If the materials have been submitted to this Court, the government has an obligation to notify the parties that it has made a secret submission in order to permit the parties to object. See D.C. Circuit Rule 47.1 (if materials are under seal, that fact must appear on the documents).

6/ Mr. Carter expressly adopts all of the arguments made in his Brief for Appellant as well as the arguments made in Ms. Lewinsky's Brief for Appellant.

dismissed. OIC failed to raise the argument before the district court and this Court cannot, absent extraordinary circumstances, consider issues or legal theories not asserted before the trial court.

In any event, the district court's conclusion that the Fifth Amendment protects materials provided to counsel in compliance with a subpoena was correct and must be affirmed. First, a client does not lose her Fifth Amendment protections by obtaining the services of an attorney to respond to a subpoena. Witnesses, like parties, are entitled to deal with often hostile opponents through an attorney. Obtaining counsel does not result in a waiver of the Fifth Amendment protections a witness would have had in the absence of counsel. Obviously, if Ms. Lewinsky did not have counsel, she could have asserted her Fifth Amendment right not to disclose items subpoenaed by Ms. Jones' attorneys. Lefkowitz v. Turley, 414 U.S. 70 (1973).[7/] Because the disclosure of the materials to her attorney was not voluntary, but instead compelled by the subpoena, it makes no difference that the materials were provided to her counsel. They remain protected by her Fifth Amendment rights.

However, even if the court were to conclude that the Fifth Amendment protections did not apply to material in counsel's possession, the attorney-client privilege would prevent its disclosure. As explained in Mr. Carter's brief for appellant, and adopted here by reference, OIC's secret submission to the district court and to this Court may not be considered in determining whether the government has sustained its burden to prove an exception to the privilege. Moreover, the evidence submitted cannot sustain the government's burden.

7/ The Fifth Amendment privilege applies to any proceeding, "civil or criminal, formal or informal, where the answers might tend to incriminate [her] in future criminal proceedings." Id. (citing McCarthy v. Arndstein, 266 U.S. 34, 40 (1924)).

Therefore, the Court should reverse the district court's finding of the existence of the crime-fraud exception to the attorney-client privilege. See Brief for Appellant (Francis D. Carter) at 7-13.

Finally, the district court's finding with respect to the crime-fraud exception does not permit disclosure of the information sought by the government. Instead, the district court was required to conduct a particularized inquiry about every communication sought to determine if the communication was in furtherance of the criminal or fraudulent act allegedly shown. Here, the provision to counsel of materials in compliance with a subpoena was not in furtherance of either of the crimes found by the district court. Therefore, the district court's decision quashing the subpoena with respect to those items should be affirmed.

ARGUMENT

The crux of OIC's argument on appeal is that the district court's ruling on the existence of the crime-fraud exception is correct. However, as Mr. Carter explained in his Brief for Appellant, the district court erred both in its conclusion and by permitting an ex parte procedure that deprived Mr. Carter and Ms. Lewinsky of the right to test, in an adversarial proceeding, the evidence on which the conclusion was based. For those reasons alone, the government's contentions in this cross-appeal must fail.

I. This Court May Not Consider an Issue Not Asserted in the District Court

As an initial matter, the argument asserted by OIC in this Court -- whether the crime-fraud exception applies to materials in the attorney's possession that would be protected by the

Fifth Amendment privilege against self-incrimination in the possession of the client -- was not presented to or passed on by the trial court. This Court does not consider legal theories raised for the first time on appeal. District of Columbia v. Air Florida, 750 F.2d 1077, 1084 (D.C. Cir. 1984). "Decisions in this Circuit have consistently followed a practice of dismissing appeals brought on grounds not asserted in the trial court. 'This is not a mere technicality but is of substance in the administration of the business of the courts.'" Id. (quoting Johnston v. Reily, 160 F.2d 249, 250 (D.C. Cir. 1947)). Absent "exceptional circumstances," an issue not litigated in the district court may not be raised for the first time before this Court. Air Florida, 750 F.2d at 1085.

OIC contended in the district court that the materials in Mr. Carter's possession would not have been protected from disclosure even if they remained in Ms. Lewinsky's possession.[8/] In the trial court, OIC framed the issue thus: "*The* question, then, is whether the OIC could have subpoenaed the items from Ms. Lewinsky before she turned them over to Mr. Carter." App. 234 (Opposition of U.S. to Motion to Quash Subpoenas) (emphasis added). If so, according to the government, neither Ms. Lewinsky nor Mr. Carter, on her behalf, could assert the privilege against self-incrimination. App. 235. Not only did OIC fail to raise the crime-fraud exception as a bar to the assertion of an otherwise valid privilege, but it conceded that "production immunity" would be appropriate to protect Ms. Lewinsky's Fifth Amendment rights if the act of producing the materials were deemed testimonial. The district court agreed and found that production of

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8/ OIC contended in the trial court that disclosure would not be testimonial or communicative and therefore the protections of the Fifth Amendment would not apply. The district court properly found that disclosure would reveal that the items exist and are in Ms. Lewinsky's possession. App. 13. On appeal, OIC has abandoned its earlier argument.

the items would "compel Ms. Lewinsky to admit that the items exist and that they were in her possession" and therefore would violate her Fifth Amendment rights unless she were granted immunity. App. 13.

The reasons underlying the rule against raising new issues on appeal support its application here.

> [O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. . . . [The rule precluding consideration of issues not raised in the trial court] is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Air Florida, 750 F.2d at 1084 (quoting Hormel v. Helvering, 312 U.S. 552, 556 (1941)). Resolution of the issue now raised in this Court requires a factual determination not appropriate for an appellate court. Even assuming the Court accepted OIC's analysis with regard to the materials provided to counsel in compliance with the subpoena, whether those materials are protected by the attorney-client privilege requires a factual assessment of the scope of any crime-fraud exception found. Because this issue was not presented to the district court, it made no findings concerning the scope of the exception. Rather than one of the "exceptional circumstances" that would permit this Court "to consider questions of law that were neither raised nor passed upon by the District Court, . . . this case warrants [no] departure from the normal rule." Id.

Furthermore, OIC cannot be heard to complain that the district court erred when the court conducted precisely the inquiry OIC requested. The government contended in the district court that the sole question was whether the materials would have been protected by Ms. Lewinsky's Fifth Amendment privilege if she had retained them. App. 234 - 235. Concluding that the

materials would have been protected, the district court allowed the assertion of the privilege. The government now complains that the district court conducted the wrong inquiry. "It has long been settled that on appeal a litigant cannot avail himself of an error that he induced the court under review to commit." Wagner v. Taylor, 836 F.2d 596, 599 (D.C. Cir. 1987). Accord, United States v. Wiggins, 530 F.2d 1018, 1020 (D.C. Cir. 1976) (an invited error does not require reversal, appellant cannot now complain that the court did what appellant asked). Because OIC argued to the district court that the issue was whether the materials would be privileged in Ms. Lewinsky's hands, it cannot now argue that the district court erred by basing its decision on its resolution of that very issue. OIC's cross-appeal must be denied.

II. Ms. Lewinsky's Fifth Amendment Rights Protect the Materials Compelled by the Subpoena in Jones v. Clinton from Disclosure.

On appeal, OIC does not challenge the district court's ruling that the Fifth Amendment would prevent the government from compelling Ms. Lewinsky from producing items that she gave to Mr. Carter pursuant to his representation of her. The act of producing items has a testimonial component, and when that testimonial component of production would be incriminating, the "accused" cannot be forced to produce the items without violating the Fifth Amendment's guarantee against compelled self-incrimination. See U.S. v. Doe, 465 U.S. 605, 612-14 (1984); Fisher v. U.S., 425 U.S. 391, 410 (1976); U.S. v. Dean, 989 F.2d 1205, 1207 (D.C. Cir. 1993); In re Sealed Case, 832 F.2d 1268, 1275-77 (D.C. Cir. 1987). There is no question but that this rule applies to the items sought here, since their existence, location, and possession by Ms. Lewinsky are not "foregone conclusion[s]," Doe, 465 U.S. at 614 n.13

(quoting Fisher, 425 U.S. at 411), and therefore OIC would be relying on the act of production by Ms. Lewinsky to establish these unknown facts potentially incriminating to herself.

OIC's sole contention on appeal is that items that indisputably were privileged by the Fifth Amendment when in Ms. Lewinsky's hands lost their privileged character when she turned them over to her attorney, Mr. Carter. This contention is without merit. In Fisher, the Supreme Court held that "if [items] are not obtainable by subpoena duces tecum or summons while in the exclusive possession of the client, . . . the [items] are also privileged in the [client's lawyer's] hands" if "the transfer is made for the purpose of obtaining legal advice." Id. at 404. That rule applies a fortiori here, because Ms. Lewinsky transferred the items to Mr. Carter not simply to obtain legal advice, but in response to the *compulsory process* issued in the Jones case.

But OIC ignores the critical fact that the materials were obtained from Ms. Lewinsky in order to comply with the Jones subpoena. The fundamental premise of the government's argument is that the Fifth Amendment is not implicated "when a person *voluntarily* gives items to an agent," Brief for Appellant (OIC) at 6 (emphasis added) (citing Couch v. U.S., 409 U.S. 322 (1973)), because then "the client is *not being compelled to do anything*," id. at 9 (emphasis changed). Thus, OIC argues, under Fisher it is the attorney-client privilege, not the Fifth Amendment, that prevents items voluntarily delivered to an attorney from being subpoenaed.

But to the extent that Couch and Fisher discuss the limits of the Fifth Amendment's applicability to items *voluntarily* transferred to another person, those cases are inapposite here. Ms. Lewinsky did not *voluntarily* respond to the Jones subpoena; to the contrary, not responding would have been sanctionable as contempt. Fed. R. Civ. P. 45(e). Hence, the civil subpoena directed to Ms. Lewinsky supplies the element of testimonial compulsion against the "accused"

that the Fifth Amendment prohibits. See Pillsbury Co. v. Conboy, 459 U.S. 248, 256-57 (1983) (privilege applies in civil cases); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (same).

By obtaining counsel to comply with the Jones subpoena, Ms. Lewinsky did not waive her Fifth Amendment protections; indeed, assistance of counsel is a virtual necessity in these circumstances. See SEC v. Graystone Nash, 25 F.3d 187, 193 (3d Cir. 1994) ("The decision to invoke or waive the Fifth Amendment [in the civil context] is not always self-evident, and it requires serious consideration of the consequences. Counseling by a lawyer familiar with the ramifications of a particular case and the intricacies of the law in this area is highly desirable . . ."). The current subpoenas to Mr. Carter merely build upon the coercive effect of the earlier civil process targeted directly against Ms. Lewinsky. In short, relinquishment of physical custody of the items was not *voluntary* as in Fisher or Couch, but instead was in compliance with the Jones subpoena. Instead of dissipating the compulsion, the current subpoena depends on the compulsion already imposed on Ms. Lewinsky.

OIC's reliance on Couch and Fisher is misplaced, because in those cases the accused had transferred the items sought to the accused's accountant or attorney voluntarily, not in responding to compulsory process. See Couch, 409 U.S. at 329 ("In the case before us the ingredient of personal compulsion against an accused is lacking"); id. ("In the present case, no 'shadow of testimonial compulsion upon or enforced communication by the accused is involved"); Fisher, 425 U.S. at 398 ("As was true in Couch, the documents sought were obtainable without personal compulsion against the accused"). Under these circumstances, the

materials produced by Ms. Lewinsky in compliance with the Jones subpoena remain privileged under the Fifth Amendment and not pursuant to the attorney-client privilege.[9/]

III. The Materials Ordered Protected are not within the Scope of the Crime-Fraud Exception Found by the District Court.

Even if the Court concludes that the attorney-client and not the Fifth Amendment privilege determines the protection afforded these items, a finding of the crime-fraud exception does not end the inquiry. Before information otherwise protected by the attorney-client privilege may be revealed, there must be a relationship between the material sought and the crime or fraud. Only communications "in furtherance" of the improper conduct by the client lose the protection of the privilege. United States v. Zolin, 491 U.S. 554, 556 (1989); In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997). "The crime-fraud exception has a precise focus: It applies only when the communications between the client and his lawyer *further* a crime, fraud or other misconduct. It does not suffice that the communications may be *related* to a crime." United States v. White, 887 F.2d 267, 271 (D.C. Cir. 1989) (emphasis added). Even a correct finding that the client utilized the lawyer's services to commit a criminal or fraudulent act does not

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9/ The government's reliance on Feldberg v. Walters, 862 F.2d 622 (7th Cir. 1988), is misplaced. In Feldberg, the documents at issue were the property of a *corporation*, not an individual. As such, the corporation could not assert a Fifth Amendment privilege. Bellis v. U.S., 417 U.S. 85, 88-89 (1974). Moreover, the subsequent testimony sought from the lawyer concerned not production of compelled information, but details of communications between the lawyer and his other client, the president of the corporation. Those communications were obviously protected by the attorney-client privilege unless they were made *in furtherance* of a crime or a fraud. See Section III.

require wholesale disclosure of anything and everything in the lawyer's possession.[10/] See In re Sealed Case, 754 F.2d 395, 402-03 (D.C. Cir. 1985) (district court's particularized determination on a question-by-question basis appropriate to assure disclosure only of material within the scope of the exception); In re Antitrust Grand Jury, 805 F.2d 155, 168 (6th Cir. 1986) ("merely because *some* communications may be related to a crime is not enough to subject [*a particular*] communication to disclosure") (emphasis added).

Here, the district court found that the criminal conduct by Ms. Lewinsky involved the allegedly false affidavit. App. 5. The materials provided to counsel in compliance with the subpoena, however, could hardly be considered in furtherance of the act of perjury, an act allegedly completed when Ms. Lewinsky signed the affidavit. Her supposed efforts to utilize *the affidavit* to obstruct justice bear no relation to the other aspects of the legal representation provided by Mr. Carter, including collection and preparation of materials in compliance with the subpoena, and certainly do not warrant destroying the protections of the attorney-client privilege. See In re Richard Roe, Inc., 68 F.3d 38, 40-41 (2d Cir. 1995) ("Because a simple finding of relevance does not demonstrate a criminal or fraudulent purpose, it does not trigger the [crime-fraud] exception"). Therefore, the scope of the exception does not include items provided in compliance with the subpoena duces tecum in Jones.

10/ OIC cites no authority for the remarkable proposition that there "is no attorney-client privilege because the privilege is defeated by the crime-fraud exception." Brief for Appellant (OIC) at 11.

IV. This Court Should not Issue the Mandate with the Opinion.

OIC demands extraordinary relief from this Court in requesting the issuance of the mandate along with the opinion. However, the government failed to establish a sufficient basis for departure from the "solid considerations of efficient judicial administration" underlying Rule 41. United States v. DeFries, 129 F.3d 1293, 1303 (D.C. Cir. 1997).

Pursuant to Fed. R. App. P. 41(a) and D.C. Cir. R. 41(a)(1), the mandate is issued 7 days after the expiration of the time for filing a petition for rehearing, or 7 days after the disposition of a timely filed petition. The purpose of the rule is to maintain jurisdiction in the appellate court to allow a sufficient opportunity for reconsideration if necessary. More importantly, the rule serves to avoid disruption and delay and permits the orderly functioning of the courts. "The mandate rule prevents the waste of judicial resources that might result if a district court, prior to the issuance of the appeals court's mandate, proceeds with a case, ruling on motions and hearing evidence, after which the appeals court reverses its original decision on rehearing." DeFries, 129 F.3d at 1303.

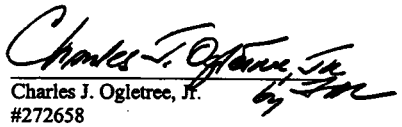
OIC argues that this Court should dispense with its ordinary procedure and "reduce to zero . . . the period for petitioning for rehearing." Johnson v. Bechtel Assoc., 801 F.2d 412, 415 (D.C. Cir. 1986). Its only justification for departing from the orderly procedure authorized by the rules is "tremendous public pressure" to complete the investigation, citing various media reports. Yet, the Independent Counsel has also publicly explained that the investigation is far from complete and "the end is not yet in sight." Susan Schmidt, *Starr Gives Up College's Offer Due to Probe; With 'End Not Yet in Sight,' He Also Denies Hale Conflict*, Wash. Post, Apr. 17, 1998, at A1. See also James Bennet, *Inquiry by Starr has All the Signs of a Long Run*, N.Y.

Times, Apr. 24, 1998, at A8. While there is no dispute that this investigation is critically important to the individuals involved and to the country, the legal issues raised are also extremely significant, both for their impact on the individual parties as well as for their far-reaching consequences beyond this case. The efforts by OIC to invade the protections of the attorney-client relationship and the Fifth Amendment require careful and deliberate consideration. There is no need to depart from the Appellate Rule's carefully constructed procedures to assure that the parties have a full and fair opportunity to address those concerns.

CONCLUSION

The district court's order granting the order to quash with respect to items privileged under the Fifth Amendment must be affirmed.

Respectfully submitted,



Charles J. Ogletree, Jr.
#272658
Jamie S. Gardner
#375811
Harvard Law School, Hauser 320
Cambridge MA 02138
617-495-5097
Attorneys for Cross-Appellee
Francis D. Carter

STATUTORY APPENDIX

Fed. R. App. P. 41(a) 1

D.C. Cir. R. 41(a)(1) 2

Fed. R. Civ. P. 45(e) 3

Fed. R. App. 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until the disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

D.C. Cir. R. 41(a): Mandate

(1) Time for Issuance. While retaining discretion to direct immediate issuance of its mandate in an appropriate case, the court ordinarily will include as part of its disposition an instruction that the court will withhold issuance of the mandate until the expiration of the time for filing a petition for rehearing or a suggestion for rehearing in banc and, if such petition or suggestion is timely filed, until 7 days after disposition thereof. Such an instruction is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Fed. R. Civ. P. 45. Subpoena.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

CERTIFICATE OF NUMBER OF WORDS

I hereby certify that the foregoing brief, prepared in WordPerfect for Windows 6.1, complies with this Court's order concerning length of briefs in this appeal.

Charles J. Ogletree, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May 1998, two copies of the foregoing Brief for Cross-Appellee, Francis D. Carter, Esquire, were served by hand, upon:

Robert Bittman
Joseph Ditkoff
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Nathaniel Speights, Esquire
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

and by Federal Express, overnight, upon:

William Ginsburg, Esquire
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Blvd.
Los Angeles CA 90067

Charles J. Ogletree, Jr.

RECEIVED
P 12: 11
OFFICE OF
INDEPENDENT COUNSEL

In The United States Court of Appeals For The District Of Columbia Circuit

No. 98-3059
Consolidated with Nos. 98-3052, 98-3053
September 1997, Term

In Re: Sealed Case, No. 98-3059

On Appeal From The United States District Court
For The District Of Columbia
Misc. Action No. 98-068 (NH)

BRIEF OF CROSS-APPELLEE MONICA LEWINSKY

SPEIGHTS & MITCHELL
NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINSBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Cross-Appellee MONICA LEWINSKY

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

"APP" shall refer to Appellant's Appendix of Monica Lewinsky

"RJN" shall refer to Request For Judicial Notice of Appellant Monica Lewinsky

"R.T." shall refer to The Reporter's Transcript of the March 4, 1998 Hearing in the District Court

(B) Rulings Under Review

Order filed March 31, 1998 and Memorandum Opinion filed March 31, 1998, Amended Memorandum Opinion filed April 28,1998 -- In re: Grand Jury Proceedings, U.S. District Court No. Misc. 98-59 (NHJ) (Under Seal) granting in part and denying in part motions relating to subpoenas issued to Francis D. Carter, Esq. former attorney of Monica Lewinsky for testimony and production of documents

(C) Related Cases

- *In Re Sealed Case* No. 98-3052 Appeal of Monica Lewinsky
- *In Re Sealed Case* No. 98-3053 Appeal of Francis D. Carter, Esq. (former counsel for Monica Lewinsky)
- *In Re Sealed Case* No. 98-3059 Appeal of the Office of Independent Counsel

  In Re Sealed Case No. 98-3054 Appeal of Monica Lewinsky

* Consolidated Appeals (with No. 98-3052)

STATEMENT OF THE CASE

In targeting Monica Lewinsky as a subject of an ongoing criminal investigation, the OIC maintains that this 24 year old former White House intern made a "false" affidavit in a now-dismissed sexual harassment lawsuit brought against President William Clinton, *Jones v. Clinton*, Civil Action No. LR-C-94-290 (E.D. Ark.). In conclusory fashion the government asserts as a "fact" that Ms. Lewinsky hired Carter on the recommendation of President Clinton's friend and advisor, Washington attorney Vernon Jordan, to represent her regarding a subpoena issued in the *Jones* Action to testify and produce documents "evidencing" a sexual relationship between the President and Ms. Lewinsky. (OIC AOB at 3.)

However, contrary to the OIC's views, what the record reveals is an abuse of OIC's limited prosecutorial powers. The OIC had "targeted" Ms. Lewinsky some time before obtaining the authorization of the Special Division to conduct any investigation of her or any matter relating to the *Jones* sexual harassment lawsuit. With respect to the charge that Ms. Lewinsky submitted a false affidavit, the government relied upon 20 hours of secretly taped recorded conversations between Ms. Lewinsky and Linda Tripp, a former "friend" who worked with her at the Pentagon and procured the tapes in violation of Maryland law.

When Tripp brought the illegal tape recordings to the attention of the OIC rather than prosecute Tripp for the crimes that she committed in unlawfully invading Ms. Lewinsky's privacy (a matter about which Ms. Tripp herself expressed legitimate concern when she disclosed the existence of these illegal recordings), the OIC furthered this unlawful conduct by its own subsequent actions. With the illegal tape recordings in hand, the OIC "wired" Ms. Tripp to secretly record another conversation with Ms. Lewinsky, at a January 13, 1998 lunch meeting. Thereafter, at the instruction

of the OIC, Ms. Tripp lured Ms. Lewinsky to another meeting for "lunch" on January 16 at the Ritz Carlton in Arlington, Virginia. There Ms. Lewinsky was met by 4 FBI agents and 4 to 5 attorneys of the OIC and interrogated for the next 10 hours. (Carter App. at A-0069-0075, A-0110-0114, A-0149-0150, A0161.)

All of these activities were undertaken by the OIC under color of its "authority" originally granted by the Special Division in 1994 regarding the investigation of possible crimes committed by the President, the First Lady and their business associates in connection with the so-called White water land deal and the affairs of Madison Guaranty Savings & Loan.[1] (RJN at 2-3; Carter App. at A-0149.)

The government does not dispute that at the time it had targeted Ms. Lewinsky for investigation regarding her affidavit in the *Jones* case, (a) it had not received permission from the United States Attorney General or the Special Division to undertake such investigation, (b) it was aware that Francis D. Carter was Ms. Lewinsky's attorney in connection with a specific subject matter of their inquiry, and (c) government agents desired to speak with Ms. Lewinsky "privately" in the hope of negotiating for her "cooperation" which meant that in exchange for an "immunity agreement" (negotiated without the presence of her attorney) Ms. Lewinsky would also wear a wire and secretly tape record conversations she had with the President and Vernon Jordan. (Emmick Decl., ¶ 11; Carter App. at A-329.) It is also undisputed that "Ms. Lewinsky told [one of the FBI agents when he initially approached her] that I could speak to her attorney." (Irons Decl., ¶ 2; Carter App. at A-345.)

When Ms. Lewinsky asserted her right to have her lawyer, Mr. Carter, speak on her behalf,

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1 *In Re Madison Guar. Savings & Loan Ass'n.*, Div. No. 94-1, Order at 1-2 (D.C. Cir. Sp. Div. Aug. 5, 1994).

she was told by FBI agent Steven Irons "the invitation to hear the OIC presentation was being made to *her*, not her attorney. .." (Irons Decl., ¶ 2; Carter App. at A-345.) Indeed, virtually every one of the government's affidavits makes reference to the fact that OIC counsel knew Mr. Carter was Ms. Lewinsky's attorney, and Michael Emmick, the OIC special deputy who "planned" the activities of January 16, 1998 at the Ritz Carlton, intended that Ms. Lewinsky *not* speak to her counsel until after the government had attempted to enlist her "cooperation." The methods and means of OIC's request consisted of placing a frightened 24 year old woman, surrounded by FBI agents and special prosecutors, in a hotel room and telling her that she could be prosecuted and would not receive immunity if she contacted her lawyer or attempted to leave. The following is undisputed, based upon Mr. Emmick's own testimony:

> ¶4 On January 16, 1998, our Office ***planned to approach Monica Lewinsky and ask her to cooperate in our investigation***. (Emmick Decl., ¶ 4; Carter App. at A-326.) (emphasis added).
>
> * * *
>
> ¶6 After arriving at the Ritz Carlton I proceeded to the 10th floor, where our Office had rented two adjoining rooms. The plan was for Ms. Lewinsky to be in one room, where the two FBI agents, Patrick Fallon and Steve Irons, and I would ask for her cooperation. There were several other lawyers and agents from the OIC in the adjoining room, and they (and I) frequently walked back and forth between those rooms. Later in the evening we took a third room as well.
>
> * * *
>
> ¶7 Ms. Lewinsky entered the room at about 1:00 p.m. I began to explain to her she was being investigated by the FBI and our Office. She began crying. For the next hour or so Ms. Lewinsky was nearly hysterical with tears. She would sob, then cry out, then stare into space, then cry for long periods. We did all we could to calm her down by bringing her water and tissues and coffee.
>
> * * *
>
> ¶8 Some time around 2:00 p.m. Ms. Lewinsky collected herself to the point where she was able to communicate reasonably well, although she would occasionally

> begin sobbing again. *I told her that Linda Tripp had been taping Ms. Lewinsky's telephone calls*, and I explained the nature of our investigation. *I explained that we were interested in having her cooperate in our investigation* and I discussed the kinds of cooperation we were looking for: agreeing to an interview, making telephone calls that would be tape recorded, participating in meetings where she would be wearing a tape recorder and possibly testifying before a grand jury or a trial. Ms. Lewinsky would occasionally ask questions. . . . She would also occasionally cry or stare off into space for periods of time." (Emmick Decl., ¶ 6-8, Carter App. at pp. A-327 to A-328.)

During the course of these discussions, agent Irons or one of the other FBI agents discussed "the operation of such undercover calls and the importance of secrecy." (Emmick Decl., ¶ 11; Carter App. at A-0329.) The FBI agent mentioned that if Mr. Carter were contacted and he "were to call other people (including, for example, the subjects of our investigation or their attorneys [namely, President Clinton and Vernon Jordan]), then Ms. Lewinsky *might be unable to engage in any successful under cover calls or meetings, and she might therefore get little credit for her cooperation*." (*Id.* at A-309.) Admittedly, the very purpose of this surprise "meeting" arranged at the Ritz Carlton Hotel under false pretenses with Ms. Lewinsky was "an to attempt to secure her cooperation in an investigation into allegations of *obstruction of justice, perjury and subornation of perjury*." (*Id.* at ¶ 2, p. A-0341.)

While the government now insists that Ms. Lewinsky was "free to leave" or to contact her attorneys, the record does not support that contention. Indeed, agent Irons concedes that Ms. Lewinsky was told from the start that "the invitation to hear the OIC presentation was being made to *her*, not her attorney" (Irons Decl., ¶ 2) and the government had never denied that Ms. Lewinsky was threatened with prosecution if she did not "cooperate." On the contrary, a 24 year old woman threatened with prosecution surrounded by 3 or more experienced attorneys and numerous special agents of the FBI who was "nearly hysterical with tears" (Emmick Decl., ¶ 7) supposedly "understood her freedom to contact whomever she wished. . . ." (Carter App. at 319.) Ms. Lewinsky has

expressly denied, under oath, the "understanding" attributed to her by the government's self-serving justification for its unjustifiable conduct. (Monica Lewinsky Decl., Carter App. at A-312.)

OIC furthermore does not dispute that the intention was to negotiate an "immunity agreement" with Ms. Lewinsky directly, outside the presence of her counsel, Mr. Carter. O I C prosecutors testify, on the one hand, that they did not "forbid Monica S. Lewinsky from making any telephone calls she desired" but, on the other hand, in response to Ms. Lewinsky's questions about whether she could contact her lawyer, "Mike Emmick, other OIC prosecutors, and FBI Special Agents explained that any telephone calls she made could *undermine the effectiveness of any cooperation* she might decide to provide." (Binhak Decl., ¶ 6, Carter App. at A-349.) And Ms. Lewinsky had already been told that her ability to obtain "immunity" from prosecution depended directly upon the extent of that "cooperation."

Even Mr. Emmick was admittedly concerned about the OIC's ultimate goal to keep Ms. Lewinsky from talking to Mr. Carter. In his own words, Mr. Emmick testifies that he explained to Ms. Lewinsky "our hope was that she call as few people as possible -- *and preferably nobody*. . . ." (Emmick Decl.,¶ 10.) While Mr. Emmick was admittedly concerned that comments concerning Mr. Carter might be viewed as derogatory, he did not clarify that Ms. Lewinsky could or should contact Mr. Carter to discuss any proposed "immunity" deal, but instead "steered the discussion in another direction." *(Id.* at ¶ 11.) In the face of these machinations, the government today asks this Court to view their 10 hour interrogation of Ms. Lewinsky, alone without her attorney, "sobbing" "hysterically" for several hours as being in a position to "understand" she was free to leave and talk to anyone she wished.

Thus, the government does not challenge that the primary purpose of this improper contact with Ms. Lewinsky, obtained by the product of illegal wire tap information, was to obtain a

"cooperation agreement" with her and when it became necessary, to negotiate an immunity agreement. Mr. Emmick himself testified that "we decided to simply offer her outright immunity from prosecution. . . . we also decided to offer not to prosecute her mother. I proceeded to make that offer and to explain what immunity meant." (Emmick Decl., ¶ 12, Carter App. at A-329 to A-330.)[2]

Another concern that the government's attorneys obviously had was their complete lack of jurisdiction to undertake an "investigation" of Ms. Lewinsky in the first place. While Ms. Lewinsky was being interrogated for 10 hours at the Ritz Carlton, in furtherance of their prosecutorial zeal, OIC attorneys pushed through a request for expansion of the OIC's jurisdiction under the guise that "exigent circumstances" existed such that there had been not time for the Attorney General to conduct the preliminary investigation required by law in order to "target" Ms. Lewinsky as a possible subject of indictment and prosecution -- on *any* charge. (RJN 1 at 2-3.)

Ms. Lewinsky was allowed to contact her parents during this extended "meeting" with the government's agents. Her mother traveled by train to Washington, D.C. from New York. Her father contacted Ms. Lewinsky's present counsel, William Ginsburg, who was told by OIC counsel that any proposed "immunity" for Ms. Lewinsky would expire at the end of their meeting. Mr. Ginsburg took the next flight from Los Angeles, arriving at the Ritz Carlton approximately 10 hours after Ms. Lewinsky was first confronted.

In the midst of an intense media frenzy fueled by leaks from the Tripp tapes, Ms. Lewinsky's counsel and the OIC thereafter continued negotiations for an immunity agreement. On February 2, 1998, an oral and written immunity agreement was proposed, signed by Ms. Lewinsky and her counsel, only to have the OIC promptly renege on the agreement as not being "authorized" by Mr.

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2 Implicit in this "offer" was the threat that Monica Lewinsky's mother would also be indicted if Ms. Lewinsky did not "cooperate."

Starr.[3]

Not coincidentally, the same day as the government attempted to withdraw immunity, it served its Subpoena Duces Tecum No. #D902 on Ms. Lewinsky's former counsel, Francis D. Carter. (Carter App. at A-0178.) A subpoena for Mr. Carter's testimony before the grand jury (Subpoena Ad Testificandum #D937) issued a week later. (*Id.* at 188.)

Chief Judge Norma Holloway Johnson heard and considered Mr. Carter's motion to quash both subpoenas, Ms. Lewinsky's joinder in response to that motion, the OIC's opposition which contended that the crime-fraud exception to the attorney-client privilege should override the privileges and constitutional rights asserted by Ms. Lewinsky. The district court also considered Mr. Carter's motion for production of the ex parte submission made by OIC, in camera, without the right of Ms. Lewinsky to examine or rebut that purported "evidence." On March 31, 1998 the district court ordered that Mr. Carter must comply with the 2 subpoenas at issue "except for those portions of the subpoenas that call for him to disclose the materials in his possession that may not be revealed without violating Monica Lewinsky's Fifth Amendment rights." (OIC App. at 1.) As the district court explained in its accompanying memorandum, "enforcement of the subpoenas would compel Ms. Lewinsky to admit that the items exist and that they were in her possession. These communications would violate her Fifth Amendment right against self incrimination. If the Independent Counsel still seeks these items, it must grant Ms. Lewinsky immunity that covers the act of producing those items." (*Id.* at 13.)

The district court additionally expressed its concern about the OIC's "failure to follow its own regulation" for service of subpoenas on attorneys representing the targets of criminal investigations,

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3 The enforceability of the government's promises of immunity is the subject of Ms. Lewinsky's related appeal in Case No. 98-3054.

and further concluded "that the Office of Independent Counsel may have acted improperly in conducting immunity negotiations with Ms. Lewinsky without the presence of her counsel. . . " (Mem. Opn., APP 27-28.) However, apart from considering referral of such ethical improprieties to the Department of Justice Office of Professional Responsibility for investigation, the district court reasoned that violation of Department of Justice regulations did not provide a basis for quashing the subpoenas. (*Id.* at 30.)[4]

II.

ARGUMENT

A. The Government Failed To Meet Its Burden Of Demonstrating A Prima Facie Case Supporting Its Crime-Fraud Exception Theory By Competent, "Lawfully Obtained" Evidence; Hence, The Purported Exception Could Not Justify The OIC's Efforts To Abridge Ms. Lewinsky's Constitutional Rights

1. The Evidence Relied Upon By The OIC In Its Ex Parte Submission To The District Court Was Unlawfully Obtained In Excess Of Its Limited Jurisdiction

Before the district court could consider any "evidence" in camera on the government's claim to the subpoenaed information under the crime-fraud exception, the OIC was required to establish that such evidence was "relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." *U.S. v. Zolin*, 491 U.S. 554, 575 (1989) OIC's purported evidence satisfied none of these conditions. On January 13, 1998, without a warrant or permission from the Attorney General and three days before expansion jurisdiction was obtained, the OIC and FBI began the investigation of Ms. Lewinsky by secretly wiring Ms. Tripp so that she could secretly record a conversation with

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4 In the district court's amended memorandum opinion filed April 28, 1998 in response to a motion for reconsideration by the OIC, the court ultimately determined that it would not refer a matter to the Department of Justice Office of Professional Responsibility for investigation. (Amend. Mem. Opn., APP 48-49.)

Ms. Lewinsky. The OIC's actions before it obtained expanded jurisdiction taints all of the evidence obtained during the unlawful investigation. (Lewinsky Opening Brief, p. 14).

In violation of Title III and Maryland law, the OIC obtained and used illegally procured tape recordings made by Ms. Tripp, then relied on them in arguing to the district court it had satisfied its prima facie burden of showing that the crime-fraud exception applies. Any tapes obtained in violation of Title III are to be excluded from grand jury proceedings as fruit of the poisonous tree. *Gelbard v. U.S.*, 408 U.S. 41, 50-51 (1972); *U.S. v. Vest*, 813 F.2d 477, 483 (1st Cir. 1987) (Lewinsky Opening Brief, p. 14-15).

The OIC and FBI arranged their clandestine "meeting" with Ms. Lewinsky on January 16 by subterfuge, and knowing she was represented by legal counsel. Thereafter they questioned (and threatened her with criminal charges) for ten hours in a hotel room -- in violation of Rule 4.2 of the D.C. Rules of Professional Conduct and Justice Department regulations. See, e.g., 28 C.F.R. pt. 77.8; 59 Fed. Reg. 39910, 39912 (Carter App. at A-0359). Title III does not authorize government wiretaps for investigation of possible perjury and obstruction of justice. The OIC wanted Ms. Lewinsky's cooperation -- asking her to commit the same illegal acts Linda Tripp had employed to Ms. ensnare Ms. Lewinsky in the government's probe -- namely, secretly taping conversations with the President and Vernon Jordan, the real targets of the investigation. If crimes were committed by anyone in January 1998, on this record, it was the OIC, the FBI and their agent provocateur, Ms. Tripp. Therefore, any evidence consisting of, or based upon, the illegally obtained tape recordings cannot be used to satisfy the burden under *Zolin* to prove that the crime-fraud exception applies.

2. The OIC Did Not, And Could Not, Make the Requisite Prima Facie Showing Of Any "Crime" Alleged Against Ms. Lewinsky

In addition to compelling Mr. Carter to involuntarily give evidence against his client, OIC invokes the "crime-fraud" exception as justifying its attempted circumvention of Ms. Lewinsky's Fifth Amendment privilege against self-incrimination. The district court properly rejected that contention. (Amend. Mem. Opn. at 11-12.)

Over the years, this Court has consistently instructed that the government in claiming an exception to the attorney-client privilege, bears the ultimate burden at every stage of the proceedings of proving a *prima facie* case by competent, and lawfully admissible evidence, that "if believed by the trier of fact would establish *the elements of an ongoing or imminent crime or fraud.*" *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (*Sealed Case III*) (see also, Lewinsky Opening Brief at 10-12). The OIC's burden requires proof of a violation of law "sufficiently serious" to defeat the attorney-client privilege. (*In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (*Sealed Case II*).

Applying this Court's "prima facie" standard, a majority of the circuits have concluded that less than "clear" evidence demonstrating the *essential elements* of the "imminent or ongoing crime" will not suffice to meet the burden. *Sealed Case III*, 107 F.3d at 49-50 (government failed to satisfy burden); *Sealed Case II*, 754 F.2d at 399 (substantial evidence of pervasive and ongoing crime or fraud required); (NACDL Amici Br. at 16-18). "Showing temporal proximity between the communication and the crime is not enough." *Sealed Case III*, 107 F.3d at 50.[5] In essence, "[u]nless the government made some showing that [Ms. Lewinsky] *intended to further and did commit a*

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5 Although the district court opinion expressed some "confusion" regarding the applicable standard, this Court recently explained "there is more than a slight difference between" the two tests discussed by the cases: The Second Circuit's "probable cause" rule would not necessarily require the government to establish the essential elements of an "ongoing or imminent crime" as this Court has steadfastly required over the years. *Sealed Case III*, 107 F.3d at 50; *Sealed Case II*, 754 F.2d at 399; cf. Mem Opn., APP 15.

crime [in the future by engaging Mr. Carter as her lawyer] the government the government could not invoke the crime-fraud exception to the privilege." *Ibid.* Here, the OIC did not and cannot meet this substantial burden for several reasons. In the first place, "[i]n nearly all cases, a client's innocence [of the alleged 'crime'] will bar application of the crime fraud exception." *Sealed Case III*, 107 F.3d at 49, fn. 2. The elements of the purported "crimes" relied upon by the OIC below as supporting the district court's finding of the crime-fraud exception cannot be established as a matter of law. There is no colorable basis for the OIC to charge that Ms. Lewinsky committed either obstruction of justice or perjury -- as the OIC should well know from the results of two cases handled by its own attorneys.

Addressing the identical "crimes" on remarkably similar facts, in *U.S. v. Adams*, 840 F.2d 1140, 1147 (6th Cir. 1989) the Sixth Circuit overturned a conviction for perjury and obstruction of justice arising from a false affidavit given by the plaintiff regarding her tax returns in a sexual discrimination suit. In *Adams*, the court concluded that the nature of the alleged offense was not "material" to any issue involved in the underlying employment litigation. The lead prosecutor in *Adams* is the OIC's present chief deputy in Little Rock, W. Hickman Ewing. *Id.* at 1141.

By reference to the underlying *Jones v. Clinton* action (also involving the OIC's counsel), the result is the same. Judge Susan Webber Wright concluded that nothing Ms. Lewinsky did say or could say based upon the affidavit was "essential to the core issues" of the proceedings. Moreover, Judge Wright, at the government's urging, excluded any testimony or evidence relating to the "Lewinsky matter" at the time of trial. As a matter of law, the government's misguided efforts to entrap Ms. Lewinsky into making purported "false" statement (i.e.; making a statement in an affidavit ostensibly inconsistent with her secretly recorded conversations made by Ms. Tripp) did not have any bearing on the material issues. (Lewinsky Opening Brief, p. 14-15); accord *U.S. v. Littleton*, 76 F.3d 614, 617 (4th Cir. 1996) (no perjury or obstruction of justice charge is viable without the essential

element of materiality and the ability to "influence the outcome" of the issues in dispute). The inconsistencies offered by Ms. Tripp's illegally taped conversations amount to "impeachment" of a prospective witness on an immaterial, collateral matter -- at best.

Judge Wright determined that Ms. Lewinsky's affidavit was "not essential to the core issues" of the *Jones* civil action, and her testimony was not even admissible. (RJN at 9-11.) OIC did not timely appeal that ruling, and in fact, intervened in support of Ms. Lewinsky's motion to quash resulting in this conclusive disposition of the issue which is now binding on the OIC and this Court. Cf. *U.S. v. Bridges*, 717 F.2d 1444, 1448 (D.C. Cir. 1983).

B. Contrary To The OIC's Argument, The "Crime Fraud" Exception Cannot Be Applied On The Record In This Case To Abrogate Ms. Lewinsky's Fundamental Constitutional Rights Or The Attorney-Client Privilege Attaching To Ms. Lewinsky's Confidential Communications With Her Legal Counsel

As the district court aptly concluded, even when the government's heavy burden can be satisfied, this "exception" can never justify an involuntary waiver of a suspect's Fifth Amendment right to remain silent (Lewinsky Opening Brief at 8-9; Amend. Mem. Opn. at 11-12, Carter App., at p. A-0040). Recognizing the inviolate nature of every citizen's Fifth Amendment privilege against compulsory self-incrimination, the Supreme Court has admonished that the government's "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." *Lefkowitz v. Turley*, 414 U.S. 78, 79 (1973). *Lefkowitz* upheld the and protected the Fifth Amendment privileges of a mere witness to a grand jury's inquiry, a status that does not remotely equate with the significance of the privilege to an actual "target" of the government's criminal investigative powers, such as Ms. Lewinsky. *Ibid citing Kastigar v. United States*, 406 U.S. 441, 445 (1972).

In recognition of the inviolate nature of an individual's Fifth Amendment privilege against

compulsory self-incrimination, the United States Supreme Court itself admonished that "...claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." *Lefkowitz v. Turley*, 414 U.S. 78, 79 (1973). *Lefkowitz* upheld the and protected the Fifth Amendment privileges of a mere witness to a grand jury's inquiry, a status that does not remotely equate with the significance of the privilege to an actual "target" of the government's criminal investigative powers, such as Ms. Lewinsky. *Ibid citing Kastigar v. U.S.*, 406 U.S. at 445.

The Fifth Amendment privilege must be afforded "liberal construction in favor of the right it was intended to secure." The privilege applies to a suspect being compelled to provide any information that could support a conviction under a federal statute as well as "those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. U. S.*, 341 U.S. 479, 486 (1951).

Thus, the act of producing subpoenaed documents which would tend to be incriminating is protected by the Fifth Amendment, accordingly, cannot be compelled absent a statutory grant of immunity. *U.S. v. Doe*, 465 U.S. 605, 617 (1984).

By virtue of this clear Supreme Court precedent, the district court appropriately ordered that, absent a grant of immunity to Ms. Lewinsky, the OIC's subpoenas to Mr. Carter must be quashed to the extent they sought disclosure from Mr. Carter of materials, testimony and information which violative of Ms. Lewinsky's Fifth Amendment privilege in the absence of a proper grant of immunity. *Kastigar*, 406 U.S. at 445. Absent such immunity, neither Ms. Lewinsky nor Mr. Carter, may be required by OIC to produce the materials in contravention of Ms. Lewinsky's Fifth Amendment privilege.

OIC asserts that *Fisher v. U.S.*, 425 U.S. 391 (1975) compels a different conclusion. (OIC Opening Brief, p. 9) Not so, *Fisher* actually supports Ms. Lewinsky's position. In *Fisher*, the Court

upheld enforcement of a subpoena for an accountant's work papers directed in possession of a taxpayer's lawyer on the ground that there was nothing contained in those records which would compel the taxpayer to be a witness against himself. However, in so doing, the Court also acknowledged the settled rule that "... *when the client himself would be privileged* from production of documents, either as a party at common law ... or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce." [emphasis in original] *Id.* at 1578. *Fisher* reaffirmed that this rule applies where the transfer of documents is to the attorney for the purpose of obtaining legal advice. *Id.* at 1581-1582. Without more, responding to the subpoena would not have represent a substantial threat of self-incrimination and the mere transmittal of otherwise non-privileged documents to an attorney does not operate to change the nature of them. *Id.* 1582.

In the instant case, the district court correctly found that the items and documents in Mr. Carter received from Ms. Lewinsky would tend to incriminate her. Moreover, the materials, and the testimony, which the district court excluded from production pursuant to OIC's subpoena are inherently private and were of the nature which falls squarely within the zone of privacy the Fifth Amendment was designed to protect. Therefore, unlike the facts in *Fisher*, responding to Mr. Carter's subpoena would pose a substantial threat to Ms. Lewinsky's Fifth Amendment rights. The district court properly recognized this distinction by precluding the production of these documents.

Ms. Lewinsky maintained constructive possession of the items she gave to her lawyer. Compelling Mr. Carter to turn over those materials to a grand jury or prosecutor would to impermissibly result in compulsory self-incrimination. *U.S. v. Guterma*, 272 F.2d 344, 345-346 (2nd Cir. 1959) (in response to grand jury subpoena, Fifth Amendment privilege applied to personal records which suspect stored in a safe he shared with an indicted co-defendant).

The Subpoena Duces Tecum and Subpoena Ad Testificandum, if allowed to stand, would compel document production and testimony from Mr. Carter in violation of the attorney-client privilege. Attached to the Subpoena Duces Tecum is a six-page Subpoena Rider requiring the production of any and all documents relating to Mr. Carter's representation of Monica Lewinsky in clear violation of her Fifth Amendment right to remain silent, and her Sixth Amendment right to counsel.[6] These basic constitutional rights take on added significance once a criminal grand jury is empaneled and a subject is "targeted." *Cobbledick v. United States*, 309 U.S. 323, 327-28 (1940). Such rights cannot be defeated simply because the government attempts to label the the legal representation as being in furtherance of a "crime" or "fraud."

C. The Government's Contention That "Tremendous Public Pressure" Should Be A Factor In Resolving Any Of The Important Issues In This Case Involving Ms. Lewinsky's Most Fundamental Constitutional Rights Cannot Be Sustained

The government's suggestion that "tremendous public pressure" on the Independent Counsel should influence the outcome of any issues pending in these proceedings is chilling. (OIC Opening Brief at 13.) The Sixth Amendment guarantees all Defendants not only the right to effective assistance of counsel but also to a "speedy and public trial, *by an impartial jury* . . ." (emphasis added.) Extensive pre-trial publicity can encroach upon jury impartiality guaranteed by this clause, particularly when the publicity is so pervasive and inculpating that the entire community from which the jury is to be drawn is likely to be influenced by what they have read or heard in the media. Few (if any) cases in recent memory so completely merit the title "media circus" as this grand jury

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6 The rider requires the production of any and all documents referring or relating to "Monica Lewinsky, Kathleen Willey and Linda Tripp, including but not limited to, calendars, appointment books, telephone messages, toll records, correspondence, recordings and memoranda. Such documents should include, but are not limited to, any documents referring or relating to the financial terms and arrangements for payment in your representation of Monica Lewinsky." (APP 3-8.)

proceeding, thereby giving rise to a presumption of prejudice to the prospective defendant's Sixth Amendment right to a fair trial by an impartial jury. *Williams v. Griswald*, 743 F.2d 1533, 1537 (7th Cir. 1984).

As Justice Holmes warned:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feeling and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400-401 (1904) (dis. opn.).

The "accident of immediate overwhelming interest" should not take precedence over careful and deliberate consideration of the fundamental principle that the Bill of Rights was designed to ensure that government has a substantial justification when it seeks to invade an individual's privacy and to abrogate the attorney-client privilege. More contemporary statements of the same sentiment are expressed in the media reports in which the OIC places such great stock: "[This investigation] has been pursued with an 'end justifies the means' mentality that raises the question: Has the independent counsel's Jarvet-like pursuit of his target finally gone too far? . . . It is the lack of proportionality and discretion that appears to drive the increasingly negative public opinion of Mr. Starr." Bohrer, *President Clinton Is No Mafia Chieftain*, THE NAT'L L.J., Mar. 2, 1998, at A-23.

III.

CONCLUSION

On the record before this Court, the manner in which the OIC has labeled Ms. Lewinsky's communications with her counsel as a "crime" or "fraud" may not result in a waiver of Ms. Lewinsky's Fifth Amendment rights. The order of the district court recognized this basic constitutional limitation on the power of the OIC. It simply did not go far enough -- the only proper

order would have been to quash these improper subpoenas in their entirety.

Respectfully submitted this 14th day of May 1998,

By:

NATHANIEL H. SPEIGHTS

(D.C. BAR NO. 952036)
SPEIGHTS & MITCHELL
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINSBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Cross-Appellee MONICA LEWINSKY

CERTIFICATE OF SERVICE

The undersigned, as one of the counsel of record herein for Appellant/Appellee Monica Lewinsky, certifies pursuant to D.C. Circuit Rule 28(d) that Brief of Cross-Appellee was prepared on a Word Perfect 5.1 word processing system using standard typographic printing in typeface of 12 points in height. The word count for the within Cross-Appellee's Brief is within the 5000 word limit, excluding the cover, tables, certificates and addenda.

I further certify that I caused to be served via hand delivery to the addressees listed below, **BRIEF OF CROSS-APPELLEE MONICA LEWINSKY**, on this the 14th day of May, 1998, as follows:

OFFICE OF THE INDEPENDENT COUNSEL
Kenneth W. Starr
Robert J. Bittman
Joseph M. Ditkoff
Terrence J. Galligan
Roger A. Heaton
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
Telephone 202-514-8688

Professor Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
Telephone 617-498-5097

By: _____
NATHANIEL H. SPEIGHTS

UNDER SEAL

ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE UNITED STATES

KENNETH W. STARR
Independent Counsel

ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Attorneys for Appellee-
Cross Appellant

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The parties to the proceedings in the district court and on appeal are (a) the United States, represented by Kenneth W. Starr, Independent Counsel; (b) Monica S. Lewinsky; and (c) Francis D. Carter, Esq. The National Association of Criminal Defense Lawyers and its local affiliate the District of Columbia Association of Criminal Defense Lawyers filed an amicus brief in the district court.

Under review in this consolidated appeal is the district court's order of March 31, 1998, reproduced at App. 14. The accompanying memorandum opinion, as amended on April 28, 1998, is reproduced at App. 17-35.

This case was not previously before this Court or any other court. There are no other related cases. Nos. 98-3033 and 98-3054 are not related cases as that term is defined in D.C. CIR. R. 28(a)(1)(C).

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GLOSSARY

App.	Appendix of the United States
Car.App.	Appendix of Francis D. Carter, Esq.
Car.Br.	Appellant Brief of Francis D. Carter, Esq.
DOJ	Department of Justice
Lew.Br.	Appellant Brief of Monica Lewinsky
OIC	Office of the Independent Counsel
RJN	Request for Judicial Notice of Monica Lewinsky
U.S.Br.	Cross Appellant Brief of the United States

ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE UNITED STATES

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in finding that the crime-fraud exception vitiated Lewinsky's attorney-client privilege.

2. Whether the district court abused its discretion in finding that the subpoenas were not overly broad, unreasonable, and oppressive.

3. Whether the district court abused its discretion by permitting the OIC to make an *in camera* submission of evidence establishing the crime-fraud exception.

4. Whether the district court abused its discretion by considering taped conversations recorded with only one party's knowledge.

5. Whether the subpoenas violated Lewinsky's Fourth and Sixth Amendment rights.

6. Whether Lewinsky waived her attorney-client privilege by disclosing her communications to third parties.

7. Whether the OIC acted within its jurisdiction.

8. Whether this Court has jurisdiction over Carter's appeal.

SUMMARY OF ARGUMENT

The evidence amply demonstrates the applicability of the crime-fraud exception here. Lewinsky's affidavit was material to the motion it accompanied and Lewinsky's corrupt intent is shown by her using the perjured affidavit to obtain benefits.

The subpoena duces tecum is not overly broad as it is limited in time and to eighteen named individuals. Movants' claims of prosecutorial misconduct are contrary to the facts and independent review of subpoenas is not required under 28 U.S.C. § 594(f).

The district court did not abuse its discretion in considering the OIC's *in camera* submission, pursuant to standard practice, as the government's interest in keeping its

confidential investigative materials from a target of its investigation outweighs movants' desire for discovery. The district court properly considered the tapes because federal law does not prohibit taping one's own conversations for the purpose of bringing them to light.

Absent overbreath and indefiniteness, grand jury subpoenas do not implicate the Fourth Amendment, and the Sixth Amendment right does not attach before indictment. The OIC's jurisdiction in this matter is well-established. Lewinsky waived her privilege by disclosure to third parties. Finally, pendent appellate jurisdiction does not apply where a party will never have a right to appeal.

ARGUMENT

I. THE EVIDENCE AMPLY DEMONSTRATES THAT LEWINSKY USED CARTER'S SERVICES FOR THE PURPOSE OF FURTHERING THE CRIMES OF PERJURY AND OBSTRUCTION OF JUSTICE.

A. The standard of review is abuse of discretion.

The crime-fraud exception vitiates the attorney-client privilege when the "privileged relationship is used to further a crime, fraud or other fundamental misconduct." *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982). The government must make out a *prima facie* case by offering evidence "'that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.'" *In re Sealed Case*, 107

F.3d 46, 50 (D.C. Cir. 1997).

The district court found that the OIC "amply demonstrated" that the crime-fraud exception applied. App. 20. This determination "lies within the sound discretion of the district court and may be disturbed on appeal only if the district court abused its discretion." *In re Sealed Case*, 754 F.2d 395, 399-400 (D.C. Cir. 1985); *see also In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994) (requiring "a clear showing of abuse of discretion").

B. Lewinsky's perjury and obstruction of justice are sufficiently weighty crimes to vitiate the attorney-client privilege.

Carter argues that the district court's ruling threatens the attorney-client privilege whenever a client is impeached with an inconsistent statement. *See* Car.Br. 12-13 & n.13. As the district court found, however, this is not a case of "mere inconsistencies." Instead, the evidence shows that Lewinsky "deliberately intended to commit perjury" and "utilized the attorney's legal services with the specific purpose of committing a crime." App. 21-22. Carter has not challenged these factual findings and they are supported by Lewinsky's repeated statements that she intended to commit perjury when she hired Carter. *See In Camera* Submission of U.S. at 6-11.

In addition, perjury and obstruction of justice are serious felonies. Courts have held that even perjury alone is

sufficiently weighty to vitiate the attorney-client privilege. *See, e.g., United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975).

C. The subsequent exclusion of evidence about Lewinsky from *Jones v. Clinton* does not render the crime-fraud exception inapplicable.

1. An affidavit supporting a motion to quash a subpoena is material if it was capable of influencing the decision whether to quash that subpoena.

A statement is material if it "'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988). Lewinsky's affidavit was part of a motion to quash a subpoena, not part of a summary judgment motion. In a motion to quash, the decision being made is whether a particular item of evidence or testimony may lead to potentially relevant evidence and the "decisionmaking body" is the judge hearing the motion. Because Lewinsky's affidavit had the natural tendency of influencing Judge Wright to quash the subpoena, it is material. *See United States v. Naddeo*, 336 F. Supp. 238, 239 (N.D. Ohio 1972) (question is whether the false testimony could "impede, influence or dissuade the examiner").

In addition, Lewinsky's reliance on events occurring after she executed her affidavit is misplaced, because materiality is

judged from the point when the false statement was made.[1] In making the ruling that Lewinsky cites, Judge Wright specifically found that evidence concerning Lewinsky "might be relevant to the issues in this case," but excluded it to prevent the undue delay caused by awaiting the completion of the OIC's investigation. *See* RJN0009. The potential relevance of this evidence to the ultimate question of President Clinton's liability demonstrates that the affidavit was material when it was made, as a false statement in a civil deposition is material when "a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit." *United States v. Kross*, 14 F.3d 751, 754 (2d Cir. 1994).

2. There is ample evidence of Lewinsky's corrupt intent in obstructing justice.

Materiality is not an element of obstruction of justice under 18 U.S.C. § 1503. *See United States v. Ruggiero*, 934 F.2d 440, 446 (2d Cir. 1991); *United States v. Haldeman*, 559 F.2d 31, 119 n.250, 123 (D.C. Cir. 1976). Corrupt intent, on the other hand, is an element.

Corrupt intent is established if the actions "have the 'natural and probable effect' of interfering with the due

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[1] *See, e.g., United States v. Holley*, 942 F.2d 916, 923 (5th Cir. 1991); *Hale v. United States*, 406 F.2d 476, 480 (10th Cir. 1969); *United States v. Manfredonia*, 414 F.2d 760, 765 (2d Cir. 1969) ("materiality must be established only as of the time (the) answers were given") (internal quotation marks omitted).

administration of justice." *United States v. Aguilar*, 515 U.S. 593, 599 (1995). Lewinsky not only knew that her actions would interfere with the *Jones* case, there is evidence that she used her perjured testimony to obtain benefits from third parties in the form of employment. *In Camera* Submission of U.S. at 13-16.[2]

II. THE DISTRICT COURT CORRECTLY REJECTED ARGUMENTS THAT THE SUBPOENAS WERE OVERLY BROAD, UNREASONABLE, AND OPPRESSIVE.

A. The standard of review is abuse of discretion.

A district court's decision rejecting a challenge to the breadth of a grand jury subpoena should be reversed only for an abuse of discretion. *See United States v. Nixon*, 418 U.S. 683, 702 (1974) ("Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court . . . . Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c).").

B. The movants failed to meet their burden in challenging the subpoenas for overbreadth.

The subpoena duces tecum demands documents relating to

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[2] In Lewinsky's principal case, *United States v. Littleton*, 76 F.3d 614, 619 (4th Cir. 1996), the court overturned a § 1503 conviction because there was no evidence that the defendant understood the significance of her testimony. Lewinsky, by contrast, understood how her affidavit would affect the proceedings.

Monica Lewinsky, whenever they were created, and documents relating to seventeen other individuals which have been created since January 1, 1997. Carter argues, albeit in passing, that the subpoenas were "extraordinary" in scope. Car.Br. 5 n.4. However, he cites no authority and provides no reasoning to explain why seeking all documents in his possession relating to Lewinsky was unreasonable or why subpoenaing him to testify was improper.

"A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972). As it sets out on this inquiry, "a grand jury has no catalog of what books and papers exist and are involved . . . nor will it ordinarily have any basis for knowing what their character or contents immediately are." *Schwimmer v. United States*, 232 F.2d 855, 862 (8th Cir. 1956). Consequently, a motion to quash must be denied unless the Court determines that there is "no reasonable possibility" that the materials sought will prove relevant to the grand jury's inquiry. *United States v. R. Enterprises*, 498 U.S. 292, 301 (1991). Doing so requires a "strong showing." *Id.* at 300.

Appellants here failed to make *any* showing in the district court. In assessing the breadth of the subpoena, the district

court noted that Carter had represented Lewinsky for no more than three months and that the subpoena duces tecum was largely limited to documents created after January 1, 1997, and found that appellants had not met their burden of demonstrating that the subpoenas were issued outside the scope of the grand jury's legitimate authority. *See* App. 18. The district court correctly concluded that appellants had failed to show that the subpoenas were unlikely to produce evidence relevant to the grand jury's investigation. *Cf. In re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575, 579 (S.D.N.Y. 1961) (enforcing subpoena seeking documents created over eighteen years).

C. The OIC did not commit prosecutorial misconduct making the subpoenas unreasonable or oppressive.

Carter also argues that the district court's "cramped exercise of its authority" led to approval of unreasonable and oppressive subpoenas issued in violation of DOJ guidelines and certain ethical rules. *See* Car.Br. 4-6; Lew.Br. 15. This argument is based on the false premise that the OIC violated various DOJ guidelines, regulations, or rules. *See* App. 28-35 (rejecting claims of prosecutorial misconduct).

Movants do not claim, nor could they, that violations of the guidelines or applicable ethical standards confer enforceable rights. *See, e.g., Nichols v. Reno*, 124 F.3d 1376, 1377 (10th Cir. 1997); *United States v. Meyers*, 123 F.3d 350, 355-56 (6th

Cir.), *cert. denied*, 118 S. Ct. 611 (1997). Instead, they argue that these alleged violations provide a basis for quashing the subpoenas, so the standard of review remains abuse of discretion.

Movants allege that the OIC improperly contacted Lewinsky in violation of Rule 4.2 of the D.C. Rules of Professional Responsibility.[3] Representatives of the OIC met with Lewinsky on January 16, at a time when Carter represented her in connection with the *Jones v. Clinton* subpoena. This was not improper.

First, in terms of whether Lewinsky was a represented party, "[a] 'party' is necessarily a 'party' to something." *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996). Carter represented Lewinsky in connection with the civil case in which she had been subpoenaed. The OIC's contact with her concerned criminal matters under investigation – matters related to but plainly distinct from the subpoena in *Jones v. Clinton*.[4] Carter

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[3] Carter states Lewinsky's brief "makes clear" that the OIC's alleged improper contact with her violated not only Rule 4.2, but also 28 C.F.R. part 77. *See* Car.Br. 6 n.5 In fact, Lewinsky's brief makes no mention of 28 C.F.R. part 77, which deals generally with government attorneys' communications with represented persons. Accordingly, any argument with respect to part 77 has been waived. *See, e.g.*, FED. R. APP. P. 28(a); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Similarly, Carter cannot circumvent rule 28(a) by "expressly adopt[ing] all the arguments . . . relied on below." Car.Br. 4 n.3.

[4] Similarly, the OIC did not act improperly by negotiating with Lewinsky. She was not represented by counsel "concern[ing] the subject matter in question," 28 C.F.R. § 77.3, and therefore, was not a "represented person" within the meaning of 28 C.F.R. § 77.8.

has never represented her concerning *any* criminal investigation.

Second, as the district court properly ruled, even if Carter had represented Lewinsky in connection with the criminal investigation, Rule 4.2 would have justified contact with her. At the time of the contact, Lewinsky was not under indictment. As the commentary to the Model version of Rule 4.2 states, "communications with represented criminal suspects prior to initiation of formal judicial proceedings as part of a noncustodial investigation by government agents . . . are not considered subject to the anticontact rule." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1992). Courts have uniformly agreed that Rule 4.2 (or its counterparts) does not apply to pre-indictment noncustodial interviews. *See United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986). Consistent with this well-established precedent, the district court properly rejected movants' claim that the OIC's attorneys violated Rule 4.2 during their initial meeting with Lewinsky. *See* App. 28-31.

Nevertheless, Lewinsky asserts that her initial contact with the OIC's attorneys was a "custodial investigation" that violated her Fifth and Sixth Amendment rights. In fact, as the evidence before the district court demonstrates, *see* Car.App. 314-56, 369-83, the OIC never forbade her from contacting Carter and repeatedly told her that she was free to leave at any time.

The district court found that the Lewinsky interview

"occurred prior to any indictment and in a non-custodial setting," App. 31, and Lewinsky has not provided any basis for challenging this factual finding. Accordingly, neither her Fifth nor Sixth Amendment rights were implicated during the OIC's initial contact with her. *See Moran v. Burbine*, 475 U.S. 412, 431 (1986) (Sixth Amendment rights do not "attach until after the initiation of formal charges"); *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966) (warnings required only when suspect is in custody).

D. Independent review of the subpoenas was not required.

Carter also complains that there was no independent review of the subpoenas outside of the OIC, and asserts that the district court should have exercised its supervisory authority to provide that independent review. *See* Car.Br. 5-7. This argument mistakenly assumes that a grand jury subpoena to an attorney must be reviewed by some entity outside of the OIC.

Unlike a United States Attorney's office, the OIC is not obliged to seek authorization for subpoenas to attorneys from the Assistant Attorney General of the DOJ Criminal Division. Such a requirement would be inconsistent with the notion of an Independent Counsel, which acts where the DOJ has a conflict. *See* 28 U.S.C. § 594(f) (requiring OIC to comply with DOJ policies "except to the extent that to do so would be inconsistent with the purposes of this chapter"). The OIC complied with this

policy to the extent consistent with the statute as Deputy Independent Counsel Robert J. Bittman authorized the subpoenas at issue after fully considering each factor set forth in the U.S. Attorneys' Manual. *See* Car.App. 238.

Contrary to Carter's claims, *see* Car.Br. 6, the district court's discussion of *United States v. Williams*, 504 U.S. 36 (1992), states only that a district court has limited authority to control prosecutorial misconduct before a grand jury. *See* App. 32. The Court in *Williams* held that a district court may not prescribe legally compelled standards of prosecutorial conduct, *see* 504 U.S. at 46-47, and reversed a decision dismissing an indictment based on a prosecutor's failure to abide by circuit court rules, *see id.* at 55. The district court's reasoning follows this precedent.

III. MOVANTS FAIL TO DEMONSTRATE THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN CONSIDERING *IN CAMERA* EVIDENCE.

Carter claims that the district court abused its discretion in considering the OIC's *in camera* submission to determine that the crime-fraud exception applied. *See* Car.Br. 7-12. His claim is based on the Fifth Amendment guarantee of due process. The district court's decision to consider *in camera* evidence is reviewed for abuse of discretion. *See Clifford v. United States*, 136 F.3d 144, 148 (D.C. Cir. 1998).

In considering the OIC's *in camera* submission, the district

court was not making an ultimate finding as to whether Lewinsky is actually guilty of perjury and obstruction of justice. It was merely making an evaluation as to the non-applicability of the attorney-client privilege and the work product doctrine to material subpoenaed by a grand jury. In such contexts, *in camera* submissions are standard operating procedure – as the cases cited in the district court's opinion reflect, *see* App. 23 – in order to protect the confidentiality of on-going criminal investigations, and courts have consistently held that they do not implicate due process rights. *See In re Grand Jury Proceedings*, 33 F.3d 342, 353 (4th Cir. 1994) (stating that "the government has the right to preserve the secrecy of its submission because it pertains to an on-going investigation").[5]

This Court has expressly approved of *in camera* submissions, in the context of a submission by an attorney subject to a grand jury subpoena, to determine the applicability of privilege exceptions. This Court reasoned that the public interest in "a complete adversary presentation of the issues" sacrificed by an *in camera* submission is outweighed by the necessity of avoiding "minitrials" that inevitably would impede the investigation and prevent "'fair and expeditious administration of the criminal laws.'" *In re Sealed Case*, 676 F.2d 793, 814 (D.C. Cir. 1982)

[5] *Accord, e.g., In re Grand Jury Proceedings*, 867 F.2d 539, 540-41 (9th Cir. 1989); *In re Antitrust Grand Jury*, 805 F.2d 155, 161-62 (6th Cir. 1986).

(quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973)).

In the instant case, the United States submitted material to the district court *in camera*, with notice to movants,[6] in order to protect the confidentiality of its on-going criminal investigation. The United States's confidentiality interest is heightened where, as here, the party seeking disclosure of *in camera* material is a target of that on-going investigation and virtually all the material has been submitted to the grand jury. *See, e.g., In re Antitrust Grand Jury*, 805 F.2d 155, 162 (6th Cir. 1986) ("Only in the most exceptional of circumstances can we envision the disclosure of grand jury testimony to the subjects of the investigation."). This interest substantially outweighs any interests of movants in reviewing materials that are a part of an on-going grand jury investigation in order to aid them in fashioning arguments to quash the grand jury's subpoenas. Accordingly, the district court did not violate the movants' due process rights in considering the *in camera* submission of the United States.

Carter's criticism of the district court for failing to make its balancing judgment on the record, *see* Car.Br. 7-8, is particularly unfair. The district court does not have to balance the particularized interests in each case but, even if it did,

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[6] Movants were given the opportunity to present evidence and to be heard with respect to the applicability of the privilege and the work product doctrine. *See* Car.App. 61-142.

"[t]he district court could not show the specific factors it considered in balancing the conflicting needs because to do so would have required it to reveal [confidential] information." *In re Antitrust Grand Jury*, 805 F.2d at 162.

IV. THE DISTRICT COURT APPROPRIATELY CONSIDERED THE TAPES BECAUSE 18 U.S.C. § 2511(2)(d) DOES NOT BAR THE ADMISSION OF CONVERSATIONS TAPED BY A PARTICIPANT FOR THE PURPOSE OF BRINGING EVIDENCE TO LIGHT.

As part of its *in camera* submission, the OIC submitted transcripts of tape recordings made by Linda Tripp of conversations she had with Lewinsky. *See* App. 24. Lewinsky claims that these tapes were made without her consent. The district court ruled that these tapes could be considered in deciding whether the crime-fraud exception applies, *see id.*, and Lewinsky challenges this ruling, *see* Lew.Br. 13-15.

Federal law permits the recording of one's own wire, oral, or electronic conversation, except when the interception is "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d). The party seeking suppression of evidence under the "criminal or tortious act" exception has the burden of demonstrating that either (1) the primary motivation or (2) the determinative factor motivating the interception was to commit an illegal or tortious act. *See United States v. Dale*, 991 F.2d 819, 840 (D.C. Cir. 1993). The

interceptor's primary and determinative motivations are factual issues, *see Brown v. ABC*, 704 F.2d 1296, 1305 (4th Cir. 1983), and the district court's determination is reviewed for clear error, *see Dale*, 991 F.2d at 841.

A desire to prevent future distortions of the interceptor's statements is a valid motivating factor. *See United States v. Zarnes*, 33 F.3d 1454, 1469 (7th Cir. 1994); *United States v. Underhill*, 813 F.2d 105, 110 (6th Cir. 1987). This is true even when the interceptor also has hope of producing evidence of an illegal conspiracy of which he is a member, *see Dale*, 991 F.2d at 841, or the interceptor wishes to turn over the tape to get a deal from the prosecutor, *see Zarnes*, 33 F.3d at 1469.

As the district court correctly found, Tripp's purpose in taping the conversations was "bringing her conversations with Ms. Lewinsky to light," which is not a criminal or tortious act. *See* App. 26.[7] Lewinsky does not even challenge this factual finding and so it must be accepted.

Instead, Lewinsky states that § 2511 "expressly forbids secretly tape recording conversations in violation of state law."

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[7] By contrast, the interceptor's sole purpose in *Hirschey v. Menlow*, 747 P.2d 402, 404-05 (Or. Ct. App. 1987), was to reveal the taped conversation in violation of state law. Movants have not suggested that Tripp made the tapes for the purpose of disclosing them in Maryland, and disclosure outside of Maryland is not unlawful. *See Mustafav v. Maryland*, 591 A.2d 481, 486 (Md. 1991) (stating that Maryland may not criminalize behavior outside its borders).

Lew.Br. 14. This assertion is flatly contrary to *Dale* and to the plain language of the statute. *See Deteresa v. ABC*, 121 F.3d 460, 466-67 (9th Cir. 1997) (holding that an interception, even if illegal under state law, is legal under § 2511(2)(d) unless the interceptor's motivation was a desire to violate state law), *petition for cert. filed* (U.S. Feb. 12, 1998) (No. 97-1566).[8] Lewinsky's principal case, *United States v. Vest*, 813 F.2d 477, 483 (1st Cir. 1987), merely states the unremarkable proposition that there is no implicit exception to the wiretap statute for perjury prosecutions. It in no way prohibits the use of tapes that are legal under federal law.

V. LEWINSKY'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE SUBPOENAS.

Lewinsky argues that the subpoenas violate her Fourth and Sixth Amendment rights.[9] This Court reviews constitutional claims *de novo*. *See United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997). Concerning the Fourth Amendment, Lewinsky claims that the subpoena duces tecum issued to Carter "seeks to invoke the 'compulsory extortion' of Ms. Lewinsky's private

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[8] *Deteresa* is worthy of greater credence than the unreasoned and unreviewed decision in *Biton v. Menda*, 796 F. Supp. 631, 633 (D.P.R.), *corrected*, 812 F. Supp. 282 (D.P.R. 1992). In any event, § 2511 is not self-executing and Lewinsky has not made a motion to suppress under 18 U.S.C. § 2518(10)(a)(i).

[9] Lewinsky also claims that the subpoenas interfered with her Fifth Amendment right against compelled self-incrimination. This argument is addressed in U.S.Br. 7-13.

papers . . . to help convict her of a crime." Lew.Br. 7. She then reasons that private information obtained other than through compelled self-incriminating testimony is legally protected by the Fourth Amendment. *See* Lew.Br. 7.

Lewinsky's attempt to analogize the subpoena duces tecum to a forcible seizure is misplaced. Courts have consistently recognized that Fourth Amendment challenges to subpoenas are "narrowly limited to overbreadth and indefiniteness." *Doe v. United States (In re Grand Jury Subpoena Duces Tecum)*, 834 F.2d 1128, 1134 (2d Cir. 1987).[10] Lewinsky's Fourth Amendment challenge is, therefore, equivalent to the overbreadth argument discussed above.

Although Lewinsky asserts in an argument heading that the subpoenas violate her Sixth Amendment right to effective assistance of counsel, her two-paragraph argument does nothing more than state several uncontroversial propositions of law about the attorney-client privilege, ignoring the crime-fraud exception entirely. *See* Lew.Br. 6. She neither applies the law to the facts, nor explains how she was deprived of effective assistance of counsel.

The issuance of the grand jury subpoenas did not violate

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[10] *See United States v. Calandra*, 414 U.S. 338, 346 (1974) (Fourth Amendment violated only if the subpoena is "'far too sweeping in its terms to be regarded as reasonable'"); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195 (1946).

Lewinsky's right to counsel, because no Sixth Amendment right to counsel attaches before indictment. *See, e.g., Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1493 (10th Cir. 1990).

VI. THE OIC ACTED WITHIN ITS JURISDICTION WHEN INVESTIGATING LEWINSKY.

A. Lewinsky forfeited this argument in the district court.

In support of her argument challenging the *in camera* crime-fraud showing, Lewinsky asserts that OIC exceeded its jurisdiction by obtaining evidence of her crimes. *See* Lew.Br. 13. She did not raise this argument in the district court; therefore, it has been forfeited. *See Bazuaye v. United States*, 83 F.3d 482, 486 (D.C. Cir. 1996).

B. OIC's investigation of Lewinsky is within its jurisdiction.

Lewinsky argues that the OIC's investigation exceeded its jurisdiction. *See* Lew.Br. 13. To the extent that she challenges the Attorney General's decision to cede jurisdiction to the OIC, she challenges a decision that is unreviewable. *See United States v. Tucker*, 78 F.3d 1313, 1316 (8th Cir. 1996). To the extent that she argues the OIC lacked jurisdiction when it issued the subpoenas to Carter, her argument lacks factual support. The subpoenas were issued on February 2 and 9, 1998, over two weeks after the Special Division, on the Attorney General's

recommendation, granted the OIC authority to investigate Lewinsky. *See* RJN0002-03.

Finally, to the extent that Lewinsky challenges the OIC's authority to have obtained tapes from Tripp prior to the January 16, 1998, she brings an argument rejected by the Attorney General. As the Attorney General explained in her referral to the Special Division:

> It would be appropriate for Independent Counsel Starr to handle this matter because he is currently investigating similar allegations involving possible efforts to influence witnesses in his own investigation. Some potential subjects and witnesses in this matter overlap with those in his ongoing investigation.

RJN0004-05. The Attorney General was aware of the taped conversations, and this language demonstrates that the she believed that the conversations related to the OIC's pre-existing jurisdiction and approved of the OIC's being given jurisdiction to investigate allegations of criminal activity in connection with them. Based on these facts, Lewinsky's complaint that OIC exceeded its jurisdiction by obtaining evidence of her crimes is baseless.

VII. LEWINSKY'S THIRD PARTY DISCLOSURES WAIVED HER ATTORNEY-CLIENT PRIVILEGE.

Although the district court found it unnecessary to address the issue, *see* App. 21, Lewinsky has waived her attorney-client privilege by discussing with Tripp her communications with Carter. *See In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir.

1989). The extent of waiver depends on the factual context, *see id.* at 982, and can be addressed by the district court on remand if necessary.

VIII. THIS COURT DOES NOT HAVE PENDENT JURISDICTION OVER CARTER'S APPEAL BECAUSE IT WILL NEVER BE APPEALABLE.

Pendent appellate jurisdiction is disfavored and will be invoked only when "substantial considerations of fairness or efficiency demand it." *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996). Pendent jurisdiction "does not bring into our court any claim that could not otherwise be here; it merely affects the timing of an appeal that one or more parties will ultimately be able to bring here as of right." *Id.* at 678; *see Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695, 700 (D.C. Cir. 1994).

Carter, however, has sworn under penalties of perjury that he will not take contempt. For the reasons explained in U.S.Br. 2 & n.1, he never will be able to appeal. Pendent jurisdiction, therefore, is inappropriate.

To the extent that Carter argues that pragmatic considerations make his appeal final, *see* Car.Br. 13-15, his argument is squarely contrary to binding precedent. *See, e.g., United States v. Ryan*, 402 U.S. 530, 532 (1971); *In re Sealed Case*, 107 F.3d 46, 48 n.1 (D.C. Cir. 1997). *In re Grand Jury Proceedings*, 841 F.2d 230 (8th Cir. 1988), is inapplicable in the

D.C. Circuit because it is premised on allowing a client to testify without the attorney stating his intention to comply with the compulsion order – a premise contrary to *Sealed Case*, 107 F.3d at 48 n.1.

CONCLUSION

For all the foregoing reasons, the United States respectfully requests that this Court affirm that part of the district court's order compelling Carter to testify and provide documents responsive to the grand jury subpoenas.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

May 14, 1998

CERTIFICATE OF SERVICE AND WORD COUNT

I hereby certify that this brief contains no more than 5000 words (as specified in this Court's order of May 5, 1998).

Joseph M. Ditkoff
Associate Independent Counsel

I hereby certify that two true and correct copies of the foregoing brief were served via hand delivery on this the 14th day of May, 1998 to:

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

Francis D. Carter, Esq.
Suite 510
Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005

and via facsimile and Federal Express priority overnight delivery on this the 14th day of May, 1998, to:

Prof. Charles J. Ogletree, Jr., Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

David L. Dunleavy

RECEIVED
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OFFICE OF
INDEPENDENT COUNSEL

UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT FRANCIS D. CARTER, ESQUIRE

Charles J. Ogletree, Jr.
Jamie S. Gardner
Harvard Law School*
Hauser 320
Cambridge MA 02138
617-495-5097

Counsel for Francis D. Carter, Esquire

***For identification and mailing purposes only**

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GLOSSARY

Opening Br. FDC	Opening Brief for Appellant (Francis D. Carter, Esquire)
Opening Br. MSL	Opening Brief for Appellant (Monica S. Lewinsky)
Opening Br. OIC	Opening Brief for Appellant (Office of the Independent Counsel)
Br. Appellee FDC	Brief for Appellee (Francis D. Carter, Esquire)
Br. Appellee MSL	Brief for Appellee (Monica S. Lewinsky)
Br. Appelle OIC	Brief for Appellee (Office of the Independent Counsel)
App.	Appendix (Francis D. Carter, Esquire)
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UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT FRANCIS D. CARTER, ESQUIRE

SUMMARY OF ARGUMENT

Overbreadth is not the only criterion of reasonableness; these subpoenas are unreasonable because they violate D.O.J. rules, which OIC concedes were applicable. Secret proceedings are not "standard operating procedure," and under the circumstances of this case violated due process. Pendant appellate jurisdiction does not depend on the possibility of an independent appeal in the future.

ARGUMENT

I. The District Court Did Not Evaluate the Reasonableness of the Subpoenas under the Appropriate Standards

Failing to appreciate the review authority vested in the court when determining a motion to quash pursuant to Rule 17(c), OIC contends that the reasonableness analysis is limited to overbreadth. Br. Appellee OIC at 8-9. However, despite the broad authority of the grand jury,

the reasonableness of a subpoena remains an issue for determination by the trial court. Rule 17(c)'s reasonableness "standard is not self-explanatory. . . . 'what is reasonable depends on the context.'" United States v. R. Enterprises, 498 U.S. 292, 299 (1991) (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)). As explained in Mr. Carter's and Ms. Lewinsky's opening briefs, the subpoenas here, evaluated *in context*, were not reasonable.

Chief among the reasons for that conclusion is that they were issued in violation of the D.O.J. guidelines (§9-2.161(a)) and regulations (28 C.F.R. part 77) and were based on evidence obtained in violation of those guidelines.[1/] OIC does not dispute that it must follow the D.O.J. guidelines and the ethical rules. Instead, OIC contends that its attorneys complied with the relevant requirements. See Br. Appellee OIC at 9-13. "[Appellants'] argument is based on the false premise that the OIC violated various D.O.J. guidelines, regulations, or rules." Id. at 9.

For the reasons explained in the briefs for appellants and cross-appellees, that conclusion is not supported by the record.[2/] The guidelines regarding subpoenas to attorneys require the

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1/ OIC argues that appellants waived the argument about the improper conduct of the OIC attorneys in communicating and negotiating with a represented individual because Ms. Lewinsky's main brief did not cite 28 C.F.R. part 77. In fact, Ms. Lewinsky's brief argued that the conduct was "in violation of the *Department of Justice regulations*." Opening Br. MSL at 5. Mr. Carter's brief cited the appropriate regulation and referred to the arguments raised by Ms. Lewinsky that the communications were unauthorized. Opening Br. FDC at 6 n.5. Mr. Carter's brief makes the legal argument that the D.O.J. guidelines and regulations set the standard for evaluating reasonableness. Ms. Lewinsky's brief, adopted by Mr. Carter, makes the argument that evidence obtained in violation of the applicable ethical rules and Department of Justice regulations may not be used as the basis to prove an exception to the attorney-client privilege. Opening Br. MSL at 5. These issues were further developed in Ms. Lewinsky's brief as cross-appellee. See Br. Appellee MSL at 9.

2/ See, e.g., Opening Br. FDC at 6-7. Mr. Carter adopts Ms. Lewinsky's arguments that the contact with Ms. Lewinsky, both through Linda Tripp and directly through OIC attorneys and FBI agents, violated the D.O.J. regulations, 28 C.F.R. part 77 and D.C. Rule of Professional Conduct 4.2.

government attorney, in the first instance, to seek sources of information other than the attorney. No such effort was made, and the government does not claim otherwise. Indeed, the subpoena was issued almost immediately after launching the investigation of Ms. Lewinsky. App. 156. Although the guidelines require subpoenas to seek only non-privileged information and be narrowly drawn, these subpoenas are completely unlimited and seek materials and information dating back long before Mr. Carter ever met Ms. Lewinsky. App. 181-86.

Most importantly, the decision to issue these subpoenas to an attorney about his representation of his client, were not *independently* reviewed by a neutral decisionmaker, as required by the guidelines. The D.O.J. rules were carefully drafted to protect the attorney-client relationship from unwarranted intrusion. In order to "exercise close control over the issuance of such subpoenas," prior approval is required by the Assistant Attorney General, Criminal Division. D.O.J. Manual §9-2.161(a). This review authority is expressly removed from the hands of the "line" Assistant United States Attorney and vested in a decisionmaker who is not intimately involved in the investigation or prosecution.[3/] OIC concedes that independent review is not possible in the context of an Independent Counsel investigation, but contends that review by Deputy Independent Counsel Bittman served the same function. However, review by the *attorney on the case*[4/] is not the type of neutral and independent review required by the

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3/ This neutral oversight is not unlike the constitutional warrant requirement, which explicitly recognizes that whether there is a "need for invading a person's privacy" should be determined after "the detached scrutiny of a neutral magistrate" rather than at the "discretion of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." U.S. v. Maxwell, 920 F.2d 1028, 1033 n. 3 (D.C. Cir. 1990) (citations and quotation marks omitted).

4/ Mr. Bittman has appeared on every pleading in this case and has signed each of OIC briefs in this Court. He appeared for OIC at the hearing in the district court, App. 65, and often communicates with counsel about issues arising in the case.

guidelines. Moreover, given the tremendous public pressure felt by the OIC attorneys, see Br. Appellee OIC at 13, and the politically charged nature of this investigation, the need for independent oversight from outside OIC is critical to protect the attorney-client relationship.

Although OIC tries to suggest otherwise, the district court viewed its supervisory authority under these circumstances as virtually non-existent. App. 17. OIC claims the district court's "reasoning" follows the holding in Williams v. U.S., 504 U.S. 36 (1992). To the contrary, the district court concluded that Williams removed all supervisory authority from the district court, something that Williams plainly did not do. See Opening Br. FDC at 6.

II. The District Court's Acceptance of Secret Evidence as "Standard Operating Procedure" Violated Due Process

In defending use of ex parte evidence, OIC trivializes what is at stake here: a decision to breach the attorney-client privilege. See Br. Appellee OIC at 14 (district court "was *merely* making an evaluation as to the non-applicability of the attorney-client privilege") (emphasis added). Yet, the ancient privilege for which OIC shows so much disdain reflects "'the imperative need for confidence and trust'" in the attorney-client relationship, Jaffee v. Redmond, 518 U.S. 1, 10 (1996), and is "essential to the protection of a client's legal rights and to the proper functioning of the adversary process," Coastal States Gas v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). The privilege assures "the benefits *to justice (not to the client)* from a franker disclosure in the lawyer's office." Id. at 862 n. 15 (emphasis added, citation omitted).

These important values, which the privilege is designed to foster, Whitehouse v. U.S. District Court, 53 F.3d 1349, 1360 (1st Cir. 1995), are systematically undermined by the

procedure used below. Clients will not disclose important yet harmful information to their attorneys if the privilege can be defeated by secret evidence they cannot even try to rebut.

Mr. Carter's opening brief demonstrates that due process requires an adversarial hearing under these circumstances to test evidence that would defeat the substantial rights protected by the attorney-client privilege. A party obviously cannot defend its rights if it does not know and cannot explain or rebut the evidence used against it. The Orwellian position adopted by OIC is vividly illustrated by its contention that "[Mr.] Carter has not challenged these factual findings." Br. Appellee OIC at 4. But, of course, the factual record that forms the basis for these findings is secret, depriving Mr. Carter and Ms. Lewinsky of the opportunity to challenge them, no matter how poorly supported they may be.[5/]

Despite the powerful adverse impact of secret proceedings on core principles of due process, OIC asserts that "courts have consistently held that [ex parte submissions] do not implicate due process rights," and that they are therefore "standard operating procedure" that may always be used to defeat the attorney-client privilege, without any showing of a specific need for secrecy. Br. Appellee OIC at 14. Those assertions are not supported by the cases. First, this Court has never endorsed the use of an ex parte procedure in this context.[6/] Second, as demonstrated in our opening brief, other circuits have consistently held that ex parte proceedings *do implicate* due process rights, although a compelling need for secrecy can, in specific cases,

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5/ In fact, however, Mr. Carter has challenged the district court's findings, insofar as they are based exclusively on unsworn statements by Ms. Lewinsky inconsistent with her sworn statements. Opening Br. FDC at 13.

6/ In re Sealed Case, 676 F.2d 793, 814 (D.C. Cir. 1982), involved a different procedure: in camera review of the very documents for which the privilege was claimed. See Opening Br. FDC at 9 n.10. Moreover, two of the three judges on the panel in Sealed Case specifically refused to join the portion of the opinion on which OIC relies.

outweigh the right to adversarial testing. The authorities relied on by OIC are to the same effect. See, e.g., In re Antitrust Grand Jury, 805 F.2d 155, 161-62 (6th Cir. 1986) (adopting reasoning of In re Taylor, 567 F.2d 1183 (2d Cir. 1977), and holding that "[t]o determine whether in camera inspection was proper under the facts of this case, the government's interest must be balanced against the interests of the" parties asserting the privilege). Like the district court, OIC misreads cases upholding the use of ex parte proceedings on specific facts as establishing a per se rule that always permits ex parte proceedings regardless of any specific need for secrecy. Yet, even if there is no absolute per se rule against ex parte proceedings in certain circumstances, it does not follow that there is an absolute per se rule permitting such proceedings as "standard operating procedure," regardless of necessity.

The need for secrecy is particularly weak here. OIC contends that the government's interest in keeping "confidential investigative materials from a target" authorizes the secret submission. Br. Appellee OIC at 3. This argument ignores the facts of this specific case. First, the existence of the evidence, the Tripp tapes, has already been disclosed in this proceeding and, of course, repeatedly in the national media.[7/] Second, as a participant in the conversations, Ms. Lewinsky is aware of the contents, so there can hardly be a concern about revealing information already known to a target. However, because the ex parte submission selectively includes information, neither Ms. Lewinsky nor Mr. Carter can put the evidence in context or explain it. Finally, as shown in Mr. Carter's Cross-Appellee's brief, even if proved, the crime-fraud exception does not vitiate the privilege for all communications. See Br. Appellee FDC at 11-12. The precise nature of the criminal conduct alleged informs the scope of the disclosure

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7/ A Westlaw search revealed 123 stories in The Washington Post alone discussing both Ms. Lewinsky and the tapes made by Linda Tripp.

permitted.[8] In sum, the balance weighs strongly in favor of adversarial testing. See Opening Br. FDC at 11-12.

Mr. Carter's challenge is to the district court's complete failure to balance the important interests at stake, not (as OIC mischaracterizes it) to the court's failure to explain on the record how it balanced these interests. OIC does not even try to claim that the district court undertook a case-specific inquiry into the need for secrecy here. Nor could it. OIC itself urged the district court to proceed ex parte as "standard operating procedure" with no case-specific justification, a position it still advocates here. Br. Appellee OIC at 15 ("The district court does not have to balance the particularized interests in each case . . .").

The record makes plain that the district court accepted OIC's erroneous position on the legal standard to apply and proceeded ex parte without first finding that doing so was necessitated by a compelling need for secrecy. The districts court's application of the wrong legal standard is by definition a reversible abuse of discretion and is entitled to no deference. E.g., In re Sealed Case, 121 F.3d 729, 740 (D.C. Cir. 1997).[9]

8/ OIC also argues that the privilege was waived, presumably based on evidence in the same secret submission. Waiver similarly requires an analysis of the facts. Ms. Lewinsky and Mr. Carter cannot rebut or explain those facts without access to the information relied on by OIC.

9/ Conceding that there must be a showing of criminal conduct "sufficiently weighty" to warrant invasion of the attorney-client privilege, OIC contends that a single act of perjury is adequate. However, the case it cites for this proposition, United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975), holds that the communications at issue were not privileged at all because they were made in the presence of at least 5 other people in addition to the client and the lawyer. "A communication divulged to 'strangers' or outsiders can scarcely be considered a confidential communication between attorney and client." Id. at 975.

III. The Court Has Jurisdiction over this Consolidated Appeal

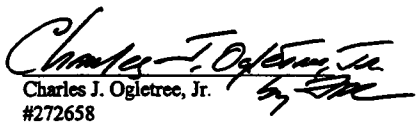
Quoting dicta from Gilda Marx v. Wildwood Exercise, 85 F.3d 675, 679 (D.C. Cir. 1996), OIC claims that this Court cannot exercise pendant appellate jurisdiction over Mr. Carter's appeal because Mr. Carter would not otherwise be able to appeal in the future. This contention is refuted by the Supreme Court's decision last Term in Clinton v. Jones, 117 S.Ct. 1636, 1651 n.41 (1997), which expressly approved the exercise of pendant appellate jurisdiction over an appeal from an otherwise nonappealable order staying trial -- an order that also would never have been independently appealable in the future, since it would necessarily be moot by the time final judgment issued. As in Clinton, pendant appellate jurisdiction is appropriate here because Mr. Carter's appeal is inextricably intertwined with the appeals brought by Ms. Lewinsky and by OIC, so that fairness and judicial economy favor adjudication of all three appeals together.

With respect to pragmatic finality, OIC is also wrong in asserting that In re Grand Jury Proceedings, 841 F.2d 230 (8th Cir. 1988), is inapplicable. OIC contends that the Eighth Circuit's standard for when *the client* can appeal an order like the one on review contravenes this Court's precedents. But the issue here is not whether the client can appeal -- OIC concedes that -- but whether, assuming that the client can and does appeal, the attorney also can. Grand Jury correctly held that there is no reason not to exercise jurisdiction over the latter appeal once the former is properly pending. Id. at 233. That holding is directly applicable here, and none of this Court's precedents suggest that it is not correct.

CONCLUSION

For the reasons explained in Mr. Carter's and Ms. Lewinsky's briefs in this Court, the district court's order denying the motion to quash subpoenas must be reversed.

Respectfully submitted,



Charles J. Ogletree, Jr.
#272658
Jamie S. Gardner
#375811
Harvard Law School, Hauser 320
Cambridge MA 02138
617-495-5097
Attorneys for Appellant,
Francis D. Carter

CERTIFICATE OF NUMBER OF WORDS

I hereby certify that the foregoing brief, prepared in WordPerfect for Windows 6.1, complies with this Court's order concerning length of briefs in this appeal.

Charles J. Ogletree, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 1998, two copies of the foregoing Reply Brief for Appellant, Francis D. Carter, Esquire, were served by hand, upon:

Robert Bittman
Joseph Ditkoff
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Nathaniel Speights, Esquire
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

and by Federal Express, overnight, upon:

William Ginsburg, Esquire
Ginsburg, Stephan, Oringher & Richman
10100 Santa Monica Blvd.
Los Angeles CA 90067

Charles J. Ogletree, Jr.

In The United States Court of Appeals For The District Of Columbia Circuit

No. 98-3052
Consolidated with Nos. 98-3053, 98-3059
September 1997, Term

In Re: Sealed Case, No. 98-3052

On Appeal From The United States District Court
For The District Of Columbia
Misc. Action No. 98-068 (NH)

REPLY BRIEF OF APPELLANT MONICA LEWINSKY

SPEIGHTS & MITCHELL
NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Appellant MONICA LEWINSKY

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

SPEIGHTS & MITCHELL
Nathaniel H. Speights
(D.C. Bar No. 952036)
1511 K Street, Northwest
Suite 811
Washington, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
William H. Ginsburg
Harry W.R. Chamberlain II
(D.C. Bar No. 439182)
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067-4012
(310) 557-2009

Attorneys for Appellant/Appellee MONICA LEWINSKY

OFFICE OF THE INDEPENDENT COUNSEL
Kenneth W. Starr
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Attorneys for Appellant/Appellee OFFICE OF THE INDEPENDENT COUNSEL

Professor Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
(617) 498-5097

Attorney for Appellant/Appellee FRANCIS D. CARTER, ESQ.

(B) Rulings Under Review

Order filed March 31, 1998 and Memorandum Opinion filed March 31, 1998, Amended Memorandum Opinion filed April 28,1998 -- In re: Grand Jury Proceedings, U.S. District Court No. Misc. 98-59 (NHJ) (Under Seal) granting in part and denying in part motions relating to subpoenas issued to Francis D. Carter, Esq. former attorney of Monica Lewinsky for testimony and production of documents

(C) Related Cases

- *In Re Sealed Case* No. 98-302 Appeal of Monica Lewinsky
- *In Re Sealed Case* No. 98-3053 Appeal of Francis D. Carter, Esq. (former counsel for Monica Lewinsky)
- *In Re Sealed Case* No. 98-3059 Appeal of the Office of Independent Counsel

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GLOSSARY

"APP" shall refer to Appellant's Appendix of Monica Lewinsky

"RJN" shall refer to Request For Judicial Notice of Appellant Monica Lewinsky

"R.T." shall refer to The Reporter's Transcript of the March 4, 1998 Hearing in the District Court

I.

REPLY ARGUMENT

A. The OIC Misstates And Misapplies The Elements Of The "Perjury" And "Obstruction Of Justice" Charges It Asserts Should Justify Application Of The Crime-Fraud Exception

The OIC's crime-fraud argument position is pure tautology. The purported "crimes" the OIC argues Ms. Lewinsky committed "in furtherance" of her consultation of Mr. Carter as an attorney, happened to be the very "crimes" with which the OIC has targeted for her investigation.

Contrary to the OIC's view the syllogism does not hold. The "materiality" element of perjury requires, that the witnesses have the ability to influence the decision making process of the trier-of-fact. The Fourth Circuit stated the rule applicable here:

> We reach the inescapable conclusion that Littleton testified to nothing at the suppression hearing that could have conceivably influenced the district court to suppress her son's confession. Her testimony was, therefore, ***immaterial*** to the court's inquiry, and, as a result, her perjury conviction must be reversed.
>
> *U.S. v. Littleton*, 76 F.3d 614, 617-618 (4th Cir. 1996); accord *U.S. v. Adams*, 870 F.2d 1140, 1147 (6th Cir. 1989) (Test is whether based upon the issues-in-suit "a truthful statement might have assisted or influenced the tribunal in its inquiry").

As a matter of law, the government could not sustain its "burden of establishing materiality. . . " *Ibid.* As *Littleton* holds, where the "actus reus" of the OIC's obstruction of justice charge "what also must additionally be proven is that the [allegedly] false statements given, in some way, either obstructed or were intended to obstruct the due administration of justice." *Littleton*, 76 F.3d at 618. Nothing more has been demonstrated on this record regarding Ms. Lewinsky's intentions in consulting Mr. Carter than she wanted to keep her private life private. The district court in the *Jones* Action aptly concluded that nothing she could

say would have had any influence on the outcome of the sexual harassment claims against President Clinton. (RJN at 9-11.)

B. The OIC's Secret In Camera Submission Of "Evidence" To The District Court Failed To Satisfy *Zolin's* 3-Part Test

The government's in camera proffer to the district court met none of the elements of the 3-part test stated by the Supreme Court in *U.S. v. Zolin*, 491 U.S. 554, 575. The "evidence" does not establish the element of a crime (hence is not "relevant"); it was not "lawfully obtained," and as the district court pointed out it is undisputed "among the parties that the attorney-client privilege would ordinarily apply to communications between Mr. Carter and Ms. Lewinsky and that the work product doctrine would normally apply to the documents prepared by Mr. Carter during his representation of Ms. Lewinsky." (APP 32.) There is no plausible justification for the government's use of the illegally-obtained "Tripp tapes" obtained in violation of Title III and Maryland law. *Gelbard v. U.S.*, 408 U.S. 41, 50-51 (1972); *U.S. v. Vest*, 813 F.2d 477, 483 (1st Cir. 1987). Regardless of the federal agency's "intent" Title III does not authorize government wire taps for investigation of possible charges of "perjury" or "obstruction of justice." *Ibid.*

The OIC has cynically employed an "ends justifies the means approach" to this entire investigation; using Ms. Lewinsky's "friend" Linda Tripp to secretly record their conversations, then luring her to the Ritz Carlton hotel where the OIC "planned" the activities of January 16, 1998 (which like all of the other activities that occurred up until the Ritz Carlton meeting had never been authorized by any court or official government agency).[1/] Once behind closed

---

1/ The jurisdiction and authority of the OIC is limited by the Ethics in Government Act and cannot be "waived" (28 U.S.C. §§ 591, et. seq.) either the OIC was authorized to act when it did, or it was not.

doors, experienced FBI agents and prosecutors made clear that the terms for their proposed immunity deal were "being made to *her*, not her attorney. . . " (Irons Decl., ¶ 2; Carter APP at A-345; Lewinsky's Brief of Cross-Appellee at 4-5.) Ms. Lewinsky affirmatively asserted her right to counsel several times, and each time without being read her rights, the government attorneys attempted to "steer the conversation in another direction. . . ." (Michael Emmick Decl., ¶¶ 10-11, Carter APP at A-329 to A-330.)

This young woman was surrounded for 10 hours by government agents who admit that she was "nearly hysterical with tears" for over an hour. She was told by those agents that if she left, she and members of her family, could be prosecuted for perjury and obstruction of justice. That is the government's definition of "non custodial" questioning.

Fortunately for the citizens of this country, another definition applies under the Fourth, Fifth and Sixth amendments of the Constitution. *Chandler v. U.S. Army*, 125 F.3d at 1296, 1304 (9th Cir. 1997) (Lewinsky Opening Brief at 14-16; Lewinsky's Brief of Cross-Appellee at 14-15).

C. The Government May Not Rely Upon A Secret In Camera Presentation To Abridge Ms. Lewinsky's Rights And Privileges

Where would Ms. Lewinsky find the "evidence" that the government says justifies application of the crime-fraud exception? She wouldn't find it anywhere because it was all submitted in secret, in camera, without the right of review or rebuttal. (OIC Oppos. Brief at 7.)

Obviously, Ms. Lewinsky cannot know what she does not know. The OIC's argument that the materials were necessarily submitted *ex parte* pursuant to the secrecy provisions of Fed. R. of Crim. Proc. Rule 6(e) fails under *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). *Douglas* permits disclosure of 6(e) material to a party who has demonstrated a

particularized need for the information. A particularized need, exists when the individual seeking disclosure has shown (1) the material sought is needed to avoid a possible injustice in another judicial proceeding, (2) the need for disclosure is greater than the need for continued secrecy, and (3) the request is structured to obtain only the material needed. *Id.*, at 219 & n.10.

While *Zolin* permits in-camera review in *some* grand jury proceedings (provided the "evidence" submitted is relevant, "lawfully obtained," and not privileged), the Supreme Court noted that commentators have criticized the practice of allowing the *prima facie* standard to be used to "dispel the privilege altogether without affording the client an opportunity to rebut the *prima facie* showing." 491 U.S. at 564, fn. 7. The high court lamented that some courts "have allowed themselves to be led in holding that only a superficial, one-sided showing is allowable on any admissibility controversy." *Ibid.*

Consequently, the weight of well-reasoned authority among the circuits following *Zolin* have adopted procedures allowing the party asserting the privilege to rebut the opponent's *prima facie* showing of any crime-fraud exception. *Haines v. Liggett Group, Inc.*, 795 F.2d 81, 97 (3d Cir. 1992) ["the importance of the privilege . . . as well as fundamental concepts of due process require the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking the exception to the privilege"]; *In The Matter Of Feldberg*, 862 F.2d 622, 626 (7th Cir. 1988) [party asserting the privilege must have an opportunity for rebuttal].

Ms. Lewinsky had no such opportunity. Her counsel's request for production of the secret proffer was denied. (APP 11, First Order.) In this regard, her rights were doubly violated. She could not examine and rebut any "evidence" submitted through Ms. Tripp; an individual who secretly tape-recorded twenty hours of conversations with her "friend" Monica

Lewinsky, while motivated by the lucrative prospects of a "book deal" fueled by the rumors and innuendo surrounding this case. At a minimum, before Ms. Lewinsky and her counsel may be required to suffer the loss of substantial constitutional rights and privileges, she should be entitled to examine and rebut the purported "evidence" submitted by the OIC to justify that outcome.

II.

CONCLUSION

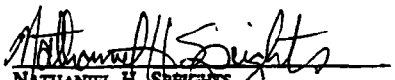
The constitutional protections afforded to all Americans, including Monica Lewinsky, are premised on the assumption that all power tends to corrupt, and there "are times when the judgment of even the most highly qualified and virtuous of prosecutors -- perhaps especially they -- will yield to an excess of zeal":

> One thinks of the Massachusetts men who, in an age not so very far removed from our own, prosecuted witches. *Adams*, 840 F.2d at 1145.

Acting in excess of the limited grant of authority received from the Special Division, the record discloses that an order to secure the "cooperation" of Monica Lewinsky to engage in illegal tape recording of the President and Vernon Jordan, the OIC itself was prepared to engage in "illegal search and seizures, wire tapping, false arrest and the third degree, it is a type of lawless law enforcement." *Sherman v. U.S.*, 356 U.S. 369, 378 (1958) (Frankfurter, J. con. opn. *citing* Donnelly, *Judicial Control of Informants, Spys, Stool Pigeons, and Agent Provacaturs*, 60 Yale L.J. 1091, 1111-1112 (1951). Enforcement of the law "by lawless means . . . goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice . . . is the transcending value at stake." *Id.*, at 380.

There is no legal justification for the improper means employed by the government to obtain the dubious ends of the OIC's investigation. The crime-fraud exception does not apply in this case, and the subpoenas issued to Mr. Carter should be quashed.

Respectfully submitted this 15th day of May 1998,

By: 

NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)
SPEIGHTS & MITCHELL
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Appellant MONICA LEWINSKY

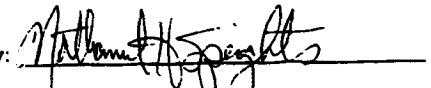
CERTIFICATE OF SERVICE

The undersigned, as one of the counsel of record herein for Appellant Monica Lewinsky, certifies pursuant to D.C. Circuit Rule 28(d) that Appellant's Reply Brief was prepared on a Word Perfect 5.1 word processing system using standard typographic printing in typeface of 12 points in height. The word count for the within Appellant's Reply Brief is 1996, excluding the cover, tables, certificates and addenda.

I further certify that I caused to be served via hand delivery to the addressees listed below, REPLY BRIEF OF APPELLANT MONICA LEWINSKY, on this the 15th day of May, 1998, as follows:

OFFICE OF THE INDEPENDENT COUNSEL
Kenneth W. Starr
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
Telephone 202-514-8688

Professor Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
Telephone 617-498-5097

By: 

NATHANIEL H. SPEIGHTS
(D.C. BAR NO. 952036)

OF COUNSEL:

SPEIGHTS & MITCHELL
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for Appellant MONICA LEWINSKY

In The United States Court of Appeals
For The District Of Columbia Circuit

No. 98-3052
Consolidated with Nos. 98-3059, 98-3053
September 1997, Term

In Re: Sealed Case, No. 98-3052

On Appeal From The United States District Court
For The District Of Columbia
Misc. Action No. 98-068 (NH)

MOTION TO NIGHT FILE REPLY BRIEF OF MONICA LEWINSKY

COMES NOW Monica Lewinsky and moves this Court for an Order allowing acceptance of her Reply Brief Night filed with the Court after 4:00p.m. Friday May 15, 1998 and in support thereof does state as follows:

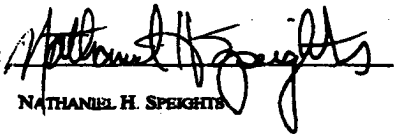
1. Due to Messenger and Production problems the Messenger Service was delayed on Friday May 15, 1998 and delivered the Reply Brief after 4:00p.m. All parties received copies on May 15, 1998.

2. All parties were contacted to seek consent to this motion.

3. No party is disadvantaged as no rejoinder is permitted to a reply brief.

Wherefore, Monica Lewinsky prays this Honorable Court allow the acceptance by Clerk of the Court of the night filed Reply Brief.

Respectfully submitted this 19th day of May 1998,

By: 

NATHANIEL H. SPEIGHTS

(D.C. BAR NO. 952036)
SPEIGHTS & MITCHELL
1511 K STREET, NORTHWEST
SUITE 811
WASHINGTON, D.C. 20005
(202) 783-6300

GINBURG, STEPHAN, ORINGHER
& RICHMAN, P.C.
WILLIAM H. GINSBURG
HARRY W.R. CHAMBERLAIN II
(D.C. BAR NO. 439182)
10100 SANTA MONICA BLVD., 8TH FLOOR
LOS ANGELES, CALIFORNIA 90067-4012
(310) 557-2009

Attorneys for MONICA LEWINSKY

CERTIFICATE OF SERVICE

I HEREBY certify that I caused to be served via hand or telecopy delivery to the addressees listed below, **MOTION TO NIGHT FILE REPLY BRIEF OF MONICA LEWINSKY**, on this the 19th day of May, 1998, as follows:

OFFICE OF THE INDEPENDENT COUNSEL
Kenneth W. Starr
Robert J. Bittman
Joseph M. Ditkoff
Terrence J. Galligan
Rodger A. Heaton
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
Telephone 202-514-8688

Professor Charles J. Ogletree, Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138
Telephone 617-498-5097

By:
NATHANIEL H. SPEIGHTS

UNDER SEAL

ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF CROSS APPELLANT UNITED STATES

KENNETH W. STARR
Independent Counsel

ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

Attorneys for Appellee-
Cross Appellant

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Car.App.	Appendix of Francis D. Carter, Esq.
Car.Br.	Appellant Brief of Francis D. Carter, Esq.
Car.Cr.Br.	Cross Appellee Brief of Francis D. Carter, Esq.
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
Lew.Br.	Appellant Brief of Monica Lewinsky
Lew.Cr.Br.	Cross Appellee Brief of Monica Lewinsky
OIC	Office of the Independent Counsel
RJN	Request for Judicial Notice of Monica Lewinsky
U.S.Br.	Cross Appellant Brief of the United States

ORAL ARGUMENT NOT SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-3052, 98-3053, 98-3059

IN RE: SEALED CASE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF CROSS APPELLANT UNITED STATES

STATEMENT OF THE CASE

Although only marginally relevant to the issues in this appeal, Lewinsky presents a lengthy and selective version of the events of January 16, 1998, presumably in an attempt to demonstrate that the OIC engaged in misconduct and therefore must have issued unreasonable subpoenas. Her presentation of the "facts" is replete with inaccuracies and misleading statements.[1] Contrary to her assertions, she was neither in custody nor unduly coerced.

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[1] For a full and accurate recitation of the events, see Car.App. 317-55.

Lewinsky was repeatedly told that she was not under arrest and was free to leave at any time. When Lewinsky asked what would happen if she wanted to contact an attorney, she was told that she was free to call whomever she wished. She understood this, as demonstrated by the fact that she left the presence of OIC members for about twenty minutes and made several unsupervised phone calls. *See* App. 34-35.

At no point was she told by anyone that she could not contact Carter. In fact, when Lewinsky asked how she could contact Carter if she wished to do so, an FBI agent called Carter's office and learned that Carter had left town and that no forwarding number was available, but that he might be reachable through his answering service.

Lewinsky met with her mother, called her father, and contacted an attorney recommended by her father. After considering all of the evidence, the district court found that the interview of Lewinsky was non-custodial, *see* App. 31, and that, in the course of the interview, the OIC did not disrupt Lewinsky's relationship with counsel, *see* App. 34-35.

SUMMARY OF ARGUMENT

Nothing in the two cross appellee briefs rebuts the fundamental fact that, under *Fisher v. United States*, 425 U.S. 391, 404 (1976), a lawyer may not refuse to produce documents

voluntarily given him by a client in the absence of a valid claim of an attorney-client relationship. Because the district court misapprehended this legal standard, that part of the decision must be reversed.

This argument was raised in the district court. The *Jones* subpoena compelled Lewinsky to turn over materials to the litigants, not to Carter. The materials fall within the scope of the crime-fraud exception because they are reasonably related to the subject matter of Lewinsky's crimes. Finally, Lewinsky's constructive possession argument is wrong both as a matter of law and of fact.[2]

ARGUMENT

I. IN THE ABSENCE OF A VALID CLAIM OF ATTORNEY-CLIENT PRIVILEGE, LEWINSKY'S FIFTH AMENDMENT RIGHT DOES NOT BAR THE PRODUCTION OF MATERIALS SHE GAVE TO CARTER.

A. The legal issue the United States raises on appeal was presented to the district court.

Contrary to Carter's argument, *see* Car.Cr.Br. 5-8, the United States presented to the district court its legal argument that Carter cannot invoke Lewinsky's privilege against self-incrimination in the absence of a valid claim of attorney-client privilege. In our Opposition, the United States answered

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[2] Much of Lewinsky's brief improperly argues her issues as appellant, not as cross appellee. *See* Lew.Cr.Br. 8-12. The United States responded to these arguments in its appellee brief.

Carter's derivative Fifth Amendment claim with a three-page discussion of *Fisher v. United States*, 425 U.S. 391, 405 (1976). *See* Car.App. 233-35.

The United States argued "that an attorney cannot directly invoke a client's privilege against compelled self-incrimination, but -- to much the same end -- can raise the client's privilege indirectly through assertion of attorney-client privilege." Car.App. 234. The United States then noted that a necessary prerequisite to Carter's claim is that the "client must have provided the materials 'for the purpose of obtaining legal advice.'" Car.App. 234 (quoting *Fisher*, 425 U.S. at 405). This is precisely our argument in this cross-appeal.

The other prerequisite, we noted in our Opposition, was that the client must have had a Fifth Amendment right not to produce the materials had she retained them. *See* Car.App. 234 (citing *Fisher*, 425 U.S. at 405). The rest of the discussion in the Opposition focused on *Fisher's* second prong. *See* Car.App. 234-35. Because nearly all of the preceding six pages were devoted to explaining why the crime-fraud exception vitiated the privilege, *see* Car.App. 223-34, it was unnecessary to explore the first prong further in this part of the filing. Instead, because of the possibility that the district court might rule that the crime-fraud exception did not apply, we focused on the second prong.

It is for this reason that the United States stated, after laying out the necessity for a valid privilege, "[t]he question, then, is whether the OIC could have subpoenaed the items from Ms. Lewinsky before she turned them over to Mr. Carter." Car.App. 234. Although we thought it unnecessary to belabor the crime-fraud point, the United States unambiguously argued that a derivative Fifth Amendment claim must be based on the attorney-client privilege — specifically, that the client must have turned over the materials for the purpose of obtaining legal advice.

In any event, this Court has discretion to hear a forfeited argument in the interest of justice. *See, e.g., Hormel v. Helvering*, 312 U.S. 552, 557 (1941).[3] This is particularly true where, as here, the issue is a question of law. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984) (acknowledging the Court's discretion to consider a forfeited question of law but declining to do so in light of the complexity of the legal claim).

Here, the issue raised by the United States is simply whether, under *Fisher*, Carter can invoke his client's Fifth Amendment privilege in the absence of a valid claim of attorney-

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[3] *Accord, e.g., White v. United States Dep't of the Army*, 720 F.2d 209, 211 (D.C. Cir. 1983) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.") (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

client privilege — a purely legal issue. There are no factual questions other than the existence of the privilege, which was argued extensively in the district court. To the extent, therefore, that this argument was forfeited, the Court should exercise its discretion and review it.

B. The *Jones* subpoena did not compel Lewinsky to transfer materials to Carter.

Carter asserts that, because the *Jones* subpoena *compelled* Lewinsky to transfer incriminating materials to Carter, the Fifth Amendment protected Lewinsky from having Carter compelled to produce them. In making this argument, Carter concedes that materials *voluntarily* surrendered by a client to an attorney do not implicate the Fifth Amendment because the "ingredient of personal compulsion" is lacking. Car.Cr.Br. 10 (distinguishing *Fisher* and *Couch*). Carter's novel argument, however, fails because the civil subpoena in the *Jones* case did not compel Lewinsky to transfer materials to her attorney.

At the time Lewinsky was served with the civil subpoena, she was compelled to produce the responsive materials to the *Jones* litigants or invoke a privilege. *See Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). Instead, she voluntarily turned them over to her attorney and used his services and her perjured testimony to resist complying with the subpoena. As the subpoena did not require her to turn over materials to Carter, she waived her Fifth Amendment rights by doing so. *See Fisher*, 425 U.S. at

397.[4]

In turning over these materials to Carter, Lewinsky was not complying with the *Jones* subpoena. In fact, she had no intention of complying. Her entire purpose in retaining Carter was to avoid compliance and to mislead the Court in the *Jones* action.

C. The subpoenaed materials fall within the scope of the crime-fraud exception, because they are reasonably related to the subject matter of Lewinsky's crimes.

This Court has established a two-pronged test for determining whether a particular document or communication falls within the crime-fraud exception to the attorney-client privilege. First, the government must make its *prima facie* case of a crime. Second, the government must "establish some relationship between the communication at issue and the *prima facie* violation." *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985);[5] *see In re Sealed Case*, 676 F.2d 793, 814-15 (D.C. Cir. 1982) ("Second, the court must find some valid relationship between the work product under subpoena and the *prima facie*

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[4] Under *Fisher*, incriminating materials voluntarily turned over to an attorney may be protected from disclosure by the attorney-client privilege. Here, however, the crime-fraud exception vitiates any such privilege. *See* U.S.Br. 9-12.

[5] The crimes involved in *Sealed Case* were perjury and obstruction of justice, and the government used an *in camera* submission to make its *prima facie* case. *See id.* at 398. This Court also found that perjury and obstruction of justice were sufficiently serious to vitiate the privilege. *See id.* at 401.

violation.").[6] This Court has also defined the term "valid relationship": "A finding that the work product reasonably relates to the subject matter of the possible violation should suffice." *Sealed Case*, 676 F.2d at 815.

The United States easily meets this standard. As the district court correctly found, the United States has established a *prima facie* case that Lewinsky used Carter's services to commit perjury and obstruction of justice. *See* App. 20. Lewinsky's perjured affidavit was intended to induce Judge Wright to quash a subpoena, thereby depriving the court and the litigants of relevant evidence. Similarly, her obstruction of justice consisted, *inter alia*, of attempting to conceal evidence, held both by her and by Linda Tripp, in the *Jones v. Clinton* case. For both crimes, the subject matter is Lewinsky's desire to conceal evidence from the court and the litigants in the *Jones* case, specifically by using perjured testimony to convince the court to quash the subpoena.

The collection of materials that would have been "in compliance with the subpoena," Car.Cr.Br. 12, is reasonably related to this subject matter. In fact, an evaluation of the materials responsive to the subpoena was helpful to Lewinsky's

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[6] *Accord In re Sealed Case*, 124 F.3d 230, 234 (D.C. Cir. 1997) ("even communications made in confidence in the search for legal advice are unprotected if they *relate* to future illegality") (emphasis added), *cert. granted sub nom. Swidler & Berlin v. United States*, 118 S. Ct. 1358 (1998).

objective of concealing that evidence, along with her testimony, from the court and the litigants.

This is not a case of "nebulous distinction[s]" between related and unrelated evidence requiring a "question-by-question determination." *Sealed Case*, 754 F.2d at 403. Instead, the court can make the determination that the subpoenaed materials are related to the subject matter of the crimes without considering each document.[7]

D. Lewinsky cannot show that she retains her Fifth Amendment right after voluntarily transferring her documents to Carter.

Lewinsky espouses a theory of constructive possession, *see* Lew.Cr.Br. 12-15, that was not relied upon by the district court in reaching its decision, and that is not supported by the facts or law. The Supreme Court squarely rejected this argument, except in those situations "where constructive possession is so clear or relinquishment of possession so temporary and insignificant." *Fisher*, 425 U.S. at 398. The instant materials have been in Carter's possession for four months and there is no reason to believe that they will be returned to Lewinsky soon.

Lewinsky relies on *United States v. Guterma*, 272 F.2d 344, 345-46 (2d Cir. 1959), in which the defendant had stored personal

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[7] Even if each document had to be examined, this argues for reversal and remand, not affirmance. Because the district court adopted a broad theory of the Fifth Amendment, it did not determine whether the subpoenaed documents were relevant to the subject matter of Lewinsky's crimes.

records in a safe, to which only he and his co-defendant knew the combination, kept at his company's offices. The court there based its finding of a Fifth Amendment right on the limited access: "Most significant is [the company's] lack of access to the safe." *Id.* at 346. By contrast, Lewinsky released control and access to her property to Carter in an effort to obstruct justice. Accordingly, her criminal behavior and her voluntary release of control over her property defeats any claim of Fifth Amendment protection.[6]

Similarly, *Lefkowitz v. Turley*, 414 U.S. 78, 79 (1973), has no application to the instant facts. There, two architects faced substantial economic sanctions if they failed to testify. The Supreme Court struck down the statute imposing this penalty, reasoning that a "waiver secured under threat of substantial economic sanction cannot be termed voluntary." *Id.* at 82-83. By contrast, Lewinsky faced no threat of economic sanctions when she decided to turn materials over to Carter in her effort to resist compliance with the subpoena through perjury and obstruction of justice. Indeed, she faced no sanction at all.

II. **THE MANDATE SHOULD ISSUE PROMPTLY.**

This Court has stated that it should issue the mandate with the opinion when (1) it would not change its decision on panel or

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[6] In addition, the Supreme Court has cast doubt on the continued viability of *Guterma*. *See Couch v. United States*, 409 U.S. 322, 335 n.16 (1973).

en banc rehearing and (2) there is no "reasonable likelihood" of Supreme Court review. *Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). Even if this Court issues the mandate with its opinion, it may always recall the mandate and rehear the case. *See id.* at 416.

If the Court decides not to issue the mandate immediately, we respectfully urge it to reduce the time for issuance to no more than three court days after the opinion is released. *See* FED. R. APP. P. 41(a) (stating that the Court may shorten the time for the issuance of the mandate for good cause).[9] Because of the need to expedite this appeal, the Court has ordered a ten-day briefing schedule. Allowing the normal fourteen days for drafting a petition for rehearing, *see* FED. R. APP. P. 40(a), would be inconsistent with this need. If the parties can draft reply briefs in thirty-one hours, they can draft petitions for rehearing in three days. In the event of a rehearing request, the United States respectfully requests that the mandate issue with a denial of rehearing.

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[9] Lewinsky's assertion that the public interest cannot be a factor in whether to shorten the time for issuance of the mandate, *see* Lew.Cr.Br. 15-16, is unsupported by law or common sense.

CONCLUSION

For all the foregoing reasons, the United States respectfully requests that this Court reverse that part of the district court's order allowing Carter to withhold certain materials responsive to the grand jury subpoenas and to issue the mandate promptly.

Respectfully submitted,

KENNETH W. STARR
Independent Counsel

ROBERT J. BITTMAN
Deputy Independent Counsel

JOSEPH M. DITKOFF
TERRENCE J. GALLIGAN
RODGER A. HEATON
Associate Independent Counsel

Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

May 15, 1998

CERTIFICATE OF SERVICE AND WORD COUNT

I hereby certify that this brief contains no more than 2500 words (as specified in this Court's order of May 5, 1998).

Joseph M. Ditkoff
Associate Independent Counsel

I hereby certify that two true and correct copies of the foregoing brief were served via hand delivery on this the 15th day of May, 1998 to:

Nathaniel H. Speights, Esq.
Speights & Mitchell
1511 K Street, N.W.
Suite 811
Washington, D.C. 20005

Francis D. Carter, Esq.
Suite 510
Colorado Building
1341 G Street, N.W.
Washington, D.C. 20005

and via facsimile and Federal Express Saturday delivery on this the 15th day of May, 1998, to:

Prof. Charles J. Ogletree, Jr., Esq.
Harvard Law School
320 Hauser Hall
Cambridge, MA 02138

J. Forrest Norman

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3052 **September Term, 1997**
98ms00068

In re: Sealed Case, No. 98-3052

Consolidated with 98-3053, 98-3059

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
MAY 20 1998
CLERK

ORDER

Upon consideration of the motion of Francis D. Carter, Esq., appellant in case No. 98-3053 for permission for Jamie S. Gardner, Esq. to be admitted to this case *pro hac vice* on his behalf, it is

ORDERED that the motion be granted.

FOR THE COURT:
Mark J. Langer, Clerk

BY: John T. Haley
Deputy Clerk

United States Court of Appeals UNDER SEAL
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3052 **September Term, 1997**
98ms00068

In re: Sealed Case, No. 98-3052

Consolidated with 98-3053, 98-3059

BEFORE: Ginsburg, Randolph and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for leave to file brief reply brief, out of time, and of the lodged reply brief, it is

ORDERED that the motion be granted and the Clerk is directed to file the lodged reply brief.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Linda Jones
Deputy Clerk

UNITED STATES COURT OF
FOR DISTRICT OF COLUMBIA
FILED
MAY 26 1998
CLERK

UNDER SEAL - RETURN TO VAULT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pursuant to the provisions of Fed. R. App. Pro. 41(a)
6/3/98
BY: E. Brown
ATTACHED: Amending Order
Opinion
Order on Costs

No. 98-3052

September Term, 1997
98ms00068

In re: Sealed Case, No. 98-3052

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED
MAY 26 1998
CLERK

Consolidated with 98-3053, 98-3059

BEFORE: Ginsburg, Randolph and Tatel, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part in Nos. 98-3052 and 98-3059, and the cases are remanded, and No. 98-3053 is dismissed, all in accordance with the opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Linda Jones
Linda Jones
Deputy Clerk

Date: May 26, 1998
Opinion for the Court filed by Circuit Judge Randolph.

UNDER SEAL - RETURN TO VAULT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNDER SEAL

Filed May 26, 1998

No. 98-3052

IN RE: SEALED CASE

Consolidated with
Nos. 98-3053 & 98-3059

Appeals from the United States District Court
for the District of Columbia
(98ms00068)

Nathaniel H. Speights filed the briefs for appellant Monica Lewinsky.

Charles J. Ogletree, Jr. filed the briefs for appellant Francis D. Carter, Esq.

Robert J. Bittman, Deputy Independent Counsel, filed the briefs for cross-appellant the United States.

Before: GINSBURG, RANDOLPH, and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: In 1997, Monica S. Lewinsky, a former White House intern, received a subpoena to produce items and to testify in *Paula Jones v. William Jefferson Clinton*, a civil matter then pending in the United States District

Court for the Eastern District of Arkansas. The subpoena requested, among other things, documents relating to an alleged relationship between President Clinton and Lewinsky and any gifts the President may have given her. Lewinsky retained Francis D. Carter, Esq., to represent her regarding the subpoena.

Carter drafted an affidavit for Lewinsky, which she signed under penalty of perjury. The affidavit, submitted to the Arkansas district court as an exhibit to Lewinsky's motion to quash the subpoena, states in relevant part:

> I have never had a sexual relationship with the President, [and] he did not propose that we have a sexual relationship . . .. The occasions that I saw the President after I left my employment at the White House in April, 1996, were official receptions, formal functions or events related to the U.S. Department of Defense, where I was working at the time. There were other people present on those occasions.

On January 16, 1998, at the request of the Attorney General, a Special Division of this Court expanded the jurisdiction of the Office of Independent Counsel to include "authority to investigate . . . whether Monica Lewinsky or others suborned perjury, 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*." Order of the Special Division, Jan. 16, 1998. On February 2 and 9, 1998, as part of that investigation, a grand jury issued subpoenas to Carter, the first for documents and other items, the second for his testimony. Carter

moved to quash the subpoenas, contending, *inter alia*, that the documents, testimony, and other items sought were protected from disclosure by the attorney-client privilege, the work-product privilege, and Lewinsky's Fifth Amendment privilege against self-incrimination. Lewinsky, as the real-party-in-interest, filed a response in support of Carter's motion. The United States opposed the motion, arguing among other things that the crime-fraud exception vitiated any claims of attorney-client or work-product privilege and that the Fifth Amendment did not bar production of the requested materials. The district court ordered Carter to comply with the two grand jury subpoenas except to the extent that compliance would "call for him to disclose materials in his possession that may not be revealed without violating Monica S. Lewinsky's Fifth Amendment rights."

Carter and Lewinsky argue in separate appeals that the district court erred in rejecting their motions to quash the grand jury subpoenas in their entirety. In its cross-appeal, the United States, through the Office of Independent Counsel, claims that the Fifth Amendment does not bar production of any of the materials the grand jury subpoenaed from Carter.

We dismiss Carter's appeal for want of jurisdiction. Well-settled law dictates that "one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest

the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States v. Ryan*, 402 U.S. 530, 532 (1971); *see Cobbledick v. United States*, 309 U.S. 323, 328 (1940); *In re Sealed Case*, 107 F.3d 46, 48 n.1 (D.C. Cir. 1997). Rather than risking contempt, Carter has sworn that he will comply with the subpoenas if ordered to do so.[1]

Our jurisdiction over Lewinsky's appeal is another matter. Lewinsky is the holder of the privilege. Given Carter's sworn declaration that he will give testimony if ordered, she is entitled to appeal the district court's ruling rejecting Carter's assertion of the privilege. *See In re Sealed Case*, 107 F.3d at 48 n.1.

The district court held that the crime-fraud exception to the attorney-client privilege applied. After reviewing the government's *in camera* submission, the court found that "Ms. Lewinsky consulted Mr. Carter for the purpose of committing perjury and obstructing justice and used the material he prepared for her for the purpose of committing perjury and obstructing justice."[2] Lewinsky tells us she could not have

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[1] In addition to adopting Lewinsky's arguments regarding the crime-fraud exception, Carter claims that the subpoenas are overbroad, unreasonable, and oppressive and that the district court's reliance on the Independent Counsel's *ex parte* submissions in enforcing the subpoenas violated due process. Contrary to Carter's contention, the issues he seeks to present are thus neither "virtually identical" to, nor "inextricably intertwined" with, those Lewinsky raises.

[2] The district court did not find, nor did the Independent Counsel suggest, any impropriety by Carter.

committed either crime: the government could not establish perjury because her denial of having had a "sexual relationship" with President Clinton was not "material" to the Arkansas proceedings within the meaning of 18 U.S.C. § 1623(a); and her affidavit containing this denial could not have constituted a "corrupt[] . . . endeavor[] to influence" the Arkansas district court within the meaning of 18 U.S.C. § 1503. Both of Lewinsky's propositions rely on the Arkansas district court's ruling on January 30, 1998, after Lewinsky had filed her affidavit, that although evidence concerning Lewinsky might be relevant, it would be excluded from the civil case under FED. R. EVID. 403 as unduly prejudicial, "not essential to the core issues in th[e] case," and to prevent undue delay resulting from the Independent Counsel's investigation.[3]

A statement is "material" if it "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." *United States v. Barrett*, 111 F.3d 947, 953 (D.C. Cir.), *cert. denied*, 118 S. Ct. 176 (1997). The "central object" of any materiality inquiry is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a

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[3] Lewinsky does not appear to contest directly the district court's finding that she made one or more false statements in her sworn affidavit. Even so, we have independently reviewed the *in camera* materials considered by the district court and conclude that sufficient evidence existed to support the court's finding.

natural tendency to affect, the official decision." *Kungys v. United States*, 485 U.S. 759, 771 (1988). Lewinsky used the statement in her affidavit, quoted above, to support her motion to quash the subpoena issued in the discovery phase of the Arkansas litigation. District courts faced with such motions must decide whether the testimony or material sought is reasonably calculated to lead to admissible evidence and, if so, whether the need for the testimony, its probative value, the nature and importance of the litigation, and similar factors outweigh any burden enforcement of the subpoena might impose. *See* FED. R. CIV. P. 26(b)(1), 45(c)(3)(A)(iv); *Linder v. Department of Defense*, 133 F.3d 17, 24 (D.C. Cir. 1998); *see generally* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2459 (2d ed. 1995). There can be no doubt that Lewinsky's statements in her affidavit were -- in the words of *Kungys v. United States* -- "predictably capable of affecting" this decision. She executed and filed her affidavit for this very purpose.

As to obstruction of justice, 18 U.S.C. § 1503 is satisfied whenever a person, with the "intent to influence judicial or grand jury proceedings," takes actions having the "natural and probable effect" of doing so. *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (citations and quotation marks omitted); *see United States v. Russo*, 104 F.3d 431, 435-36 (D.C. Cir. 1997). Our review of the *in camera* materials on which the district court based its decision convinces us that the government sufficiently

established the elements of a violation of § 1503. That is, the government offered "evidence that if believed by the trier of fact would establish the elements of" the crime of obstruction of justice. *In re Sealed Case*, 107 F.3d at 50 (citation and quotation marks omitted); *see In re Sealed Case*, 754 F.2d 395, 399-400 (D.C. Cir. 1985) (same).

Lewinsky maintains that the district court erred in treating, as admissible for *in camera* review, transcripts of taped conversations between Lewinsky and Linda Tripp. She relies on the following statement in *United States v. Zolin*, 491 U.S. 554, 575 (1989): "the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged." *Zolin*, and the statement just quoted, dealt with a rather different problem than the one presented here. Sometimes a party seeking to overcome the privilege by invoking the crime-fraud exception asks the district court to examine *in camera* the privileged material to determine whether it provides evidence of a crime. The issue *Zolin* addressed is under what circumstances a district court should undertake such *in camera* review. *Zolin's* answer, as the quotation indicates, was that the court should do so only when there has been a threshold showing through evidence lawfully obtained. *See In re Grand Jury Proceedings*, 33 F.3d 342, 350 (4th Cir. 1994). In this case, the district court reviewed *in camera* not the allegedly

privileged material, but other evidence intended to establish that the crime-fraud exception applied. In any event, even if *Zolin* applied, Lewinsky gains nothing from the decision. She maintains that the Tripp tapes were not "lawfully obtained" and therefore should not have been considered *in camera*. But the government satisfied its burden wholly apart from the Tripp tapes. Other government evidence -- consisting of grand jury testimony and documents -- established that the crime-fraud exception applied. Because that other evidence, if believed by the trier of fact, combined with the circumstances under which Lewinsky retained Carter, would establish the elements of the crime-fraud exception, there is no reason for us to consider her arguments about the tapes.[4]

Lewinsky raises other objections to the district court's decision, including the argument that production of the subpoenaed materials would violate her Fifth Amendment privilege against self-incrimination. Our resolution of the cross-appeal,

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[4] Lewinsky's brief suggests, in a short passage, that other evidence obtained by the grand jury is tainted by the alleged illegality of the Tripp tapes. *United States v. Calandra*, 414 U.S. 338 (1974), refused to extend the exclusionary rule -- and hence doctrines such as the fruit-of-the-poisonous-tree -- to grand jury proceedings. No grand jury witness may refuse to answer questions on the ground that the questions are based on illegally obtained evidence. *See* 414 U.S. at 353-55. It follows that regardless of the legality of the Tripp tapes, the grand jury did not unlawfully obtain the other evidence presented to the district court *in camera*.

discussed next, disposes of that claim. As to the remainder of Lewinsky's arguments, we have accorded each of them full consideration and conclude that none has merit.[5]

This brings us to the Independent Counsel's cross-appeal. The district court ruled that compelling Carter to produce materials his client gave him would violate Lewinsky's Fifth Amendment privilege because it would compel her to admit the materials exist and had been in her possession. The Supreme Court foreclosed that line of reasoning in *Fisher v. United States*, 425 U.S. 391 (1976). Documents transferred from the accused to his attorney are "obtainable without personal compulsion on the accused," and hence the accused's "Fifth Amendment privilege is . . . not violated by enforcement of the [subpoena] directed toward [his] attorneys. This is true whether or not the Amendment would have barred a subpoena directing the [accused] to produce the documents while they were in his hands." *Id.* at 398, 397; *see also Couch v. United States*, 409 U.S. 322, 328 (1973).

Regardless whether Lewinsky herself would have been able to invoke her Fifth Amendment privilege, *but see Andresen v. Maryland*, 427 U.S. 463, 473-74 (1976), the district court's refusal to order full compliance with the subpoenas could be

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[5] In her reply brief, Lewinsky argues for first time that the district court should have permitted her to examine the material the court reviewed *in camera*. This argument comes too late to be considered. *See Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991).

sustained only if the materials sought fell under a valid claim of attorney-client privilege. *See Fisher*, 425 U.S. at 403-05; *see also In re Feldberg*, 862 F.2d 622, 629 (7th Cir. 1988). But the district court held, correctly, that no valid attorney-client privilege existed. Under *Fisher*, the district court therefore should have denied the motions to quash in their entirety.[6]

Accordingly, we affirm in part and reverse in part the order of the district court and remand the case for proceedings consistent with this opinion. No. 98-3053 is dismissed. The mandate shall issue seven days after the date of this opinion. *See* FED. R. APP. P. 41(a); D.C. CIR. R. 41(a)(1); *Johnson v. Bechtel Assocs. Prof'l. Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1159 n.31 (D.C. Cir. 1983).

So ordered.

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[6] As respondent in the cross-appeal, Carter makes additional arguments against the applicability of the crime-fraud exception. But because the only issue in the cross-appeal is the applicability of the Fifth Amendment, Carter may not use the cross-appeal to press arguments we will not consider in his direct appeal. *See Grimes v. District of Columbia*, 836 F.2d 647, 651-52 (D.C. Cir. 1988).