

# ONLINE EXCHANGE



# The Scandal's Legal Coups And Gaffes

Now that the independent counsel's report on the Monica Lewinsky affair has been delivered to the House, and thousands of supporting documents have been made public, this unprecedented scandal has entered a new phase. So has the legal maneuvering, which is only expected to intensify as the possibility of impeachment looms.

But it took a lot of legal strategizing—some excellent, some flawed—to reach this remarkable point in our nation's history.

We asked lawyers who participate in Counsel Connect, the online service affiliated with Legal Times, to answer two questions:

What single decision or step taken by a lawyer in the case seemed especially well-timed, clever, successful, or sharp? And what single decision was particularly foolish, ill-timed, or poorly thought out?

Did the case turn on the Paula Jones deposition? On the Supreme Court's decision to permit the civil suit against President Bill Clinton to proceed? On Clinton's repeated denials under oath of a sexual affair with Lewinsky? Or on some other little-noticed stratagem?

What follows are some of their answers, excerpted from an ongoing online discussion:

**David Butler, Alpert & Levy, West Orange, N.J.:** I don't know if it was a lawyer, but whoever decided to send Monica Lewinsky to the same place where

known troublemaker Linda Tripp was parked should get the "Idiot of the Century" award.

**Bruce McAllister, Steel Hector & Davis, Miami:** The decision not to settle the [Paula] Jones case has to be the critical wrong decision for the Clinton camp. And [Kenneth] Starr's quick work at using [Monica] Lewinsky to obtain [Janet] Reno's consent to enlarge his jurisdiction was the key effort on that side.

**Terry Carr, Ferndale, Mich.:** [A mistake was made by] whoever decided to wait to bring up the ultimately successful motion to dismiss the Jones case on the basis [that there was] no harm to

her career. To my way of thinking, that could have been addressed much earlier and with less involvement of the president.

**Butler:** I've often wondered why the motion was delayed in that case. The best answer I can think of is that they were afraid of the public reaction to any argument that began with "assuming the allegations in the complaint are true..."

**Richard Zitrin, Zitrin & Mastro Monaco, San Francisco:** The worst gaffe by a lawyer is a no-brainer to me: President Clinton's initial insistence that



NEWSMAKERS / RICHARD ELLIS

AP/WIDE WORLD PHOTOS

he had no improper relationship with "that woman." He is a lawyer, after all, and it was the Big Gaffe.

The worst ethical gaffe? A tie, between Kenneth Starr and Kenneth Starr.

First, for the high-handed and inappropriate way he dealt with Monica Lewinsky in the first meeting, the one which was to be Lewinsky meeting Linda Tripp, but which turned into something close to an inquisition.

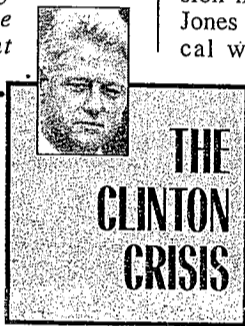
Unable to get her counsel, Lewinsky got her mother, and was, I recall the media saying, "comforted" by Tripp, of all people. No witness (and I don't accept her as a true target of Starr's investigation) should have been treated so shabbily.

The tie? A complete failure to appreciate that prosecutors, with their enormous power, must exercise that power in the interests of justice as well as in the interests of developing a case. While I question the purpose of several subpoenas, the one that stands out is Kramerbooks. I'd love to ask Starr and his colleagues whether they ever stopped to think about the consequences of this subpoena, raising important privacy and free speech issues, on a small family-run business trying to earn an honest living. That's part of doing

justice too, a point Starr still does not appear to appreciate.

**David Haron, Frank Stefani & Haron Troy, Mich.:** Easily the most significant gaffe was the failure of Clinton's lawyer to object to the Paula Jones deposition to instruct his/his client not to answer absent a ruling by the court. Given the ultimate ruling in the Jones case, it is likely that the objection would have been sustained and any issue of lying under oath, at least, would have been moot.

Equally as awful was the decision of the Supreme Court to let the Jones case go for



THE  
CLINTON  
CRISIS

## PARTICIPANTS

**JAMES M. BECK**, attorney at law, Philadelphia

**DAVID BUTLER**, partner, Alpert & Levy, West Orange, N.J.

**TERRY CARR**, solo practitioner, Ferndale, Mich.

**JAMES J. CORBELL**, partner, Lillick & Charles, San Francisco

**GARTH GERSTEN**, solo practitioner, Chapel Hill, N.C.

**DAVID HARON**, partner, Frank, Stefani & Haron, Troy, Mich.

**BRUCE McALLISTER**, partner, Steel Hector & Davis, Miami

**ARNOLD ROSENFELD**, bar counsel, Board of Bar Overseers, Boston

**DOM ROWE**, professor, Duke Law School, Durham, N.C.

**ALEXANDER SCHMIDT**, solo practitioner, New York

**RICHARD ZITRIN**, partner, Zitrin & Mastro Monaco, San Francisco

## ONLINE EXCHANGE FROM PAGE 12

ward because it was unlikely to unnecessarily burden the president's time. Unfortunately, none of the Supremes ever handled the defense of a difficult personal injury case!

**Arnold Rosenfeld, Board of Bar Overseers, Boston:** The biggest gaffe seems to me to be the apparent failure of the Clinton lawyers to make the point to him to take the time to sit down with them and let them question him thoroughly about, and investigate, what he had done.

They obviously had heard the name "Monica Lewinsky." Even if he told them that he had no relationship with her, they had a duty to pursue this line much more thoroughly than they did. After all, this wasn't the first liaison allegation he had denied. I suspect they were intimidated by the fact he was the president. It doesn't take a brilliant or experienced lawyer to realize that clients lie, even to their lawyers. But this doesn't absolve the lawyer of his or her duty to still protect the client.

Second, I agree with the statement already made that his lawyers should have instructed him not to answer any questions about any other women at the Paula Jones deposition without a court order. What were they thinking?

Third, this is a political matter more than a legal matter and the legal and political advisers can't seem to get together to come up with a coherent defense theory.

Starr, on the other hand, has made a brilliant move, I think, by attacking attorney-client privilege (thus far successfully), thus keeping Clinton's team from adopting a coherent policy because they don't know who he can talk to without danger.

**Alexander Schmidt, New York:** I agree with Richard [Zitrin] that the supreme gaffe was Clinton's denial of having had a relationship with Lewinsky.

The most astute lawyering may have been Robert Bennett's preparation of Clinton for the Monica-related sexual relations questions in the Jones case and, in particular, Bennett's objections to those questions when posed by the Jones lawyers at Clinton's deposition. Caveat: My comment refers to Bennett's astuteness as viewed from a pure legal tactics perspective as of the time those actions were taken. Obviously, in hindsight, Bennett's actions have backfired politically for his client.

**Garth Gersten, Chapel Hill, N.C.:** If I were Bennett, I would not have let Clinton testify about Monica at all in the Jones deposition. I would have stuck to my guns that it was not relevant, was designed only to embarrass the president, and have Clinton refuse to answer the questions. Eventually, the judge agreed that Lewinsky was irrelevant.

Second, I will give Bennett the benefit of the doubt and assume that Clinton did not tell him the truth about his relationship with Lewinsky. I don't know that, knowing the whole truth, Bennett would have believed Clinton's testimony was "legally correct" given the definition of "sexual relations." In that event, Bennett should have discussed with Clinton what the answer to the questions should have been. If Bennett did know more, then he erred in allowing Clinton to testify as he did.

**Tom Rowe, Duke Law School, Durham, N.C.:** I think I recall that the Jones and

Clinton legal teams may have been close to a settlement that would have involved a payment plus a carefully worded Clinton statement that didn't admit anything. The White House PR people couldn't resist trying to get out their version that this meant Clinton was innocent—or something like that—and that spooked the Jones side into withdrawing from the settlement negotiations.

If those recollections are more or less correct, the spinmeisters may have

**'The spinmeisters may have derailed an early settlement that would have spared us the present mess.'**

Tom Rowe

derailed an early settlement that would have spared us all the present mess. It was through later discovery in *Jones v. Clinton* that the Lewinsky affair came to light. Whether the president's lawyers could have headed off the White House politicians from premature disclosure of the settlement talks, I don't know; but if they might have and didn't, there was a lawyering gaffe as well as the political one.

Hasn't this been a continuing train wreck, with (1) an overreaching independent counsel who weakens his case by questionable investigative tactics (such as the Kramerbooks subpoena) and diluting his stronger charges (grand jury perjury) with weak ones (claiming privilege), and (2) a wheedling president who never missed an opportunity to miss an opportunity—repetition intended—to end the whole thing at relatively low cost?

Contrast this to what I recall to be [Watergate Special Prosecutor] Leon Jaworski's judicious judgment. . . . Starr's zealotry is giving a bad name to the independent counsel idea, which a dwindling minority of us may continue to think is at its core a good idea and in need of adjustment rather than being killed off, which now seems all too likely.

**James J. Corbelli, Lillick & Charles, San Francisco:** This doesn't quite fall under either heading, but some time ago I heard a lawyer on a talk show state that the smartest thing Clinton could have done in the Jones case was to default, citing an unwillingness to spend the time on a frivolous civil suit when he had the awesome task of heading the U.S. government, or some such spin.

The point she was making was that Jones then would have had to prove up damages, which she wasn't able to do, the publicity would have been largely minimized, discovery wouldn't have occurred, and Clinton's legal fees would have been minimal. I thought at the time it was an intriguing position but in hindsight it looks more and more brilliant. I wonder if his Jones attorneys are wishing they had done something along those lines.

**James M. Beck, Philadelphia:** The biggest coup would seem to be Starr's decision to wire Linda Tripp immediately, before he had any legal authority to do so. The results provided the basis for him to seek expansion of his mandate to cover Monica Lewinsky, and thus to be able to investigate what he had really wanted to investigate all along—the president's sex life. I consider it totally *ultra vires* and totally unethical, but it seems to have worked.

Biggest gaffe—easy. The president's "I didn't have sexual relations with that woman" statement on television. Any lawyer should know that lies are poison, and any politician should know that lies that can be shown on television are worse than poison. ■

## HOLLAND &amp; KNIGHT LLP

We are pleased to announce that

## Eugene M. Propper

Complex civil, commercial, and white collar litigation

## Martin J. Jaron, Jr.

Complex civil and commercial litigation

## Alan P. Vollmann

Commercial real estate

and

## Martin C. Calhoun

Complex civil litigation

have joined the firm as Partners

## Sharon K. Freiman

Commercial real estate

has joined the firm as Senior Counsel

and

## Christopher G. Margand

Commercial litigation

has joined the firm as an Associate

2100 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037  
(202) 955-3000  
(202) 955-5564 (Fax)

www.hklaw.com

Atlanta • Boca Raton • Boston • Fort Lauderdale • Jacksonville  
Lakeland • Melbourne • Mexico City • Miami • New York  
Northern Virginia • Orlando • St. Petersburg • San Francisco  
Tallahassee • Tampa • Washington, D.C. • West Palm Beach