

*Press
Office*

**A SUPPLEMENTAL REPORT ON THE
REPRESENTATION OF
MADISON GUARANTY SAVINGS & LOAN
BY THE
ROSE LAW FIRM**

Prepared For
FEDERAL DEPOSIT INSURANCE CORPORATION

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I. INTRODUCTION.

Pillsbury Madison & Sutro LLP ("PM&S") was retained by the Resolution Trust Corporation to assist in the investigation of possible civil claims against individuals and entities associated with Madison Guaranty Savings & Loan Association of McCrory, Arkansas ("Madison Guaranty"). As part of this investigation, PM&S was asked to investigate certain issues with respect to the legal services rendered to Madison Guaranty by the Rose Law Firm of Little Rock, Arkansas. The results of that part of the investigation are set forth in two reports dated December 28, 1995: *A Report on the Representation of Madison Guaranty Savings & Loan by the Rose Law Firm* (the "Rose Report"); and *A Report on the Rose Law Firm's Conduct of Accounting Malpractice Litigation Pertaining to Madison Guaranty Savings & Loan* (the "Frost Report").

On December 21, 1995, it was learned that the Rose Law Firm (and, in particular, Hillary Rodham Clinton) had prepared an option agreement for a portion of the land associated with the Castle Grande real estate project undertaken by Madison Guaranty's real estate subsidiary, Madison Financial Corporation ("Madison Financial"). The same day, a set of interrogatories pertaining to that subject and related matters were sent to Mrs. Clinton. The interrogatories were lengthy. It was not expected that Mrs. Clinton could answer them fully by December 31, 1995, the date which marked both the end of the RTC and the expiration of the statute of limitations applicable to most possible claims that the RTC could conceivably assert against the Rose Law Firm.

Because of this imminent deadline, the RTC's Acting Chief Executive Officer directed PM&S to negotiate a tolling agreement with the Rose Law Firm pertaining to Castle Grande. PM&S did so, obtaining a 30-day agreement (later extended to March 1, 1996).

Originally it was contemplated that the additional time would be used chiefly to analyze and follow up on the interrogatory answers. The discovery of Rose Law Firm billing records at the White House and the ongoing hearings before the Senate Special Committee on Whitewater both provided new information, however, that made it advisable to investigate certain matters more fully.

This supplemental report summarizes the scope and results of the investigation conducted since December 28, 1995.

II. NATURE AND SCOPE OF THE INVESTIGATION.

A. Sources of information.

As noted in the *Rose Report*, documents were subpoenaed from the Rose Law Firm and numerous other sources including the Arkansas Securities Department and President and Mrs. Clinton.¹ The Rose Law Firm produced approximately 49 banker's boxes of documents, of which approximately 44 banker's boxes pertained to the Frost & Company litigation of 1988-1991.² Most of the remaining documents pertained to services rendered before Madison Guaranty failed, or to services rendered to other clients on matters that fell within the scope of the subpoenas.

Also as noted, a number of witnesses were interviewed, approximately a dozen of which provided information with respect to the Rose Law Firm.³

1. The option and the interrogatories relating to it.

On December 21, 1995, counsel for the Rose Law Firm, responding to a question asked of them on December 19, 1995, disclosed that the Rose Law Firm and in particular Mrs. Clinton had prepared an option dated May 1, 1986 relating to a portion of Madison Financial's Castle Grande project.

On December 21, 1995, a set of interrogatories on this subject was sent to Mrs. Clinton. She answered these interrogatories on January 20, 1996.

1 The documents produced by the Rose Law Firm bear the prefixes "RIC" and "RLF2". Also cited frequently below are documents obtained from the Arkansas Securities Department (prefix "ASD"), from David E. Kendall, counsel to the President and Mrs. Clinton (prefix "DKRT"), and from the RTC's Kansas City office (prefix "RTCKC"). Also cited below is the Report of Investigation dated August 3, 1995 prepared by the RTC's Office of Inspector General with respect to the Rose Law Firm. For example, a citation to "IG Report at III-15" is a reference to page 15 of volume III. Similarly, a citation to "IG Ex. III-35, at 2" is a reference to page 2 of exhibit 35 to volume III.

2 The Frost & Company action, which is the subject of the *Frost Report*, originally was styled *Madison Guaranty Savings & Loan Association, et al. v. Frost & Company*, No. 88-1193 (Pulaski Cty. Cir. Ct.). After Madison Guaranty failed, the action was removed to United States District Court, and the Federal Deposit Insurance Corporation was substituted for the plaintiffs. The action then was styled *FDIC v. Frost & Company*, No. LR-C-89-0216 (E.D. Ark.). Later still the RTC was substituted for the FDIC, and the case became *RTC v. Frost & Company*, under the same docket number. Hereinafter, the case will be referred to as "*RTC v. Frost & Co.*" The Rose Law Firm did not enter the case until after the Federal Savings & Loan Insurance Corporation was appointed conservator for Madison Guaranty on or about February 28, 1989.

3 *Rose Report* at 1-2.

2. Rose Law Firm billing records.

On or about January 4, 1996, billing records pertaining to the Rose Law Firm's representation of Madison Guaranty were discovered at the White House. The records are responsive to the RTC's subpoena served on the Rose Law Firm in February 1994. The records also are responsive to the RTC's subpoenas served on President and Mrs. Clinton in June 1994.

On January 5, 1996, David E. Kendall, counsel to the President and Mrs. Clinton, sent PM&S a copy of these billing records.⁴ The records shed new light on work performed by the Rose Law Firm for Madison Guaranty in 1985 and 1986. Had they been available earlier, the records would have eased the task of determining what services the Rose Law Firm performed for Madison Guaranty. That task that was made more difficult by the absence of billing records and other records of the work performed, notably the absence of any files documenting the Rose Law Firm's work on the acquisition of Castle Grande.

3. Further interviews.

The billing records and other recently discovered evidence (notably the option drafted by Mrs. Clinton) suggested certain follow-up interviews. On January 10, 1996, Sherry Bartley, counsel for Madison Guaranty in *Ward v. Madison Guaranty*, was interviewed by telephone about the role played in this trial by Mrs. Clinton's May 1, 1986 option. On January 10, 1996 and February 20, 1996, Greg Young, Madison Guaranty's former CFO, was interviewed by telephone to follow up on other questions related to Castle Grande. On January 11, 1996, Mike Schaufele, Seth Ward's former accountant, was interviewed by telephone about his role with respect to the option. On February 14, 1996, Mrs. Clinton was interviewed in person at the White House.

4. Other sources of information.

On January 31, 1996, a lengthy set of written questions was sent to counsel for the Rose Law Firm. Counsel answered these questions in a letter dated February 13, 1996.⁵

4 They are numbered DKRT11 000824 through DKRT11 000939. Frequent reference is made to them below.

5 This follows the approach taken in the fall of 1995. See letter dated September 15, 1995 from Bruce A. Ericson to Alden Atkins of Vinson & Elkins, and Atkins' response dated October 31, 1995.

Since the Senate Special Committee on Whitewater began the "Arkansas phase" of its investigation on January 11, 1996, numerous witnesses, including several present and former partners of the Rose Law Firm, have testified before the Committee. Transcripts of these hearings have been obtained via the Internet.⁶ In addition, the Committee has furnished a copy of the depositions of Alston Jennings taken February 6, 1996 and Seth Ward taken February 12, 1996.

B. Issues examined.

In 1985 and 1986, the Rose Law Firm opened six matters for Madison Guaranty, each of which was billed separately. Matter 1, labeled "stock offering," was an effort to obtain permission from the Arkansas Securities Department to recapitalize Madison Guaranty by issuing preferred stock. No such offering ever occurred. Matter 2, labeled "limited partnership," was an effort to obtain permission from the Arkansas Securities Department to operate a broker-dealer firm as a service corporation. Permission was obtained but on conditions that Madison Guaranty never met, so the broker-dealer never commenced operations. Matter 3, labeled "Bibler Golden," concerned a condominium loan in Colorado. Matter 4, labeled "general," seems to have covered miscellaneous corporate advice. Matter 5, labeled "I.D.C.," involved real estate work undertaken in 1985 and 1986 pertaining to the acquisition and development of a real estate project later called "Castle Grande," which was acquired in September-October 1985 from the Industrial Development Corporation of Little Rock, or I.D.C. Finally, matter 6, labeled "Babcock," involved loan workouts that occurred after the default of two commercial loans, in both of which Madison Guaranty had obtained participations from Savers' Savings.

According to the newly discovered billing records, the following fees were charged for these six matters (not including disbursements, which were minor):

⁶ These transcripts are cited "[witness name] Senate Testimony, [date], at [page]. Because the transcripts were obtained via the Internet, their pagination differs from that of the official record. In particular, these transcripts are single spaced, whereas the official record is double spaced. Hence page references will not correspond even approximately.

<u>Matter</u>		<u>Total Fees⁷</u>
1	Stock Offering	\$ 7,431.00
2	Limited Partnership	1,857.00
3	Bibler Golden	85.00
4	General	1,627.50
5	I.D.C.	6,576.75
6	Babcock	<u>3,625.00</u>
Total		<u>\$21,202.25</u>

The initial investigation focused most intensely on matters 1, 2, 4 and 5. Matters 3 and 6 were examined only so long as it took to confirm that they presented no issues meriting further investigation. The supplemental work undertaken since December 28, 1995 has focused almost entirely on matter 5, although work on other matters (e.g., matters 1 and 2) was examined because it had involved issues that might have surfaced as well with respect to matter 5.

III. DISCUSSION AND ANALYSIS.

A. The Rose Law Firm's retention by Madison Guaranty.

1. Introduction.

Madison Guaranty retained the Rose Law Firm in April 1985. No engagement letter or other document memorializing the beginning of the engagement has been located.⁸ The witnesses' recollections vary as to how and why the engagement began. The recollections of Mrs. Clinton and Massey are consistent in broad outline, although discrepancies emerge in the detail. The purported recollections of Jim McDougal are inconsistent with those of the

7 DKRT11 000824-28, a "Client Billing and Payment History" run February 12, 1992. Disbursements totaled \$339.62. In considering these totals, it should be borne in mind that time was not always recorded to the correct matter. In particular, some time apparently related to matter 2 was recorded to matter 1, and some time pertaining to matter 5 was recorded to matter 4. These errors appear to be inadvertent errors of the type familiar to anyone who has ever filled out a timesheet or reviewed a draft bill.

8 Mrs. Clinton does not know whether there was an engagement letter. Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answer to Interrogatory No. 17(g)(3), at 37. At the time, the Rose Law Firm had no policy regarding engagement or retention letters, and the Firm is unaware of any retention letter for Madison Guaranty. Letter from Alden L. Atkins to Bruce A. Ericson, Oct. 31, 1995, at 6. As described below, Mrs. Clinton later wrote a letter memorializing the retainer arrangement apparently entered into at this time, but Mrs. Clinton's letter is dated July 1986.

others and upon analysis make little sense.⁹ No matter whose version is credited, however, nothing about the retention itself seems actionable, or suggests that the firm or its partners had any particular motivation to engage in actionable conduct.

2. The recollections of Mrs. Clinton and Richard Massey.

In an interrogatory answer dated May 24, 1995, Mrs. Clinton explained the engagement:

To the best of my recollection, the president of Madison Guaranty, John Latham, who was a friend of an associate at the Rose Law Firm, Richard Massey, became interested in having Madison Guaranty issue some kind of preferred stock to raise capital. Latham had spoken to Massey about doing the related legal work. In the spring of 1985, Massey came to see me because he had learned that certain lawyers at the law firm were opposed to doing any more work for Jim McDougal or any of his companies until he paid his bill and then only if Madison Guaranty agreed to prepay a certain sum to the firm once a month to cover fees and expenses. Under such an arrangement, the firm could be assured that Madison Guaranty was staying current with regard to paying for the new work that the firm might do for it.

I believe Massey approached me about presenting this proposal to Jim McDougal because he was aware that I knew him. I agreed to go see McDougal. I visited him at his office on April 23, 1985, and told him that I understood Latham wanted Massey to do some work for Madison Guaranty, but that our firm would not let Massey proceed until the previous bill was paid and some kind of prepayment arrangement was worked out for new work the firm might do. As I recall, McDougal agreed that Massey could proceed with the work and informed me he would arrange to pay the past due bill. McDougal also indicated that he was agreeable to some kind of prepayment arrangement.¹⁰

9 Jim McDougal declined to be interviewed or deposed, invoking his privilege against self-incrimination under the Fifth Amendment. The only source for his version of the retention is a newspaper interview given in 1993.

10 Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answer to Interrogatory No. 17(a), at 34-35. See also IG Ex. III-69, at 6. The Clintons' lawyer, David E. Kendall, has confirmed that the "past due" matter was the Madison Bank litigation from 1981-82, described above. Memorandum of telephone conversation with David E. Kendall, July 25, 1995, at 1-2.

As of April 1985, Mrs. Clinton had been a lawyer for 12 years and a partner in the Rose Law Firm for approximately six years. Richard Massey, in contrast, had been a lawyer for approximately eight months.¹¹ He had, however, lectured on securities law at the University of Arkansas at Little Rock, and John Latham (Madison Guaranty's president) had attended that class.¹² Massey does not have a clear recollection of how the matter came to the Rose Law Firm, other than that he had answered a number of securities questions posed by Latham and by Patricia Heritage (a Madison Guaranty employee and a law student at night), and had encouraged them to retain the Rose Law Firm.¹³ His recollections do, however, differ from Mrs. Clinton's in a number of particulars, mainly with respect to how the fees and retainer came to be negotiated and how Mrs. Clinton came to be the billing partner.

To start, Massey does not recall how he came to be assigned to work on the Madison Guaranty matter:

MR. CHERTOFF: . . . Did there come a time in April of 1985, about eight months after you came to the Rose Law Firm, that you began to work on a matter for Madison Guaranty Savings and Loan?

MR. MASSEY: Yes, sir.

MR. CHERTOFF: What was the matter you began to work on?

MR. MASSEY: The first matter I worked on for Madison Savings and Loan was seeking from the Arkansas savings and loan regulators the authority to create a class of preferred stock.

.

MR. CHERTOFF: Yes, how did you come about to be assigned to work on that matter?

MR. MASSEY: Sir, I don't remember. I've been asked that question many times.¹⁴

11 IG Ex. III-28, at 1.

12 *Id.* at 3.

13 *Id.* at 3-4.

14 Massey Senate Testimony, Jan. 11, 1996, at 6-7.

Massey does, however, recall talking to Latham about the matter:

MR. CHERTOFF: Now, did you know a man by the name of John Latham?

MR. MASSEY: Yes, sir, I did.

MR. CHERTOFF: And who is Mr. Latham?

MR. MASSEY: I believe at the time he was the president or maybe senior vice president at Madison S&L.

MR. CHERTOFF: And how old was he at the time, in 1984, 1985, approximately?

MR. MASSEY: Sir, I don't know; he was approximately my age, 25 to 30 years old.

.....

MR. CHERTOFF: Now, did you -- before you began working on Madison Guaranty Savings and Loan, before the firm was retained, did you know Mr. Latham?

MR. MASSEY: Yes, sir, I did.

MR. CHERTOFF: How did you know him?

MR. MASSEY: I knew him briefly in some classes I took in college. I also helped to teach a securities class in Little Rock at a law school there -- I helped teach it. John, I think, was auditing the class, maybe he was a student, and he asked -- and I got to know him in the context of that class.

MR. CHERTOFF: Were you a social friend of his?

MR. MASSEY: Not really; no, sir.

MR. CHERTOFF: Would you consider yourself a friend of his, other than a casual acquaintance, at the time?

MR. MASSEY: No.

MR. CHERTOFF: Did Mr. Latham come to you and offer you work for the Madison Guaranty Savings and Loan?

MR. MASSEY: I don't believe so.

MR. CHERTOFF: Did Mr. Latham come to you and ask you to help him -- come to you directly, that is to say, before you'd been assigned to the matter, and ask you to help him with an effort by the savings and loan to issue preferred stock?

MR. MASSEY: Sir, I don't remember that. It could have happened, but I don't remember that.¹⁵

As this indicates, Massey thinks that his talk with Latham led somehow to the business, but he is not quite sure how:

SEN. SARBANES: Okay. So you were with Mr. Latham. You are his instructor, professor at the law school in a securities course. You are asked by Mr. Latham, What do you think about this? What do you think about that? -- you provide him the advice. And at the same time you are saying to him, you know, you really ought to come, you know, to the law firm, Rose Law Firm, where we can provide you legal advice, and we can do this stuff for you -- correct?

MR. MASSEY: Sure, yes, sir.

SEN. SARBANES: And then at some point, coincidentally, the Rose Law Firm is asked by Madison Bank to perform exactly the kind of legal work on the legal matters that you and Mr. Latham have been discussing. Isn't that so?

MR. MASSEY: Yes, sir. Now, coincidentally -- I don't think the work came to us coincidentally.

SEN. SARBANES: Okay. I don't think so either, on the basis of the circumstances you have described. There was a need for representation, you made your pitch. You may have had a conversation with Mrs. Clinton, as you have testified, wherein you said, Look, they're looking for representation on securities issues. I've talked to this fellow. Maybe we can bring the client in the door -- you may have had such a conversation -- correct?

MR. MASSEY: Yes.

15 Massey Senate Testimony, Jan. 11, 1996, at 6-8.

SEN. SARBANES: And then the client appears, and you are immediately plugged into providing the service you discussed with Mr. Latham. Is that a fair capsulization of what occurred 11 years ago?

MR. MASSEY: Um, I pitched the business. I was told it wasn't up to him. Sometime later, months or weeks -- I wish I could tell you -- hours, days -- I believe it was weeks, at least weeks, we got this piece -- the first piece of work from Madison, which was the preferred stock issue.¹⁶

Massey does not remember closing the deal to sign Madison Guaranty up as a client:

MR. CHERTOFF: Okay. Did you sign him up as a client?

MR. MASSEY: In terms of engagement letter or --

MR. CHERTOFF: (Yes. Now ?) did you --

MR. MASSEY: No, sir.

MR. CHERTOFF: Did you reach an agreement with Mr. --

MR. MASSEY: No, sir.

MR. CHERTOFF: -- Latham, on your own, to do work for the Madison Guaranty Bank?

MR. MASSEY: No, sir.¹⁷

Nor does Massey recall speaking to Mrs. Clinton about fees or a retainer:

MR. CHERTOFF: Did Mr. Latham ask you to go and help him -- let me withdraw the question. Did you go to Mrs. Clinton and ask Mrs. Clinton to help you with Madison Bank by getting permission from the firm to allow you to represent the bank?

MR. MASSEY: I've been asked that question before. It's possible that I had a casual conversation with her that I don't

16 *Id.* at 64-65.

17 *Id.* at 8.

remember from 11 years ago, sir, but I don't recall a conversation in which I went to her and asked her to help me bring in the client.

.....

MR. CHERTOFF: Did you tell Mrs. Clinton that Mr. Latham wanted to hire the firm, but that you were concerned that certain lawyers at the Rose Firm were opposed to doing any more work for Jim McDougal, and that you wanted her to help you arrange for the engagement?

MR. MASSEY: I don't remember that happening.

MR. CHERTOFF: Did you ask Mrs. Clinton to go to Mr. McDougal in order to arrange for him to pay money on a retainer basis, upfront, so to speak, so that the firm could do work for the Madison Bank?

MR. MASSEY: Sir, I don't believe I was involved in the -- any negotiations with respect to how the client would be billed or -- it would not have been my place, as a first-year associate, to be involved in that.

MR. CHERTOFF: So you would not have been -- given your position as a first-year associate, you would not have gone to Mrs. Clinton and said, "Look, here's a client who wants to come in. There's been a problem with the billing in the past. Would you speak to Mr. McDougal and see if you can get him to pay money in advance?"

MR. MASSEY: I don't remember that happening, sir.

MR. CHERTOFF: Now did you know Mr. McDougal in -- as of the time you started working on Madison Guaranty Savings and Loan?

MR. MASSEY: I've been asked that question, too. I think, to this day, I've never met Mr. McDougal.¹⁸

Massey was questioned about Mrs. Clinton's interrogatory answer (quoted above). He expressed doubt that he, as a first-year associate, had been privy to the partners' discussions over fees issues:

18 Massey Senate Testimony, Jan. 11, 1996, at 8-9.

MR. CHERTOFF: [Reading from Mrs. Clinton's interrogatory answer:] "In the spring of 1985 Massey came to see me" -- "me" being Mrs. Clinton -- "because he had learned that certain lawyers at the firm were opposed to doing any more work for Jim McDougal or any of his companies until he paid his bill." And -- is that -- is that your memory of this?

MR. MASSEY: No, sir.

MR. CHERTOFF: To continue: "And then only if Madison Guaranty agreed to prepay a certain sum to the firm once a month to cover fees and expenses." Is it -- is it your recollection that you discussed with Mrs. Clinton having Madison Guaranty prepay a certain sum to the firm?

MR. MASSEY: Sir, I've -- I've heard that there were discussions, that there was some disgruntlement, and discussions like this could have gone on. I don't believe I was a party to it.

MR. CHERTOFF: And -- and the reason, as you said before, that you not a party to it is because it's not the kind of thing a first-year associate would be doing at a law firm. Is that correct?

MR. MASSEY: Not even at my law firm.¹⁹

Massey agrees that he might have spoken to Mrs. Clinton casually about doing work for Madison Guaranty, but he is quite sure that, as a first-year associate, he did not approach her with a fee proposal in hand:

MR. CHERTOFF: I want to continue down to the next paragraph: "I believe Massey approached me about presenting this proposal to Jim McDougal because he was aware that I knew him." Did you approach Mrs. Clinton about presenting this proposal to Jim McDougal?

MR. MASSEY: As I said before, we could have had -- if I may I'd like to give you a bit of a backdrop. When John Latham (sp) was a student in this class I had -- in fairness I should say for the record that I had asked him to lunch -- I'm sorry. I'd asked him to lunch one day -- sorry, Mr. Chairman -- and pitched the business, asked for their work. They were a growing S&L. We -- we liked looking for companies like that, so I pitched the work.

19 *Id.* at 10.

And the response that I got was gee, I'd like to think about hiring you, but it's not up to me.

MR. CHERTOFF: In other words Mr. Latham told you it wasn't in his power to give work out from the bank.

MR. MASSEY: That's correct. Now, it's possible -- and I think I knew at that time that Mrs. Clinton had some relationship with Mr. McDougal. And so it's possible that I could have had a casual conversation with her in a hallway and said gee, I'm -- we'd really like to try to get these folks' business and maybe you could have a word with Mr. McDougal. That's very possible.

MR. CHERTOFF: But the question here is different. The question here is did you go to Mrs. Clinton with a proposal, in hand, to work for Madison Guaranty and ask her to go to see McDougal to arrange for a prepayment?

MR. MASSEY: I don't remember that, Mr. Chertoff.

MR. CHERTOFF: I want to continue. "I visited him in his office" -- him being Mr. McDougal -- "on April 23, 1985, and told him that I understood Latham wanted Massey to do some work for Madison Guaranty but that our firm would not let Massey proceed until the previous was paid and some kind of prepayment arrangement was worked out for new work the firm might do." Now, again, just to be clear on this, Mr. Latham did not come to you and say he wanted to give you some work. Is that correct?

MR. MASSEY: I -- he -- she may be relating, in this interrogatory, the luncheon that I had, where he said, "Gee, I'd like to hire you, but it's not up to me." But that's --

MR. CHERTOFF: I'm -- let's not speculate about someone else's mind.

MR. MASSEY: Okay.

MR. CHERTOFF: I just want to ascertain the facts here.

MR. MASSEY: Okay.

MR. CHERTOFF: And the fact is you did not -- am I correct that you did not go to Mrs. Clinton and say: "I have a proposal to do work. Can you go to Mr. McDougal and get him to agree to prepay?"

MR. MASSEY: Sir, I don't have a recollection of that.

MR. CHERTOFF: Because, in fact, Mr. Latham didn't even have the power to award you the contract to do the work for Madison.

MR. MASSEY: John told me it was up to his boss. It was up to Mr. McDougal.²⁰

Massey also does not recall asking Mrs. Clinton to be the billing partner, and he thinks he would have recalled such a thing:

MR. CHERTOFF: Now, finally, let me just -- I want to make sure that there's no dispute on the record about this because I will tell you, Mr. Massey, in many ways this is probably the most important question we've addressed in your examination, and I don't want to sugar-coat it. We have two documents, one of which is a sworn document, one of which is an unsworn document, but still under (color/cover ?) of law, provided by Mrs. Clinton, her answers with respect to how this work came in.

And you understand, Mr. Massey, we've got -- Mr. McDougal made a public statement to the press that he made -- gave the work to the firm as a benefit to the Clintons; Mr. Latham indicated that the work came over to the firm because it was McDougal's decision to do something for his friends. You've seen what Mrs. Clinton's version is. But I want to focus your attentions very specifically on some things, and I want you to bear in mind in answering the question that there are certain things which are memorable -- certain things are quite memorable in an attorney's career and in terms of what an attorney does.

I want to ask you this in respect to the statement in Mrs. Clinton's interview that she recalled Massey came to her and asked her to be the billing attorney, which was a normal practice when an associate was handling a matter, did you go to Hillary Clinton in April of 1985 or before or afterwards and ask her to be the billing attorney on the Madison matter that you were working on?

MR. MASSEY: I told you before, I don't believe I did. I have no recollection of that.

20 *Id.* at 10-11.

MR. CHERTOFF: And it's something you would recall if you did?

MR. MASSEY: My brain works in funny ways, Mr. Chertoff. I think I would recall it.²¹

Nor does he recall actually bringing in the business:

MR. CHERTOFF: You did not come in to Mrs. Clinton and say, "John Latham just said he wants to hire us. We are going to be retained, but we have a problem with respect to the billing"?

MR. MASSEY: That I can speak to. That I'll say I don't have any recollection of that. I don't believe it happened that way.

MR. CHERTOFF: And in fact, you know that Mr. Latham didn't have the authority to make such a deal with you?

MR. MASSEY: That's why my recollection is different.²²

Had Massey brought this business to the firm, it probably would have been his first piece of business development:

SEN. HATCH: And how long had you been at the Rose Law Firm when -- before you started working on the Madison Guaranty issue?

MR. MASSEY: Approximately eight months, Senator Hatch.

SEN. HATCH: So even less than a year -- about eight months --

MR. MASSEY: Yes, sir.

SEN. HATCH: -- before you got onto the Madison matter. Do you recall having brought in any substantial clients up till that point?

MR. MASSEY: No, sir, none. No.

21 *Id.* at 97.

22 *Id.* at 58.

SEN. HATCH: Okay. Did you have the authority as a first-year associate to agree to represent a particular client on behalf of the firm?

MR. MASSEY: Not without a billing partner.

SEN. HATCH: So you would not have had the authority?

MR. MASSEY: No, sir, not by myself.²³

In summary, while Massey recalls "pitching" the work, he does not recall actually bringing it in:

MR. CHERTOFF: You did not reach an agreement to have the firm retained, have the Rose Law Firm retained --

MR. MASSEY: With Latham?

MR. CHERTOFF: -- by Madison Guaranty with John Latham, correct?

MR. MASSEY: That's right. I don't believe so.

MR. CHERTOFF: And therefore you were not able to bring any such agreement into Mrs. Clinton to have her work out the fee arrangements?

MR. MASSEY: I don't have any recollection of that. And it's -- (inaudible.)

MR. CHERTOFF: And if you don't have a recollection --

MR. BEN-VENISTE (?): Mr. Massey, let me say something to you. You're a first-year associate, you're there. If you had brought in this business, it would have been the first piece of business, I think you testified, that you brought into the firm, right?

MR. MASSEY: That's correct.

MR. BEN-VENISTE: You would have remembered that.

MR. MASSEY: That's correct.

23 *Id.* at 65.

MR. BEN-VENISTE: You don't remember bringing that business into the firm.

MR. MASSEY: No, sir, I do not.²⁴

The subject of the Rose Law Firm's retention by Madison Guaranty was explored further in the interview of Mrs. Clinton on February 14, 1996, approximately a month after Massey's Senate testimony (quoted above):

Q Next, I'd like to ask you a little about how the Madison Guaranty work came to the Rose Law Firm in the spring of 1985. In particular, I'd like to ask you about the recent testimony of Mr. Massey before the Senate committee.

Have you had any occasion to see that testimony or review it or have it summarized to you?

A I have not seen or reviewed it. I have some general knowledge, mostly through press accounts of what he said.

Q Here I'm paraphrasing -- I'm certainly not quoting -- but as I read his testimony, he said that he had certainly talked with Mr. Latham about doing work for Madison, but it was not up to Mr. Latham to be hired. Mr. Massey said he hadn't met Mr. McDougal ever, and that Mr. Massey further said that he did not discuss fees or any sort of retainer arrangement with anyone at Madison.

And further, it was his recollection that he did not ask you to be billing partner, nor did he raise the subject of fees or retainer with other members of the firm.

I'd like to ask you about your own recollection of how the client came in the door, how your recollections compare with those of Mr. Massey.

A Well, as I have said consistently since 1992 and again, in my answers to the RTC interrogatories, my recollection is that Mr. Massey

24 *Id.* at 98.

wanted to do the work he had discussed with Mr. Latham, that some partners, I believed in the securities section, had advised Mr. Massey that they were not enthusiastic about undertaking representation on behalf of Jim McDougal and Madison because of some problems in having work paid for in the past, that there were discussions among partners.

I believe it was Vince Foster who came to me, who said that Mr. Massey wanted to do this work, but the partners didn't want him to do it. We had a very high regard for Mr. Massey, who was quite an energetic and accomplished first-year associate, already teaching a securities course at the law school and attracting people who wanted his advice, like Mr. Latham.

And I was asked, as someone who knew McDougal, if I could intervene and perhaps set up an opportunity for Mr. Massey to do this work. I agreed to do that. Obviously now, 10, 11 years later, much to my regret because of all the confusion and concern that has been raised by it.

So I talked with Mr. Massey about that work. Mr. Massey told me, as his testimony relates, that he had a talk with Mr. Latham, but it wasn't up to Mr. Latham, and he wasn't getting any support from others within the firm, and I told him I would talk to Mr. McDougal, which I did.

And as I recall, Mr. McDougal said well, if Latham wants him to do the work, that's fine. And because of the request of other partners in the firm, I advised Mr. McDougal that the work that Mr. Latham wanted Mr. Massey to do could not be done unless Madison entered into a retainer agreement with the Rose Firm that would be payment against which fees and expenses could be billed on a monthly basis. Mr. McDougal agreed to that. I informed Mr. Massey. Mr. Massey undertook the work.

But it would not surprise me that Mr. Massey, as a first-year associate would not have direct knowledge of conversations among partners and

decisions concerning whether or not he could do the work under whatever circumstances.

Q You said you were asked to approach Mr. McDougal about the things you've described. Who asked you?

A I don't have a specific recollection. I believe it was Vince Foster, but I'm not positive about that.

Q Do you recall discussing this matter with partners other than Vince Foster?

A I believe I did, but I cannot recall which ones now.

Q Can you give me anymore specifics about the substance of those discussions with Mr. Foster or other partners about the advisability of taking on this work?

MR. KENDALL: And again, this is in addition to what the witness has already set forth in her interrogatory answer 17?

MR. ERICSON: Yes.

THE WITNESS: No. I have said the same thing for four years, and my recollection is clear that partners wanted to encourage Mr. Massey. He was a go-getter. He's an excellent lawyer. But they were somewhat hesitant because of our prior experience with Mr. McDougal, which is why the retainer agreement was worked out.

BY MR. ERICSON:

Q In the discussions you had with your partners, what did you say about Mr. McDougal and Madison Guaranty?

A Oh, I don't recall, Mr. Ericson.

.....

(Discussion off the record.)

BY MR. ERICSON:

Q I think where I was, was I was going to ask you whether, in your discussions with your partners about the advisability of taking on work for Madison Guaranty, you described your business or investment relationship with Mr. McDougal?

A Mr. Ericson, I don't recall any of the substance of the conversations that I had.²⁵

Vincent Foster, of course, is no longer living, but Richard Massey and Ronald Clark (the Rose Law Firm's current Chief Operating Officer) both testified that Mrs. Clinton did not, at this time, mention that she and her husband had invested with McDougal:

MR. CHERTOFF: At the time you started work at the firm up until -- through April of 1985, you were aware that Mrs. Clinton and Mr. McDougal did know each other?

MR. MASSEY: I had -- I believe, sir -- it's difficult, but I believe I had -- they knew each other.

MR. CHERTOFF: Did you know they had a business relationship?

MR. MASSEY: No.

MR. CHERTOFF: Did you know that they were -- they had a joint investment in something called Whitewater?

MR. MASSEY: No.

MR. CHERTOFF: To your knowledge, did anyone at the firm during that period of time, '84 and '85, know that Mrs. Clinton had a business relationship with Jim McDougal involving Whitewater?

MR. MASSEY: I'm not aware that anybody knew.

MR. CHERTOFF: Can you tell us when the first time, to your knowledge, someone at the firm learned about that relationship was?

25 Clinton Interview, Feb. 14, 1996, at 27-33.

MR. MASSEY: I can only speak to my knowledge, Mr. Chertoff. Again, I -- there are a lot of lawyers, and we all have our separate feelings, and I wasn't particularly situated to know what her investments might or might not have been. And there were some who were closer to her than I was. With respect to me, I learned about it during the 1992 presidential elections, reading it in the newspapers as most of you did.

MR. CHERTOFF: Did Mrs. Clinton ever say to you that -- in connection with her discussions with you about your work on this assignment, that she had a separate and distinct financial relationship with Mr. McDougal?

MR. MASSEY: I don't believe so.

MR. CHERTOFF: So she never discussed or disclosed to you the existence of that separate investment relationship?

MR. MASSEY: No, sir.

MR. CHERTOFF: What was your own opinion? Was it that you were disturbed that Mrs. Clinton had been representing Mr. McDougal's bank and had not disclosed at least to you that she had a separate business relationship with Mr. McDougal?

MR. MASSEY: "Disturbed" is strong. I was a little surprised. I was disappointed.²⁶

MR. CHERTOFF: Finally, let me ask you this. When did you become aware that Mrs. Clinton was a partner in a business venture with Mr. McDougal called Whitewater?

MR. CLARK: It would have probably been in the spring of 1992, when the article came out; some article.

MR. CHERTOFF: Now, you've been asked to come here to represent the firm, right, to represent the Rose Law Firm as managing partner?

MR. CLARK: I think that's correct, yes.

26 Massey Senate Testimony, Jan. 11, 1996, at 57, 84-85.

MR. CHERTOFF: So to the best of your knowledge, speaking for the firm, is it your understanding -- and let's put Mr. Hubbell and Mr. Foster to one side. Excluding them, to the best of your knowledge, was the firm unaware or not made aware by Mrs. Clinton of her separate business relations with Mr. McDougal until it came up in 1992?

MR. CLARK: I think that's probably true, that the majority of the people would not have been aware of that.²⁷

3. The recollections of John Latham and Jim McDougal.

As noted, Latham and McDougal are unavailable as witnesses, so we must rely on statements they have made to others.

Latham says that retaining the Rose Law Firm was Jim McDougal's idea:

"McDOUGAL had friends over there, he suggested we use them."
LATHAM said when asked who the friends were that it was
HILLARY RODHAM CLINTON and others.²⁸

Latham also said, however, that "MASSEY worked on the matter because he [Latham] had specifically asked for him to do so."²⁹

McDougal's version, available only as a newspaper story, is completely different from any other:

Early one morning about nine years ago, McDougal answered a knock on his office door from a winded and sweating Clinton, out on one of his morning jogs. Clinton was then struggling to retire campaign debts and to make ends meet on his \$35,000-a-year salary. The governor expressed concern about his family's financial condition and told McDougal that "things were tight," requesting that the savings and loan send some business to Hillary Clinton through her law firm.

"I asked how much he needed, and Clinton said 'about \$2,000 a month'" McDougal said. Later that day, the Madison Guaranty owner said, he directed an S&L executive to

27 Clark Senate Testimony, Jan. 18, 1996, at 27.

28 IG Ex. III-29, at 1.

29 *Id.*

immediately put Hillary Clinton's Rose Law Firm on retainer for that amount.

"I hired Hillary because Bill came in whimpering they needed help," McDougal told The Times. He said he had no specific legal work in mind when he hired Hillary Clinton.

McDougal said he recalled the event vividly because he was so uncomfortable in the meeting -- not over the retainer issue, but because throughout that morning conference, Clinton sat sweating in McDougal's new leather desk chair, an expensive gift from his wife.³⁰

4. Analysis.

Mrs. Clinton's recollections and Richard Massey's recollections differ in some respects, but for present purposes the differences are not material. Mrs. Clinton's interrogatory answer gives the impression that Massey brought in the work and Mrs. Clinton simply resolved a dispute over unpaid fees. Massey agrees that he initially "pitched" the work, but he does not believe he brought in the work, he did not discuss the subject of fees with Latham or with his colleagues at the Rose Law Firm, he never met McDougal and he does not recall asking Mrs. Clinton to be billing partner.

For present purposes, it makes little difference who was right. There is no hint of fraud or intentional misconduct in either version, and the mere act of retaining the Rose Law Firm did not harm Madison Guaranty in any respect. At worst, Mrs. Clinton may have neglected to tell her partners about her other business dealings with McDougal, but that would not have harmed Madison Guaranty, which, in the person of McDougal, knew all about those dealings.

McDougal's version of the retention obviously differs sharply from that of either Mrs. Clinton or Massey, but it too, even if credited, does not give rise to a cause of action. It is not a tort to ask a friend to retain one's wife as a lawyer. There is no suggestion that the money was to be a gratuity (as opposed to payment for work performed), nor is there any suggestion of an improper quid pro quo. Again, there is no proof of fraud, intentional misconduct or harm to Madison Guaranty.

In addition, there are a number of reasons to disbelieve McDougal's story.

30 William C. Rempel and Douglas Frantz, Fallout From Collapse of S&L Shadows Clinton, *Los Angeles Times*, Nov. 7, 1993.

First, McDougal may not be a reliable witness. In January 1996, McDougal's psychiatrist testified that McDougal's recollections are not trustworthy, although this one might be.³¹

Second, the statement that McDougal had no specific legal work in mind when he retained the Rose Law Firm obviously is wrong. The preferred stock issue had arisen at least a week before Mrs. Clinton met with McDougal on April 23, 1985, and work on this project began the same day as that meeting.³²

Third, and perhaps most significantly, the alleged economic motivation makes no sense. McDougal suggests that the Clintons needed \$2,000 a month and the implication is that this accounts for the monthly retainer in that amount, but there is no evidence that the Clintons ever received anything like \$2,000 a month from this engagement, and every reason to believe that they never received more than a trivial sum of money.

As a partner in the Rose Law Firm, Mrs. Clinton was paid a percentage of the firm's profits.³³ The percentage she received varied from year to year, in accordance with a formula, but it averaged roughly two percent:

Q I'd like to ask you a few questions now about your compensation from the Rose Law Firm, again, focusing on 1985, 1986, 1987.

Could you explain for me briefly the basis

31 According to a press account, on January 16-17, 1996, a psychiatrist testified that McDougal suffers from severe mental problems and no longer has a reliable memory of events. The psychiatrist said McDougal is bipolar and has a blocked carotid artery that deprives him of the normal flow of blood to the brain. He is being treated with lithium and Prozac but has a memory loss about 50% greater than normal for a man his age (55). The psychiatrist said that McDougal has a better memory of events involving people with whom he has emotional ties (such as the President). In that regard, the psychiatrist said he had reason to believe McDougal's story about the \$2,000 retainer. Sara Fritz, Doctor Says McDougal Has Memory Loss, *Los Angeles Times*, Jan. 10, 1996, at A10.

32 RLF2 03746-48; DKRT11 000836. On the other hand, it is not clear why Madison Guaranty retained the Rose Law Firm rather than its regular outside counsel, the law firm then known as Mitchell, Williams, Selig, Jackson & Tucker. The Mitchell, Williams firm had opened file no. 5615-9, entitled "Madison Guaranty - Sale of Stock," on February 6, 1985. It also had opened file no. 5615-10, entitled "Madison Guaranty - Broker-Dealer," on March 27, 1985. Both files are essentially empty. It does not appear that the Mitchell, Williams firm did much of substance with respect to either of these matters. Billings for matters 5615-9 and 5615-10 totaled \$155.35.

33 See generally Clinton Interview, Feb. 14, 1996, at 22-27; letter from Alden L. Atkins to Bruce A. Encson, Feb. 13, 1996, at 4-7.

on which you were compensated.

A Well, the Rose Firm, during those years, had a method of compensation that relied upon a five-year moving average of the percentage of an individual attorney's collections as a percentage of all of the firm's collections. And so you would do the work. You would bill for it. It would be collected and at the end of the year, all of the collections would be totaled up. And then each attorney's percentage would be calculated and then five years' worth of percentages would be averaged, and so that would determine what your percentage of the profits at the end of the fiscal year would be.³⁴

Q In these years, do you have any recollection as to what your percentage of the net profits was roughly?

A I don't have any specific recollection, but it was during this period of time somewhere around 2 percent.³⁵

Thus, if all \$2,000 a month had gone straight to the bottom line, Mrs. Clinton's share would have been approximately \$40 a month.

Even this overstates the situation. Part of the retainer was never earned and was returned to the client. Also, a law firm's revenues never go straight to the bottom line. Like any other business, a law firm has expenses (rent or mortgage payments for office space, salaries for associates and staff, and expenditures for law books, typewriters and all the other equipment required to set up a practice). These expenses must be paid before the partners can share what is left over. In the case of the Rose Law Firm, expenses consumed roughly half of each dollar of revenue.³⁶ Therefore, even if all the retainer had been earned in fees, Mrs. Clinton's share would have been less than \$20 a month.³⁷

34 Clinton Interview, Feb. 14, 1996, at 22-23.

35 Clinton Interview, Feb. 14, 1996, at 26.

36 Clinton Interview, Feb. 14, 1996, at 25-26.

37 These numbers are approximations, for illustrative purposes. According to counsel for the Rose Law Firm, Mrs. Clinton's actual share of net income attributable to Madison Guaranty (continued...)

In some law firms, "rainmakers" (people who bring in business) are compensated for bringing in that business, whether or not they do the actual work. There is no evidence, however, that this was true of the Rose Law Firm in 1985 and 1986.³⁸ To the contrary, the compensation system then in force created only a very indirect link between new business and compensation. A partner's percentage of the profits was determined not by looking at the business he or she brought in but at the money received for work actually performed by that partner, regardless of who brought in the matter.³⁹ Furthermore, the percentage was not determined solely by the current year's results but by averaging the partner's fee credits over the past five years. Thus, new business brought in during the current year, even if it materially increased the partner's fee credits, would have only an attenuated effect on that year's percentage. For all these reasons, the suggestion that the Madison Guaranty business was economically significant to the Clintons (or, for that matter, to the Rose Law Firm) finds no support.

Thus, regardless of which version of the retention one credits, a trier of fact is highly unlikely to find that there was anything untoward, let alone fraudulent or intentionally wrongful, in the circumstances of the Rose Law Firm's retention by Madison Guaranty.

B. The Rose Law Firm's efforts to help Madison Guaranty obtain permission to issue preferred stock and acquire a broker-dealer.

1. Introduction.

In 1985 and early 1986, the Rose Law Firm represented Madison Guaranty in an effort to obtain permission from Arkansas regulators to issue preferred stock (Rose's "matter 1") and to acquire and operate a broker-dealer firm (Rose's "matter 2"). The *Rose Report* concluded that the RTC did not have a basis consistent with the statute of limitations extender on which to assert claims against the Rose Law Firm relating to matters 1 and 2.⁴⁰ Nothing

37(...continued)

is \$230.68 for fiscal years 1986 and 1987 (i.e., the years ended January 31, 1986 and January 31, 1987) combined. Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 6.

38 Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 4-7, 45.

39 These were called "fee credits"; hence the fee credit reports such as RIC 120795, 97, 803, 10, 13, 20, 21, 24, 25, 61. Fee credits essentially represent hours work times standard billing rate less any sums not paid by the client, although the billing partner has discretion to make adjustments. Clinton Interview, Feb. 14, 1996, at 22-25; Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 4-5; Clark Senate Testimony, Jan. 18, 1996, at 9.

40 See *Rose Report* at 48-53.

in the evidence received since the completion of that report calls into question that conclusion.⁴¹ In addition, the tolling agreement between the FDIC and the Rose Law Firm does not cover matters 1 and 2. Nevertheless, these matters warrant brief discussion because some of the Rose Law Firm's work touched upon a legal issue that later arose with respect to IDC/Castle Grande.

2. Commencement of the work and Mrs. Clinton's telephone call with Beverly Bassett.

In the spring of 1985, Madison Guaranty became interested in issuing preferred stock.⁴² At first, the matter seems to have been referred to Madison Guaranty's regular outside counsel, the Mitchell Williams firm, which opened files but did not perform much work.⁴³ Then the matter seems to have been pursued in-house. On April 3, 1985, Davis Fitzhugh, a Madison Guaranty vice president and a lawyer,⁴⁴ contacted the Arkansas Securities Department to ask

41 While not affecting the conclusion, the additional information does shed new light on certain factual matters discussed in the *Rose Report*. No effort will be made here to list all such factual matters, but several merit brief mention. First, the linkage between matter 1 and matter 2 is less close than was suggested. See *Rose Report* at 11 n.42. The notion that the broker-dealer was to be used to sell the preferred stock (see, e.g., Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answer to Interrogatory No. 17(k), at 40; Schaeffer Senate Testimony, Jan. 25, 1996, at 22) seems to have been wrong. According to Greg Young, Madison Guaranty's Chief Financial Officer, who also was listed as the broker-dealer's president, the broker-dealer never was licensed to sell anything other than interests in real estate (tax shelter syndications) and could not have sold securities. Young Interview, Feb. 20, 1996, at 1-2. Second, Young says he never worked for Lasater & Company and would not have done so. *Id.* at 3-4. He does not know who prepared ASD1281; he did not.

42 Although there can be no doubt about Madison Guaranty's need to raise capital, no contemporaneous document explains the source of Madison Guaranty's interest in doing this via preferred stock. Charles Handley, an employee of the Arkansas Securities Department, stated in 1994 that the idea "was in response to a request from the Arkansas Securities Department for MADISON GUARANTY to develop a plan to raise capital." IG Ex. III-24, at 1. The Commissioner of the Arkansas Securities Department, Beverly Bassett (now Beverly Bassett Schaeffer), attributed the directive to raise capital to the Federal Home Loan Bank Board. IG Ex. III-25, at 1.

43 The Mitchell, Williams firm opened file no. 5615-9, entitled "Madison Guaranty - Sale of Stock," on February 6, 1985. It also opened file no. 5615-10, entitled "Madison Guaranty - Broker-Dealer," on March 27, 1985. Both files are essentially empty. It does not appear that the Mitchell, Williams firm did much of substance with respect to either of these matters. Billings for matters 5615-9 and 5615-10 totaled \$155.35.

44 Fitzhugh had a law degree and an MBA. He had worked for an accounting firm and for a New York-based real estate developer. Fitzhugh Senate Testimony, Jan. 31, 1996, at 29-30. In his testimony, Fitzhugh downplayed his status as a vice president. In response to a question from Senator Sarbanes about whether Fitzhugh was Madison Guaranty's only vice president, he answered: "I don't believe there was another male person there that was not a vice president. There may have been some, but I do not recall who they were." *Id.* at 46.

for the forms needed to do this.⁴⁵ A Securities Department employee, Charles Handley, looked at the statutes and telephoned Fitzhugh to say that he thought a savings and loan could only issue common stock and not preferred stock. Fitzhugh replied that he understood some other state-chartered savings and loans had issued preferred stock. Handley said he thought that was not the case, but he invited Fitzhugh to submit an opinion on the subject from Madison Guaranty's attorneys.⁴⁶ Fitzhugh then undertook a little legal research on his own and reported his findings to John Latham, Madison Guaranty's president, in a memorandum dated April 16, 1985.⁴⁷

It is not clear where the lunch at which Massey "pitched" Latham fits into this chronology, but the recently discovered billing records indicate that Mrs. Clinton met with McDougal and Latham on April 23, 1985.⁴⁸ Massey's work on this project began the same day.⁴⁹ A total of five timekeepers recorded 23.10 hours between April 23 and the end of the month.⁵⁰

In a letter dated April 30, 1985, the Rose Law Firm wrote to the Arkansas Securities Department in support of a proposal by Madison Guaranty to issue a class of non-voting preferred stock.⁵¹ The Rose Law Firm's letter opined that an Arkansas chartered savings and loan may, under Arkansas law, issue preferred stock.

On April 29, 1985, Mrs. Clinton recorded separate telephone calls to Massey and to Beverly Bassett, for a total of one hour.⁵² As was typical for

45 RLF2 03746-48. The Arkansas Savings and Loan Supervisory Board was part of the Arkansas Securities Department.

46 RLF2 03747.

47 RLF2 03730-32. Latham also was a lawyer.

48 DKRT11 000836. Mrs. Clinton recorded two hours for the day, but that total also encompasses meetings with Gregory and Massey.

49 *Id.*

50 *Id.* Baledge recorded 1.1 hours, Mrs. Clinton recorded five hours, Gregory recorded one hour, Grimes recorded 6.5 hours and Massey recorded 9.5 hours.

51 ASD1212-13; DKRT11000701-02; IG Ex. III-1. Massey says he wrote the letter. IG Ex. III-28, at 4. The letter was signed "Rose Law Firm" because it was a legal opinion. *Id.* at 5. The last sentence invited Bassett to call Hillary Rodham Clinton or Richard Massey with any questions. According to Mrs. Clinton, Massey drafted this letter; he was a securities lawyer, whereas she was not. Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answers to Interrogatories Nos. 17(k), at 40-42, 17(b), at 35, and 17(l), at 43.

52 DKRT11 000836.

Mrs. Clinton, her timesheet entry recorded the fact of the call but not its subject.⁵³

Beverly Bassett and Mrs. Clinton have each been examined about the substance of the telephone calls. Ms. Bassett (now Beverly Bassett Schaeffer) recalls more of the conversation, but their recollections are generally consistent with one another:

MR. CHERTOFF: And -- now the purpose of her calling you was what, back in 1985?

MS. SCHAEFFER: Well, I don't know the purpose. I can tell you what happened in the call --

.....

MR. CHERTOFF: What did she say to you in that call?

MS. SCHAEFFER: She called and said that -- well, let me be careful about that, because I can't remember exactly what was said. I'll be happy to tell you what I think happened in the conversation, what I remember happening, but -- and I just want you to keep in mind, I'm not -- I can't remember word for word. What I recall from the conversation is this: that she introduced herself, said she was representing Madison Guaranty Savings and Loan, that they had a proposal that was -- either had been sent to us or was going to be sent to us. I thought that she said it had been sent to us and --

MR. CHERTOFF: But you know now it wasn't sent until the next day, right?

MS. SCHAEFFER: Well, I don't know. I have heard, I have read that she -- her billing records show that she called on the 29th of April, but --

MR. CHERTOFF: And the letter was dated the 30th.

MS. SCHAEFFER: Well, that's correct, but I remember -- I mean, I don't remember it being before the letter came. That's my memory. I don't know -- I mean, her billing records show the

53 There is nothing unusual about this. While some clients today demand greater specificity, many clients do not, and many lawyers eschew specificity so as to avoid any inadvertent disclosure of privileged matters should time records later be sought in discovery.

29th. That's not my memory. My memory was that it -- the call was after we had the letter. In any event, she called and said that they had a proposal and what it was about. And I said, "I'm familiar with that; I've already looked at that. You know, I agree with the -- basically, I have no problem with that position, and you'll be getting a letter soon to that effect" -- or something --⁵⁴

.....

MS. SCHAEFFER: Okay. In this conversation with Mrs. Clinton, I have no -- I mean, I didn't get to finish the -- you know, what happened in the conversation. She did ask me -- that's how come it was so brief, that's the reason it was brief, as I recall, because I didn't give her an opportunity to say much else. When I said, "I'm familiar with that issue" and really brushed it more or less aside, she said, "Who should we work with at the department?" And I referred her to Charles Handley, said, "he's the one who is working on this, he's the one who knows all of this and all about it; work with Charles." So I don't think that my recollection is inconsistent with that at all.⁵⁵

Mrs. Clinton does not recall the substantive part of the discussion; she simply recalls calling to ask to whom the letter should be addressed and being told "Charles Handley".⁵⁶

Q Next, I'd like to ask you about a brief telephone conversation that you said you had with Beverly Bassett. I believe there's a time sheet entry with respect to this on page 836.

A If I could get a set, he has his own set. Yes.

Q And the time sheet entry indicates you made the call on April 29, and that is a day before a letter was sent to the Arkansas Securities Department, at least a day before the letter is dated, the letter being behind tab 1 in the book.

54 Schaeffer Senate Testimony, Jan. 25, 1996, at 9-10.

55 *Id.* at 17.

56 Clinton Interview, Feb. 14, 1996, at 35. The April 30, 1985 letter misspells Handley's name as "Hanley." ASD1212; DKRT11000701; IG Ex. III-1.

Let me ask you, is there any reason why you, as opposed to Mr. Massey, would have made this call?

A I have no recollection of the circumstances, other than what I have said in the interrogatories and even prior to that, which is that I made a call to the office to find out to whom any information or requests should be directed in the office of the securities commissioner. I did not recall actually talking with Beverly Bassett. Her testimony is that we did have a brief conversation, and that's all that I could tell you about it.

Q Mr. Massey is in the securities or corporate section of the firm?

A That's correct.

Q And so working with the securities department would be really his specialty rather than yours?

A That's correct.

Q Do you know whether at this point in his career he had any previous dealings with the securities department?

A I do not know.

Q By calling the department yourself, as opposed to having him call the department, were you attempting to send any sort of implicit message along the lines that this is an important matter, or I hope you consider this promptly or something like that?

A No, I was not, Mr. Ericson. I was seeking information because it came as news to me that the securities commissioner also administered savings and loans. I don't think I knew that before 1985, and I was seeking public information as to who in the securities department would handle savings and loan inquiries.

Q And apparently, you found that it was

Mr. Handley?

A I believe that's what the information was.⁵⁷

The Rose Law Firm's letter first went to Charles Handley, who continued to be of the opinion that a savings and loan could not issue preferred stock. On May 6, 1985, Handley sent the letter to Beverly Bassett⁵⁸ along with the suggestion that one of the Department's attorneys look into the matter.⁵⁹ Someone within the Department (probably Nancy Jones) disagreed with Handley's analysis and raised another issue—whether the stock could be non-voting, as had been suggested.⁶⁰ It was suggested that one of the Department's attorneys "research and draft response to Hillary."⁶¹ The Department's sole staff attorney, William Brady, wanted to refer the matter to the Arkansas Attorney General, but Bassett, disagreeing with Brady and agreeing with Jones, decided the matter herself and drafted her own reply.⁶²

In that reply, a one-paragraph letter dated May 14, 1985, Bassett concurred with the Rose Law Firm's opinion that a savings and loan could issue non-voting preferred stock.⁶³ On May 23, 1985, Mrs. Clinton sent McDougal a

57 Clinton Interview, Feb. 14, 1996, at 33-35.

58 Ms. Bassett served as Arkansas Securities Commissioner from January 1985 to January 1991. IG Ex. III-25, at 1. Her duties included service as the Arkansas Savings & Loan Supervisor. She was appointed to her post by Governor Clinton. *Id.* While a law student, she had worked "full time for a year for Bill Clinton when he was serving as Attorney General." IG Ex. III-25, at 7. Before assuming office, she had practiced with Jim Guy Tucker's firm. IG Ex. III-25, at 1, 6. There she did some work for Madison Guaranty in connection with its Campobello and Maple Creek Farms projects. RTCKC30135-39. She now practices law with Wright, Lindsey & Jennings in Fayetteville. IG Ex. III-25, at 1. She currently is on a leave of absence because Whitewater-related inquiries are taking up so much of her time. Schaeffer Senate Testimony, Jan. 25, 1996, at 65.

59 ASD1210, ASD1216; IG Ex. III-2.

60 ASD1209; IG Ex. III-3. The author of this note probably was Nancy Jones (who is a CPA). IG Ex. III-26. *See also* ASD1210; ASD1373. Charles Handley confirmed this. IG Ex. III-24, at 2. William Brady, the staff attorney who looked at the issue says he disagreed with the position advocated by the Rose Law Firm, but Bassett disagreed with him, and he had nothing further to do with the matter. IG Ex. III-27, at 1.

61 ASD1209.

62 Brady and Schaeffer Senate Testimony, Jan. 25, 1996, at 17-18, 33-35, 40.

63 RLF2 00015; RTCKC26734; ASD1211; IG Ex. III-4. The salutation of the letter was "Dear Hillary." This has been noted in the press as evidence of a personal relationship between Mrs. Clinton and Bassett. As noted above, Governor Clinton had appointed Bassett to
(continued...)

copy of Bassett's letter. Mrs. Clinton's letter concludes: "We appreciate the opportunity to work for you and look forward to continuing success in resolving whatever questions arise as you pursue your plan for growth."⁶⁴

Meanwhile, lawyers at the Rose Law Firm had been working on an application to the Arkansas Savings & Loan Supervisory Board seeking permission for Madison Guaranty to offer broker-dealer services through a second-tier service corporation.⁶⁵ On May 14, 1985, Richard Massey sent this application to Bassett, Jones and Handley.⁶⁶

3. Notice of Rule V(C)'s limits on Madison Guaranty's investment in Madison Financial.

The events recounted thus far have little direct relevance to Castle Grande, but an exchange of correspondence that followed this broker-dealer application raised a legal issue that has relevance to the acquisition of Castle Grande. That issue is the limitation on a savings and loan's investment in its service corporations imposed by Rule V(C) of the Rules and Regulations of the Arkansas Savings and Loan Association Board. As explained in the *Rose Report*, this rule limits such investments to six percent of the savings and loan's assets. The acquisition of Castle Grande may have violated this rule. If Seth

63(...continued)

her office, but the evidence does not suggest that the Clintons and Bassett were other than business acquaintances. Bassett says, "Although I knew Hillary Clinton, and we were cordial with one another, we are not personal friends." IG Ex. III-25, at 2. See also IG Ex. III-28, at 5-6.

64 RLF2 03581-82. On Bassett's letter, McDougal penned a note to John Latham: "Be sure we keep their \$2,000 a month retainer paid. Jim." RTCKC26734-35, RTCKC39623-24; IG Ex. III-5, at 2.

Also dated May 23, 1985, McDougal apparently prepared a letter to Mrs. Clinton, which read as follows: "Dear Hillary: If Joe Giroir [a partner at the Rose Law Firm] can fit it into his busy schedule, I would like to discuss a couple of banking matters with him which might be mutually beneficial. Thanks. Sincerely, Jim McDougal." RTCKC42759. The billing records indicate that Mrs. Clinton, Giroir and McDougal spoke by telephone on June 5, 1985. DKRT11 000856. Mrs. Clinton does not recall the subject of the conversation. Clinton Interview, Feb. 14, 1996, at 36.

65 DKRT200358-69, 200271-200357; RLF2 03677-88; IG Ex. III-8. At the time, Madison Guaranty had only one service corporation, Madison Financial Corporation. As noted in footnote 35 above, the broker-dealer apparently was to be used to syndicate real estate interests, not to sell the preferred stock.

66 DKRT2000271-72.

Ward had not purchased most of Castle Grande, the acquisition almost certainly would have violated the rule.⁶⁷

As explained in the *Rose Report*, the rule has significance for present purposes because a deliberate violation of it might constitute fraud or an intentional breach of fiduciary duty on the part of McDougal. If that occurred, and if it were proved that the Rose Law Firm both knew of the violation and substantially assisted in its commission, then the Rose Law Firm might be liable for aiding and abetting McDougal's primary violation.⁶⁸ The following discussion applies only to the first element—knowledge. As shall be shown, correspondence relating to the broker-dealer application arguably put at least one lawyer at the Rose Law Firm (Massey) on notice of Rule V(C). Then, in subsequent sections of this report, the questions of whether anyone at the Rose Law Firm (a) learned of facts suggesting that Rule V(C) might be violated by the Castle Grande acquisition and, with such knowledge, (b) substantially assisted in that violation will be further explored.

On May 22, 1985, Charles Handley advised Beverly Bassett that Madison Guaranty's broker-dealer application raised a number of issues, both technical and substantive.⁶⁹ One of these was compliance with Rule V(C). Handley said:

7. We will need current detailed financial statements on the Association to determine if the total aggregate outstanding investment in the capital stock, obligations or other securities of services corporations and subsidiaries and joint ventures thereof does or would not exceed the six (6%) percent of the Association's assets limitation which is set forth in Rule V(C).⁷⁰

A copy of this memorandum was sent to Richard Massey.⁷¹

On June 17, 1985, Richard Massey replied to Handley's memorandum and enclosed Madison Guaranty's amended application to engage in brokerage

67 *Rose Report* at 56-59.

68 *See Rose Report* at 46-47, 53-78.

69 DKRT200325-31; RLF2 03583-84; ASD1415-40; IG Ex. III-9. Although this document takes the form of a memorandum, Massey was copied. *See also* IG Ex. III-28, at 7. This seems to have been the custom.

70 DKRT200326.

71 *Id.*

services.⁷² The cover letter and Exhibit C to the amended application addressed Rule V(C).⁷³ The cover letter asserted that Madison Guaranty was not in violation of Rule V(C); no Rule V(C) calculations were included to back up this assertion, although the attached financial statement might be read to suggest that Madison Guaranty was nowhere near that Rule V(C) limit.⁷⁴

Massey's recollection is that he knew little about Rule V(C) and therefore, at John Latham's request, relied on Sarah Hawkins, then Madison Guaranty's compliance officer and a former FHLBB examiner.⁷⁵ The billing records indicate that Massey spoke to Hawkins on June 5, 7 and 13, 1985.⁷⁶ The records also indicate that Mrs. Clinton spoke briefly to Massey on June 4 and 7, and that she made a "review of application amendments" on June 17.⁷⁷ Mrs. Clinton does not recall whether she and Massey discussed Rule V(C) or whether she reviewed either Handley's May 22 memorandum or Massey's June 17 reply.⁷⁸ She correctly notes that none of these documents is cc-ed to her. She also asserts that she did not supervise Massey's work:

Q In this time period, meaning April, May, June of 1985, were you the partner or member of the firm who was principally supervising Mr. Massey's work on this matter?

A No, I did not supervise his work. I was not a securities lawyer and would not have been the

72 RLF2 03590-03676; ASD1220-1312; RTCKC41196-97; IG Ex. III-11.

73 RLF2 03591, RLF2 03662-69.

74 RLF2 03591, RLF2 03663. On RLF2 03663, 6% of line 800 (total assets of \$67,086,000) equals \$4,025,160, while line 490 (equity investment in service corporation/subsidiaries) was \$2,151,000. This probably overlooks loans to joint ventures and overdrafts, which together were considerable. See RLF2 03531 (calculation as of May 31, 1985).

75 Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 18-20.

76 DKRT11 000856, 858. The June 5 entry was billed to matter 2; the June 7 and 13 entries were billed to matter 1. Massey spent a little time on May 30 and on June 7 researching ASLAB rules. DKRT11 000858.

77 DKRT11 000856. All three entries were recorded to matter 1 but it would appear that they pertained to matter 2, especially the last. Somebody made a number of errors with respect to specifying to which matter time entries pertained. Clinton Interview, Feb. 14, 1996, at 66. When it comes to recording lawyers' time, minor errors such as these are so common as to signify nothing.

78 Clinton Interview, Feb. 14, 1996, at 36-41.

person to supervise his work. I was the billing partner and had some contact with the client and some contact with others related to this matter.

Q And in those connections, you did record some time to this matter?

A Yes, I did.⁷⁹

Massey's testimony is a little less categorical:

MR. CHERTOFF: Who supervised you?

MR. MASSEY: Sir, I had -- I worked with partners within my section and lawyers within my section with respect to technical matters. Mrs. Clinton was the billing attorney. She -- as you will see in the time records, she would fairly regularly contact me, ask me for updates on what was going on with the matters. She oftentimes would review draft documents that I had intended to submit to the client or the ASD.

MR. CHERTOFF: To be clear, you say she would contact you for updates on the matter and she would review documents you were preparing the matter; we're talking about the application to make a preferred stock offering and the application for broker-dealer license?

MR. MASSEY: Yes, sir. Those were the two matters in which I was the -- I was doing most of the work.⁸⁰

SEN. MACK: Well, I think -- I don't think I have a question about whether she looked at the letter. It's a question of whether she did work on the preferred stock or the broker-dealer. And I think your testimony to Mr. -- in response to Mr. Chertoff's question (was?) that she did.

MR. MASSEY: I will tell you, my impression, which has not varied by the time sheets, was that this -- these were primarily

79 Clinton Interview, Feb. 14, 1996, at 39. Mrs. Clinton recorded a total of approximately 13 hours to matters 1 and 2 combined.

80 Massey Senate Testimony, Jan. 11, 1996, at 11-12. Later in the testimony, Massey characterized Mrs. Clinton's work with respect to him as "billing-attorney-type supervision," apparently drawing a distinction between that and the sort of supervision he would receive from someone in his own section of the firm (which Mrs. Clinton was not). *Id.* at 32.

one-man jobs and I did primarily all of the research, writing, drafting and so forth. Mrs. Clinton had a role in the -- obviously she had a role in those matters. I view it as a supervisory role.

SEN. MACK: Yeah, but -- okay.

MR. MASSEY: In terms of who was in the trenches and doing the work, senator, it was me.⁸¹

.....

SEN. SHELBY: When you worked with her, did you work under her supervision, so to speak, on matters?

MR. MASSEY: With respect to this, I'd say technically that's true.⁸²

.....

SEN. D'AMATO: . . . I mean, she was the partner who supervised this matter -- is that true?

MR. MASSEY: She billed the matter, yes, sir. She was the --

SEN. D'AMATO: She supervised the work on this matter?

MR. MASSEY: She supervised my work.⁸³

In a memorandum dated June 18, 1985, Handley commented on Massey's June 17 letter and the amended application enclosed with it.⁸⁴ Handley's memorandum attempted to perform Rule V(C) calculations as of May 31, 1985, but he indicated that he was not sure he had located all investments in and loans to services corporations, and he also lacked information as to

81 *Id.* at 32.

82 *Id.* at 40.

83 *Id.* at 69.

84 ASD1410-11.

Madison Guaranty's total assets. Therefore, he asked for help with these items.⁸⁵

In a letter dated July 10, 1985,⁸⁶ Massey replied to Handley's memorandum of June 18, 1985. Exhibits B and C to Massey's letter contained calculations showing that Madison Guaranty could invest another \$904,547 in its service corporation (Madison Financial) before reaching the Rule V(C) limit.⁸⁷ The letter concluded: "Should you have any questions, please call Hillary Rodham Clinton or me"⁸⁸

Exhibit B to the July 10, 1985 letter is a single page of handwritten calculations, entitled "Investment in Service Corp."⁸⁹ Massey believes he received information on this subject from Sarah Hawkins, a former FHLBB examiner who then was serving as Madison Guaranty's compliance officer.⁹⁰ The sheet itself was prepared by Greg Young and for the most part it is in his handwriting. Young does not recall the circumstances in which he prepared this particular document, but he prepared reports such as these, which he circulated to Latham and McDougal, on a weekly basis.⁹¹

The July 10 letter seems to have laid the Rule V(C) matter to rest for purposes of the broker-dealer application. In his next memorandum, dated July 17, 1985, Handley raised other issues but did not return to Rule V(C). The

85 ASD1410.

86 DKRT200228-56, 200199-227; RLF2 03518-46; ASD1381-1409; IG Ex. III-13.

87 RLF2 03530-33. *See especially* a worksheet setting forth the calculations, RLF2 03531.

88 DKRT200229, 200200; RLF2 03519. Mrs. Clinton recorded no time on any Madison Guaranty matter between June 18 and July 10, 1985. DKRT1 000856, 58, 70, 72, 83. She does not recall seeing Massey's July 10 letter. Clinton Interview, Feb. 14, 1996, at 41.

89 RLF2 03531, FDICHR 0036.

90 Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 18-20; Massey Senate Testimony, Jan. 11, 1996, at 16-17.

91 Young Interview, Feb. 20, 1996, at 1, 3; Young Interview, Jan. 10, 1996, at 1. Some of the numbers on this report would have fluctuated considerably. Overdrafts (line 7), for example, were under \$30,000 as of May 31, 1985, but grew to \$546,392 by the end of June, \$1,293,104 by the end of July and \$1,527,682 by the end of August 1985. IC02487, IC01760, IC00022, IC00202. The number then dropped to \$189,923 by the end of September (IC11681) by the simple expedient of deeming the overdrafts additional paid-in-capital. Young Interview, Feb. 20, 1996, at 2. This reclassification on the books would have no effect on the Rule V(C) calculations, which include both loans and capital contributions. *Id.*

same is true of Massey's letter dated July 25, 1985⁹² and Handley's reply to it of July 27, 1985.⁹³ The issue did not surface again in any of the subsequent correspondence.

Nor does the issue seem to have surfaced in the Rose Law Firm's other work for Madison Guaranty before the IDC matter (matter 5) arose. Matter 3 (Bibler Golden) involved a condominium loan in Colorado and took roughly an hour; the fees totaled \$85.⁹⁴ Matter 4 (general) involved some advice given by Massey with respect to Madison Guaranty's business and capital plans, apparently in advance of a meeting with federal regulators. There is one reference in Massey's time entries to "ASLAB . . . laws" but in all likelihood the issue was Madison Guaranty's failure to meet its net worth requirements (a very serious problem) rather than Rule V(C) (as shown, not a problem at the time).⁹⁵

4. Analysis.

The evidence discussed above shows that lawyers at the Rose Law Firm had some exposure to Rule V(C), if perhaps not much familiarity with it. Massey drafted several letters that discussed Rule V(C), although he seems to have placed principal reliance on Sarah Hawkins and others at Madison Guaranty. Mrs. Clinton says she does not recall seeing these letters, or the memoranda that prompted them, and she doubts she had any familiarity with the rule:

Q Look at page 2 of the letter, if you would, the second page. And the paragraph numbered 7, which refers at the very end of that paragraph to a Rule V(C).

Did it ever come to your attention that some sort of issue was being raised by the securities department with respect to Rule V(C)?

A I do not know what Rule V(C) is, Mr. Ericson.⁹⁶

92 DKRT200148-71; RLF2 03467-90; IG Exs. III-15-17.

93 ASD1347-48; IG Ex. III-18

94 DKRT11 000825.

95 DKRT11 000883.

96 Clinton Interview, Feb. 14, 1996, at 38. The letter being referred to is Massey's letter of June 17, 1986, RLF2 03590-91, FDICHRC 0011-12.

While Massey may have gained a passing acquaintance with the rule itself, he apparently had no reason to think that Madison Guaranty was in violation of the rule. He was advised by Madison Guaranty personnel and on that basis represented to the Arkansas Securities Department that Madison Guaranty was not in violation of Rule V(C) as of May 31, 1985. The information provided by Massey to the Securities Department suggested that Madison Guaranty could invest approximately \$900,000 more in its service corporation before any violation would occur. As the acquisition of the broker-dealer itself represented an expenditure of \$5,000 or \$6,000--in any event, nowhere near \$900,000--Massey probably had little occasion to give Rule V(C) any deep thought.⁹⁷

At most, the evidence suggests that Massey (and possibly others) had some actual or constructive notice of Rule V(C), which notice occurred when the rule was temporarily a concern with respect to the broker-dealer application.⁹⁸ Given such notice, it is hypothetically possible that someone might have recalled the rule some months later when working on the Castle Grande issue. Even if this occurred, however, there would be no aiding-and-abetting liability unless the person with notice then realized that a violation of Rule V(C) was about to occur and, with that realization in mind, went ahead and substantially assisted in the commission of the violation.⁹⁹

C. The Rose Law Firm's work on the IDC/Castle Grande project.

1. Introduction.

Between August and October 1985, while the Rose Law Firm was representing Madison Guaranty in matters 1 through 4, Madison Financial and Seth Ward acquired approximately 1,050 acres of land in southern Pulaski County (Little Rock) from a company called Industrial Development Corporation

97 If he did give the matter some thought, he probably would have realized how little he knew. The information that Massey had provided only a "snapshot" view of the situation. Madison Guaranty grew rapidly throughout 1985. Its total assets more than doubled, growing from \$48,961,154 as of December 31, 1984 to \$109,680,561 at December 31, 1985. *General Report on the Investigation of Madison Guaranty Savings & Loan and related Entities* 13 (Dec. 28, 1995). Thus, the investment limitation (6% of total assets) would have grown as well, from approximately \$2.9 million as of December 31, 1984 to approximately \$6.6 million as of December 31, 1985. In addition, as shown above, for Madison Guaranty, at least some of the numbers used to perform Rule V(C) calculations fluctuated wildly as 1985 progressed. This is especially true of the overdrafts. There is no evidence that Massey (let alone Mrs. Clinton or others) had any knowledge of these fluctuations.

98 Whether constructive notice will suffice in this context is discussed at page 156 below.

99 *Rose Report* at 46-47.

of Little Rock ("IDC").¹⁰⁰ At the time, Seth Ward was working as a consultant to Madison Financial.¹⁰¹ (Ward is the father-in-law of Webster Hubbell, then a partner in the Rose Law Firm.) Madison Guaranty fully financed Seth Ward's acquisition of a portion of the IDC property. That acquisition took place pursuant to an agreement between McDougal and Ward that gave McDougal an option to obtain Ward's part of the property at cost, plus effective control of the entire property.

In the months following the acquisition, virtually all of Ward's land and portions of Madison Financial's land were sold to friends of Jim McDougal in transactions that, like Seth Ward's original acquisition, were fully financed by Madison Guaranty. A portion of the Madison Financial land that remained unsold was named "Castle Grande" or "Castle Grande Estates" and was developed for mobile homes.

As stated in the *Rose Report*, the principal issues are:

1. Was Ward a bona fide purchaser, or simply a straw man or nominee for Madison Financial?
2. If Ward was a straw man or nominee, was the acquisition fraudulent, or did it intentionally violate Rule V(C), the Arkansas regulation that limited the size of the investment that Madison Guaranty could make in Madison Financial—a regulation that management thought prevented Madison Financial from buying all of Castle Grande?
3. If fraud or intentional wrongdoing on the part of Madison Guaranty or Madison Financial did occur, was the Rose Law Firm legally responsible for the wrongful aspect of the acquisition and, if so, does it have any liability to the RTC (now the FDIC)?

The *Rose Report* concluded, on the evidence then available, that:

100 The land, most of which was undeveloped land, was located 15 miles south of Little Rock at the intersection of Highway 65/167 and 145th Street. IDC had owned the land since 1974. IDC had financed its acquisition through several Little Rock banks, including Union National Bank, Worthen Bank and Trust Company and First Commercial Bank, N.A. By 1985, these creditors were pressuring IDC to dispose of the property. Wilson Interview, May 10, 1994, tape 2, at 1.

101 Ward sued Madison Guaranty in 1987, after McDougal had left. *Ward v. Madison Guaranty Savings & Loan Financial Corporation*, No. 87-7580 (Pulaski Cty. Cir. Ct.) (hereinafter, "*Ward v. Madison*"). Ward sought to recover almost \$400,000 in commissions that he said he had earned in connection with Castle Grande. The trial transcript and discovery from this case are cited frequently below. The trial transcript is cited as "*Ward v. Madison R.T.*" Depositions are cited by the name of the deponent, e.g., "Ward Deposition."

1. Ward probably was a straw man or nominee.
2. The RTC reasonably could state a claim against McDougal for fraud and for breach of his fiduciary duties in connection with the acquisition.¹⁰²
3. There was no substantial evidence that the Rose Law Firm aided and abetted whatever wrongdoing McDougal might have engaged in.¹⁰³

To some extent, the discussion with respect to this matter (and especially issue 3) was hampered by the lack of contemporaneous documents (the Rose Law Firm had virtually nothing) and clear recollections with respect to the acquisition. The billing records found at the White House and other newly acquired evidence add considerably to the sum of knowledge with respect to this matter. Taken as a whole, however, the new evidence does not change the conclusions stated in the *Rose Report*. The new evidence weakens to some extent the conclusion that Ward was a straw man or nominee, and that the acquisition therefore was wrongful, although those remain propositions that one could reasonably advocate. The new evidence has very little effect on the analysis of what the Rose Law Firm knew and did before the acquisition of the IDC property closed. The new evidence shows that, after the acquisition closed, lawyers at the Rose Law Firm (and in particular Mrs. Clinton) had more contact with Seth Ward and performed more services for Madison Guaranty than previously was known, but there remains no substantial evidence that these lawyers knew of or intended to aid and abet McDougal's apparent misconduct. For these reasons, the following conclusion, taken from page 78 of the *Rose Report*, remains valid:

The evidence taken as a whole does not amount to convincing proof that the Rose Law Firm knowingly aided and abetted a fraud, or a scheme to circumvent the Arkansas investment limitation regulation. This conclusion does not necessarily mean that the evidence exonerates anyone; it simply means, given the applicable legal standards and the statutory mandate under which the RTC [and now the FDIC] operates, that no reasonable basis has been found to recommend the filing of a

¹⁰² *Rose Report* at 55-61. The *Report* also noted that such a claim would not be cost-effective because McDougal has no money. McDougal filed for bankruptcy in September 1991 and obtained an order of discharge on January 17, 1992 (PMS0532, PMS0552), well before the enactment of the RTC Completion Act of 1993. The order of discharge could be set aside only if the RTC could prove a fraud on the bankruptcy court; proof that McDougal defrauded someone other than the bankruptcy court would be of no avail.

¹⁰³ *Id.* at 74-78.

claim relating to the acquisition of Castle Grande against the Rose Law Firm.

2. The principal actors.

Before describing the acquisition and development of the IDC/Castle Grande property, it might be helpful to list the principal actors and describe each briefly:

Mrs. Clinton was a partner in the Rose Law Firm. She and her husband had invested with McDougal back in the late 1970s (Whitewater). She had represented the Little Rock Airport Commission, of which Seth Ward was a member, since roughly the same time. A litigator and not a real estate partner, she was the billing partner for all Madison Guaranty matters. She recorded no time to matter 5 until November 14, 1985, over a month after the acquisition was completed.

Charles Cook worked at First Commercial Bank, a creditor of IDC. The Rose Law Firm had represented First Commercial and two other banks with respect to this debt.

Harry Don Denton was Madison Guaranty's chief loan officer. He had worked with Robert Wilson at Union National Bank (where for a time he had been Jim McDougal's principal banker), and he introduced Seth Ward to McDougal. Denton served as loan officer with respect to Madison Guaranty's loans to Ward.

Richard Donovan was an associate in the Rose Law Firm's litigation section. After the acquisition of the IDC property, he, working with Mrs. Clinton, researched several legal questions with respect to the property's development. These questioned concerned whether the property was within a "dry" township and therefore could not become the site of a brewery and tasting room, and whether the sewer and water facility need become a public utility and could provide sewer and water services to customers off the property.

Darrell Dover, a lawyer, represented IDC in the sale of its property to Madison Financial and Seth Ward.

Webster Hubbell was a partner in the Rose Law Firm's litigation section. He is Seth Ward's son-in-law. He did not record any time to matter 5, but Mrs. Clinton consulted with him briefly on two occasions and R. Davis Thomas, Jr. apparently wrote him a memorandum on the sewer and water issue.

R. A. "Brick" Lile was president of IDC, having succeeded Everett Tucker, who died.

William Lyon briefly showed some interest in buying a portion of the IDC property from Madison Financial for use as a brewery. Concerns about the legality of this usage prompted legal research by Mrs. Clinton and Richard Donovan. Between ca. 1980 and early 1984, Lyon had served on the Arkansas State Bank Board until Governor Clinton sought his resignation, an event Lyon blames on Jim McDougal.¹⁰⁴

Jim McDougal was the principal shareholder of Madison Guaranty. By 1985, he was no longer an officer or director of Madison Guaranty, but by most accounts he still controlled it and directed its daily operations, and he remained the chairman and president of Madison Financial, Madison Guaranty's real estate subsidiary.

Michael Schaufele was Seth Ward's accountant. He has known Webster Hubbell since childhood and they remain close friends today.

R. Davis Thomas, Jr. was an associate in the Rose Law Firm's real estate section and he worked briefly on the acquisition of the IDC property, exchanging one draft of a purchase agreement with Dover.

Thomas P. Thrash was a partner in the Rose Law Firm's real estate section. He also worked briefly on the acquisition.

Seth Ward, a semi-retired businessman, was a consultant to Madison Financial and purchased part of the IDC property in a transaction fully funded by Madison Guaranty. He is Webster Hubbell's son-in-law and had worked closely with Mrs. Clinton on Little Rock Airport Commission matters since the late 1970s.

Robert M. Wilson, a lifelong friend of Seth Ward, was a senior officer at Union National Bank. The Bank was a creditor of IDC, a client of the Rose Law Firm with respect to that debt, and a creditor of Jim McDougal personally. After retiring from Union National Bank at the end of 1985, Wilson worked for Madison Financial as a consultant and loaned money to Madison Financial as well.

These short sketches should not leave the reader with the impression that all these people were close to one another or knew each other equally well. Some of them knew each other quite well, but others were comparative strangers. In particular, it bears mention that McDougal and Ward were not close, having never met before Denton introduced them, and McDougal had no close ties to any of the people associated with IDC.

104 Lyon Senate Testimony, Jan. 23, 1996, at 5-8, 16.

The character and work habits of Jim McDougal have been reported on elsewhere.¹⁰⁵ It may be helpful, however, to say a few words about the character and work habits of Seth Ward. Mrs. Clinton described him as follows:

Q Mr. Hubbell, in his recent testimony before the Senate committee described -- I'm paraphrasing, not quoting -- said that you did a lot of legal work for Mr. Ward and that Mr. Ward was a frequent visitor to your office at the Rose Law Firm.

Do you agree with that characterization?

A Well, I didn't do work for Mr. Ward personally. I don't believe I ever did any work for Mr. Ward personally. But because he was on the Airport Commission, and he took his obligations as a commissioner quite seriously, it would not be at all surprising to see Mr. Ward in the Rose Firm, particularly on the third floor where I was officed. He would drop in to discuss a matter. He might ask to use the phone. He might ask a secretary, including mine, to type something for him. He was someone who was around, not all the time, but it was not surprising to see him.

Q Tell me a little bit about him as a client. Again, I don't mean individually, but in a representing capacity. Is he the sort of client who would actively seek to participate in the work more? What I'm specifically getting at, is he the sort of client who would want to edit any written product heavily or perhaps even take a draft at a first draft of a letter or paper he might be looking at?

A I don't know that I would characterize him in that way. I would say he was a persistent, adamant, demanding client, someone who pushed very hard for lawyers to respond to him, to get his work done, and by his, I mean anything he was involved in, whether it was for Little Rock Airport or for Madison, someone who wasn't at all shy about showing

105 *Madison Guaranty Savings & Loan and Whitewater Development Company, Inc., A Preliminary Report to the Resolution Trust Corporation* 45-47 (Apr. 24, 1995) ("Preliminary Report on Whitewater").

up at your office unannounced and demanding that you give him the time he wanted right then, no matter what else you were involved in. So he was a client who really required attention whenever he showed up, and that was not infrequently.¹⁰⁶

Ward, in turn, says that he knows Mrs. Clinton reasonably well but has no recollection of working with her or other lawyers on the IDC/Castle Grande matter:

Q. . . . Now, do you know Hillary Rodham Clinton?

A. Yes.

Q. How do you know Hillary Rodham Clinton?

A. I was on the Airport Commission for a number of years, and we hired Mrs. Clinton as our attorney.

Q. When did you first meet Mrs. Clinton?

A. Well, I would say about -- sometime about somewhere in there.

Q. Do you know Bill Clinton?

¹⁰⁶ Clinton Interview, Feb. 14, 1996, at 12-14. Webster Hubbell painted a similar picture of his father-in-law:

MR. BEN-VENISTE: There is a series of telephone conversations between Mr. Ward and Mrs. Clinton which corresponds to the work being done by Mr. Donovan and overseen by Mrs. Clinton relating to the wet-dry issue and the sewer issue. Now, my question is directed to -- based on your knowledge of Mr. Ward and his predilections, do you find it or would you find it unusual that he would pick up the phone and initiate contact with Mrs. Clinton about the status of those matters?

MR. HUBBELL: I would find it not unusual at all that he'd pick up the phone and, like a lot of clients, would want to know why it hadn't been done yesterday.

MR. BEN-VENISTE: In fact, I take it from that answer it would surprise you if he hadn't done so.

MR. HUBBELL: If he wanted something and it was important, then I would expect him to call every day until it was done.

Hubbell Senate Testimony, Feb. 7, 1996, at 24.

A. No. I've met him.

Q. But you know Mrs. Clinton reasonably well, would you say?

A. I would say so.¹⁰⁷

Despite the recently discovered billing records, which detail a number of conversations that Ward had with Mrs. Clinton and others, Ward continues to insist that he had few dealings with lawyers on IDC/Castle Grande:

MR. COLE: Let me ask you this. During the time you were employed at Madison and working with Mr. McDougal, were you -- did you have any role in the work that was done by outside law firms for Madison Guaranty?

A. No.

MR. COLE: So it was not part of your normal responsibility to deal with lawyers?

A. None of my activity at all. I had no -- I didn't have any -- any reason to be involved in any -- such activity.

MR. COLE: Do you recall whether you ever received questions about matters like the location of properties or aspects of the transaction at IDC from outside lawyers?

A. No.

MR. COLE: You just don't recall any recollection?

A. No.¹⁰⁸

In particular, Ward says that Hubbell never worked on Madison matters:

Q. Now, am I correct that Webster Hubbell is your son-in-law?

A. That's correct.

Q. And he occasionally performed some legal services for you and your family?

107 Ward Deposition, Feb. 12, 1996, at 7.

108 Ward Deposition, Feb. 12, 1996, at 94-95.

A. I'd say seldom, but not in connection with anything connected with Madison.¹⁰⁹

Ward reiterates that he had little to do with lawyers and says his work as a whole did not amount to more than three or four hours a week:

Q. When you worked at Madison Guaranty in 1985 and 1986, were you someone who usually was responsible for dealing with lawyers on legal issues?

A. No. I wasn't involved with lawyers.

Q. You were primarily involved with trying to structure transactions with other businessmen?

A. I was trying to find property for him to buy.

Q. So you were driving around in your car looking for property?

A. That's right. That was on a part-time basis.

Q. About how many hours a week would you generally work for Madison back in '85 and '86?

A. Well, I'd say, in '85, I might have been averaging maybe three or four hours a week. In '86, I'd say I was averaging quite a bit more.¹¹⁰

Ward is elderly and is quite candid about the fact that his memory is not what it once was.¹¹¹ Alston Jennings, Ward's former lawyer, agrees. In the fall of 1995, Jennings set up a meeting between Ward and David Kendall, the Clintons' lawyer. At the meeting, Ward reiterated that he has no recollection of Mrs. Clinton representing Madison Guaranty. In a deposition taken in February 1996, Jennings commented on Ward's lack of recollection: "Mr. Ward is not quite as old as I am, but he is 75 or 76. He has had very serious health problems, and I would say that as far as memory goes, that Mr. Ward is not--

109 Ward Deposition, Feb. 12, 1996, at 6.

110 Ward Deposition, Feb. 12, 1996, at 106.

111 "Well, time and my physical condition certainly hasn't enhanced my memory. I'd like to think that my memory is better than it is." Ward Deposition, Feb. 12, 1996, at 93.

Mr. Ward doesn't have the best memory in the world."¹¹² Still, by all accounts, Ward makes an engaging witness, and discrepancies aside, his views as to the larger picture cannot be dismissed.

3. The acquisition of IDC/Castle Grande.

a. The commencement of matter 5.

Madison Guaranty matter 5, "I.D.C.," was opened on or about August 2, 1985.¹¹³ Mrs. Clinton was the billing partner.¹¹⁴ Hubbell says that Ward referred the matter to the Rose Law Firm at McDougal's instruction.¹¹⁵ Mrs. Clinton has no idea how the matter came in.¹¹⁶

As of August 1985, and for some time before that, the Rose Law Firm had been representing IDC's creditors, Worthen Bank, Union National Bank and First Commercial Bank. These banks had loaned IDC several million dollars on the security of this property. The loan was delinquent and the banks were pressing IDC to repay it.¹¹⁷ The banks therefore had a keen interest in seeing IDC sell the property for the highest possible price. Madison Financial and Ward, of course, wished to buy the property for as low a price as possible.

It is unclear what, if anything, Mrs. Clinton or others did with respect to possible conflicts of interest. Mrs. Clinton's files with respect to matter 5 no

112 Jennings Deposition, Feb. 6, 1996, at 98-101. Many of Ward's health problems stem from an accident in which Ward fell out of a second-story window "and damn near killed himself" *Id.* at 102-03. This occurred after the 1988 trial of *Ward v. Madison*. *Id.* Cf. Clinton Interview, Feb. 14, 1996, at 14-16.

113 See IG Ex. III-33, a Rose Law Firm "New Matter Master Form" dated Aug. 2, 1985.

114 The form indicates that Webster Hubbell was the billing partner. IG Report at III-15; IG Exs. III-33, III-34, III-69, at 7-8; letter from Alden L. Atkins to Bruce A. Ericson, Oct. 31, 1995, at 4. Hubbell denies this. Hubbell Interview, Dec. 27, 1995, at 6:25-8:14. The billing records indicate that Mrs. Clinton was the billing partner. *E.g.*, DKRT11 000907. She agrees. Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 62(b), at 12.

115 Hubbell Interview, Dec. 27, 1995, at 8:15-9:8.

116 Clinton Interview, Feb. 14, 1996, at 44-46.

117 The banks, in turn, were feeling pressure on this subject from their regulators, who had criticized this loan. Wilson Interview, May 10, 1994, tape 2, at 1.

longer exist, having been discarded in 1988.¹¹⁸ Mrs. Clinton does not recall whether she checked for conflicts. She also does not recall seeing letters showing that the Rose Law Firm was representing IDC's creditors at this time.¹¹⁹

Q When this matter came in, do you recall whether you took steps to see if a conflicts check was performed?

A I don't recall what was done 10 or 11 years ago, Mr. Ericson. We were already representing Madison at that time, I believe.

Q With respect to the securities matters we've already discussed?

A That's correct.

Q But not with respect to IDC?

A That's correct, if this date is right as to when IDC first came to the attention of the Rose Firm.

Q Did it come to your attention in 1985 or 1986 that your firm had represented other entities with respect to IDC in 1984 and 1985?

A I don't recall knowing that at the time.

Q Let's look at the two letters behind tab 11 [¹²⁰], and let me ask you whether these came to your attention at any time in 1985 or 1986?

A I do not recall ever seeing these letters

118 RIC 000007G through RIC 000007I; Clinton Interview, Feb. 14, 1996, at 97-103; Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 68, at 14-15, and Tab A thereto.

119 FDICHRC 0055-58; SEN 34857-60; Clinton Interview, Feb. 14, 1996, at 46-48.

120 The first letter, dated July 13, 1984, was from Allen Bird II, a Rose Law Firm partner, to all three banks; it discussed how to collect on the IDC loan and was copied to Darrell Dover. The second letter, dated August 30, 1985, was from Bird to Max Sears at Worthen Bank; it returned the bank's credit file with respect to IDC. SEN 34857-60; FDICHRC 0055-58.

until they arrived in this book that you had prepared.

Q To the best of your recollection, did you have any knowledge that your firm had represented the three banks listed in the first letter with respect to IDC?

A I do not recall having any such knowledge.

Q Do you know whether any disclosures were made, either to the banks or to Madison with regard to the firm's representation of these banks with respect to IDC?

A Mr. Ericson, again, after all this time, I do not recall what was done.¹²¹

In any event, the firm's dual representation cannot long have been a secret, at least from IDC and the banks. The billing records show that Rose Law Firm partner Thomas Thrash conferred with representatives of the banks several times in August 1985.¹²² IDC's lawyer Darrell Dover (who had been copied on Allen Bird's 1984 letter) has made it very clear that the banks took an active role in the negotiation of the purchase agreement and had a keen interest in maximizing the price.¹²³ It seems highly unlikely that these banks would not have known that Thrash was representing the purchasers in these negotiations.¹²⁴ Whether Ward or Madison Guaranty knew this is less clear. Ward and Bob Wilson were lifelong friends.¹²⁵ McDougal, in contrast, did not

121 Clinton Interview, Feb. 14, 1996, at 46-48.

122 DKRT11 000875. Charlie Cook worked for First Commercial Bank; Bob Wilson worked for Union National Bank. Ward Deposition, Feb. 12, 1996, at 57-58. Wilson retired from Union National Bank at the end of 1985 and went to work shortly thereafter as a consultant to Madison Financial with respect to its Campobello project. Wilson Interview, May 10, 1994, tape 1, at 1, 5-6, 10.

123 Dover Senate Testimony, Jan. 31, 1996, at 90-91, 103, 108 ("The banks were as interested as IDC was in getting that purchase price up.").

124 Thrash met with Bob Wilson and Charlie Cook on August 19, 1985. DKRT11 000875.

125 Ward Interview, April 1994, tape 1, at 20. Ward and Wilson went to high school together and lived across the street from one another. Ward banked with Wilson for years.

know the principals of IDC, which is one reason why Ward was so useful to him.¹²⁶

The next two sections of this report (III.C.3.b and III.C.3.c) discuss the acquisition of the IDC property through its closing on October 4, 1985. The first section discusses the negotiations between IDC and the buyers (Madison Financial and Ward); the second section discusses the arrangements between Madison Financial and Ward. Lawyers from the Rose Law Firm had a definite if limited role in the negotiations between IDC and the buyers, but with one limited exception they do not recall knowing anything about, much less working on, the arrangements between Madison Guaranty and Ward.¹²⁷ The main point of the first section is to explore whether any aspect of the negotiations between IDC and the buyers would have put the Rose Law Firm lawyers on notice specifically of the Rule V(C) problem or more generally of Ward's arrangements with McDougal. The point of the second section is to explore whether any evidence undercuts the recollection of the Rose Law Firm lawyers that they did not know anything about, or work on, the arrangements between Madison Guaranty and Ward.

b. The negotiations with IDC.

As just noted, the main issue in this section is whether these negotiations put the Rose Law Firm on notice of the Rule V(C) problem or of Ward's arrangements with McDougal. This issue may be broken down further into the following questions: When and why did Ward agree to buy part of the IDC property? Was that agreement prompted, at least in part, by the Rule V(C) problem? As a result of the work they performed negotiating a purchase agreement with IDC, did lawyers at the Rose Law Firm learn, or have reason to know, of these matters?

In the acquisition of the land from IDC, Seth Ward served as the principal negotiator for Madison Financial.¹²⁸ Ward, who was then 65 years old and semi-retired, had gone to work for Madison Financial in May 1985.¹²⁹ As

126 Ward said: "Mr. McDougal asked me if I knew anybody associated with the Industrial Development Company, and I replied that I did." Ward Deposition, Feb. 12, 1996, at 10. The principals in IDC were prominent citizens, civic leaders. Hubbell Interview, Dec. 27, 1995, at 35-37. McDougal was relatively new to town and his style did not impress everyone. See text accompanying footnote 156 at pages 59-60 below.

127 The limited exception is Webster Hubbell, with whom Ward discussed the latter subject repeatedly, although perhaps not until after the deal closed. Hubbell denies performing any services with respect to either subject.

128 *Ward v. Madison* R.T. 7-13.

129 *Ward v. Madison* R.T. 5-7.

noted above, he and McDougal did not previously know each other; Harry Don Denton had introduced them.¹³⁰ For \$25,000 a year plus commissions, Ward was given the task of looking for real estate that Madison Financial might buy and develop.¹³¹

A few months after hiring Ward, McDougal asked him if he knew anyone connected with IDC. At the time, McDougal was not contemplating an acquisition; instead, he owned (or was contemplating buying) some landlocked property just south of Castle Grande and wanted an access easement. Ward knew the head of IDC (then Everett Tucker¹³²) and went to see him. Tucker had no interest in selling an easement but offered the entire property for sale at a price that Ward has variously claimed was \$5.5 million or \$3.5 million.¹³³ McDougal had no interest in anything that big,¹³⁴ but Ward continued to negotiate and ultimately got the price down to \$1.75 million.¹³⁵

What happened next is not entirely clear. According to Ward's testimony in 1988, McDougal said he still was not interested in purchasing anything that big:

Q. All right, sir. Now, you have a contract for the purchase and sale of the property for \$1,750,000. Was Madison Financial able to carry that transaction?

A. When I presented it to Mr. McDougal and told him I thought it was an exceptionally good purchase, he told me that Madison was unable to purchase that. I told him, "Well, if y'all aren't going to purchase it, I will."

Q. What happened after that?

130 Ward Deposition, Feb. 12, 1996, at 11-12.

131 *Id.* Madison Financial had hired Ward to represent Madison Guaranty in real estate deals. Ward received \$25,000 a year plus 10 percent of any profits on the sale of properties he arranged. IG Ex. III-35, at 2.

132 Tucker died, and was succeeded by R.A. "Brick" Lile, who has since died.

133 *Id.* at 7-8 (\$5.5 million); Ward Deposition, May 19, 1988, at 16 (\$5.5 million). In his most recent deposition, Ward says the asking price was \$3.5 million. Ward Deposition, Feb. 12, 1996, at 11.

134 "After that meeting, Ward said McDougal became very abrasive with him and told him not to bring any big deals in. That they do not want any big deals. They are only working on little deals." Seth Ward Interview, Dec. 9, 1986, Borod & Huggins Report, IG Ex. III-54, at 125.

135 Ward Deposition, May 19, 1988, at 16-18. *Ward v. Madison* R.T. 12.

A. He [McDougal] asked me [Ward] if I would participate with him and have Madison purchase that amount that they could afford to purchase and I purchase the balance.¹³⁶

This makes it sound as though the property always was to be divided between Ward and Madison Financial. Other evidence, including other portions of Ward's own testimony, casts some doubt on this. For a man who says he wanted all of the property, Ward seemed fairly casual about its division. Asked about how the property was divided, Ward testified:

Q. How did you structure the deal, as to who would buy which portions of property? How did you and Mr. McDougal decide that?

A. Well, I don't know how we came to it. I know what we did.¹³⁷

When Ward was deposed by the staff of the Senate Special Committee on Whitewater in February 1996, he proved more voluble than he has in the past and offered the following narrative with respect to the origins of the transaction:

Q. Now, you were involved in negotiating the price of -- to purchase this property from IDC, correct?

A. Yes. Am I at liberty to tell you how this came about?

Q. Certainly. Just tell us on the record.

A. In the first place, I want to remind you that some things I remember and some things that I don't and some things that I'm recollecting to the best of my ability. But, after I had been with the Industrial Development Company, I don't know, three months or so --

Q. You mean, Madison? You were with Madison.

A. Excuse me. Madison. Mr. McDougal asked me if I knew anybody associated with the Industrial Development Company, and I replied that I did. He said, "Well, Madison can buy some property south

¹³⁶ Ward v. Madison R.T. 12-13.

¹³⁷ Ward Deposition, May 19, 1988, at 19. Ward was 65 years old at the time of the transaction and 74 years old at the time of his interview. The transcript of *Ward v. Madison* shows that Ward's memory is not what it once was. Repeatedly at trial he contradicted his deposition testimony. E.g., *Ward v. Madison* R.T. 39-43, 45-46, 58-61, 89-91.

of the Industrial Development Company from the International Paper Company at a bargain price. But the trouble is it's landlocked. There are no roads going in to or out of it. Would you ask the Industrial Development Company if we could have an easement from 145th Street south through that portion of the Little Rock Industrial Development Company into the International Paper Company property?" And I replied that I would go ask. I went to the late Everett Tucker, who managed the Industrial Development Company. And he told me that he wouldn't give an easement, but that he would sell the entire property. I asked him for how much. He told me it was worth \$9 million. That it was on their books for \$3 1/2 million, and that's what they would sell it for. At that point in time, I informed McDougal that he would not give an easement, but they would sell the entire Little Rock Industrial Development Company to him for \$3 1/2 million. McDougal became somewhat indignant and said that he couldn't afford to pay that much. And it made no difference to me, I was just a messenger. I would like to state at this time that at no time did I have any idea what Madison's financial structure was. I did not know of what their so-called ratio was versus assets and lending limits. I had no knowledge of it at all. I had never known Mr. McDougal prior to the time that I became involved with him. I met him through a mutual -- well, through a friend.

Q. This is Mr. Denton?

A. Denton. I met him through Don Denton.

MR. COLE: Who was Mr. Denton?

A. Don Denton used to be the chief loan officer for Union National Bank. At the time I met McDougal, he was the chief loan officer for Madison Guaranty Savings & Loan. And he invited me to come down and see his new office. And while I was there, he introduced me to Mr. McDougal. After telling Mr. McDougal of the reply of Industrial Development Company, I learned that the Industrial Development Company was in the arrears on a bank loan. As a matter of fact, there was three banks working in conjunction with one another that had loaned the Industrial Development Company \$2 million, and they were in the arrears for about two years. And the thought occurred to me that I would get the banks to discount those notes. I personally purchased those notes and foreclosed and thereby owned the property myself. I met -- I can't remember his name, but one of the -- either a president or vice president --

Q. (BY MR. GIUFFRA) Brick Lyle?

A. -- of First Commercial Bank, and was Brick Lyle. And Brick Lyle was one of about six men who owned the Little Rock Industrial Development Company. We negotiated a price whereby I could buy it for a million seven. And I was preparing to purchase it myself, because at that price and all that it entailed would have been a substantial bargain, at least wise to me. But then I recalled that I was drawing \$25,000 a year from Madison. So I felt honor-bound to run it by Mr. McDougal. At that point, he said, "Well, at that price, we'd like to share it with you." And I asked him what he had in mind. He said, "Well, for \$600,000, we'd like to buy all the property south of 145th Street." And I would take all the remaining property, which would have been north of 145th Street, plus some property over off of the other industrial development location on 65th Street, plus the utilities both north and south of 145th Street. And for that my share would be a million and seven. Excuse me. A million one-fifty. So I told him that I would arrange my own financing. At which point, he said, "That won't be necessary. Madison will finance it. Madison Guaranty will finance it for you." And as a matter of fact, he stated that since it was such a good deal they would be able to finance it for me on a non-recourse note.¹³⁸

Ward's narrative is rich in detail, but as noted in the *Rose Report*, with Ward the detail tends to change with the retelling. Ward is elderly and is quite candid about the fact that his memory for details is not what it once was.¹³⁹

Hubbell, who frequently talked to Ward at the time, says that Ward told him that the idea of having Ward buy part of the property came later:

MR. ERICSON: . . . You mentioned a moment ago that your father-in-law told you at least a little something about this transaction [the IDC acquisition].

Q. To the best of your recollection, what did he tell you in the time period August, September, October, 1985 about this transaction?

A. My understanding initially was that Madison was going to buy the entire parcel. And then at some point, I learned that it was structured so that Madison bought part, and my father-in-law bought part. And then Madison lend him the money to buy that part, but he was still going to be paid, as it was sold, a commission.

138 Ward Deposition, Feb. 12, 1996, at 10-14.

139 Ward Deposition, Feb. 12, 1996, at 93; Jennings Deposition, Feb. 6, 1996, at 98-101.

Q. When you say you learned these things, would these be things that you learned from your father-in-law?

A. Yes.¹⁴⁰

Other evidence besides Hubbell's testimony suggests that the division of the property between Madison Financial and Ward occurred in the midst of negotiations and was not a condition of the deal from the outset.¹⁴¹ The drafts of the purchase agreement itself, while not explicit on the point (Ward is never mentioned by name), suggest that the idea of a second purchaser other than a corporate affiliate of Madison Guaranty came and went as the negotiations proceeded.

The files of Darrell Dover, IDC's lawyer, show that the lawyers began exchanging drafts of the agreement in August 1985.¹⁴² Dover says that the principals, as opposed to the lawyers, negotiated the terms of the deal. He identified IDC's principal as R. A. "Brick" Lile.¹⁴³ According to Dover, the principals left the "scrivener" work to Dover and to the Rose Law Firm, mainly Thomas P. Thrash.

The initial drafts do not refer to any purchaser other than Madison Financial, although they do permit Madison Financial to assign its rights to an "affiliate."¹⁴⁴ This is true of the first draft, as well as the drafts dated August 9 and August 12, 1985.¹⁴⁵

On August 14, 1985, Rose Law Firm associate R. Davis Thomas, Jr., who was helping partner Thomas P. Thrash on this matter, had a conversation

140 Hubbell Interview, Dec. 27, 1995, at 14:10-26.

141 Thus, Hubbell testified: "I remember that initially Madison was going to acquire it all and then the transaction changed to where my father-in-law acquired part of it and Madison acquired part of it." Hubbell Senate Testimony, Dec. 1, 1995, at 102.

142 *E.g.*, IG Ex. III-40, at 9-12, 16-70. Negotiations must have begun earlier. By July 30, IDC's board of directors had met to discuss a proposed sale of the land to Madison Guaranty. Thomas P. Thrash of the Rose Law Firm sent Darrell Dover a draft agreement on August 9, 1985 and his associate R. Davis Thomas, Jr. sent a revised draft on August 12, 1985. *Id.*

143 See IG Ex. III-40, at 2.

144 IG Ex. III-40, at 16-17 (draft prepared by the Rose Law Firm).

145 FDICHC 0061, 63, 65.

with Seth Ward, as well as one with Darrell Dover's secretary.¹⁴⁶ On August 19, 1985, Thrash met with Ward as well as bankers Bob Wilson and Charlie Cook and attended a meeting of IDC's shareholders.¹⁴⁷ In what appears to be the next draft, dated August 19, 1985, the "affiliate" language is changed to read "any entity or individual."¹⁴⁸ This language, much more than "affiliate," would encompass Ward, who was an individual but not an affiliate of Madison Guaranty in the normal sense of the word.¹⁴⁹

The "entity or individual" language appears in the final version of the agreement, but several of the drafts between the August 19 draft and the September 13 final return to the old "affiliate" language. For a while, it appeared as though the deal would close quickly on the basis of Madison Financial buying the entire property. A meeting of IDC's shareholders to approve the transaction was held for August 19, 1985.¹⁵⁰ Draft minutes of Madison Financial purportedly reflect approval of the transaction on August 20, 1985, with all the land to be sold to Madison Guaranty (or affiliate) for \$1.75 million.¹⁵¹

146 DKRT11 0008896.

147 DKRT11 000875.

148 FDICHR 0066.

149 See generally Dover and Thrash Senate Testimony, Jan. 31, 1996, at 105-08.

150 IG Ex. III-40, at 15.

151 IG Ex. III-36. Most Madison Financial minutes after December 1984 (as opposed to Madison Guaranty minutes and earlier Madison Financial minutes) are of doubtful authenticity and may have been drafted long after the fact. See IG Exs. III-149, at 12-15, III-151. On this particular draft, however, someone has written "Pat [presumably Pat Heritage, now Hays] did not 'create' this document. She found + pulled from minutes book --" *Id.*

In addition, Thrash's timesheet for August 20, 1985 reads: "Prepare corporate resolutions; telephone conf w/Seth Ward." RIC118697. Last fall, Thrash says he could have prepared this resolution; it appears similar to the form he used. Thrash Interview, Dec. 1, 1995, at 14:23-15:12, 23:5-18. Now Thrash is more definite on the point:

MR. BEN-VENISTE: And rather than ask you a series of questions, why don't you lay out in narrative form your recollection of how this matter originated and your involvement.

MR. THRASH: Well, Mr. Ben-Veniste, what -- my involvement in this transaction was very limited. When I first got involved I looked at an agreement that Mr. Dover had prepared, I made a few changes on it, I believe I went to an IDC board meeting. This was in early August. I prepared some corporate resolutions that authorized Madison Financial Corporation to purchase the

(continued...)

At this point, with both IDC's and Madison Financial's approval apparently secured, the Rose Law Firm lawyers seem to have dropped out of the transaction for reasons that nobody can remember.¹⁵² Davis Thomas has no timesheet entries between August 16 and October 18, 1985. Thomas Thrash has no entries between August 20 and September 30, 1985.¹⁵³ Between August 20 and September 30, 1985, it appears that nobody else recorded any time to matter 5 either.¹⁵⁴

Although this section of the report focuses on the negotiations with IDC, rather than the arrangements between McDougal and Ward, it helps at this point to digress and consider a meeting that apparently occurred shortly after the events of August 19-20, 1985 just described. Ward called Mike Schaufele, his accountant, and asked him to attend a meeting with McDougal at Madison Guaranty. Schaufele had never met McDougal before, but is quite sure that the meeting occurred on McDougal's birthday, which is August 25.¹⁵⁵ Schaufele is sure of this because there was a birthday party for McDougal at the office, it was hot and McDougal was wearing a Hawaiian shirt:

MR. ERICSON: And you mentioned it happened to be Jim McDougal's birthday?

151(...continued)

entire tract of property for \$1,750,000. That was on August 20th, I believe. From that point on, I had no further involvement in it until closing. I was not involved in the negotiations of the ultimate agreement that was signed. I was not involved in participating with the abstract company in getting that started, in having the abstract company commence preparing the title commitments. I was not involved in that. I was not involved in the preparation of the deeds. I was not involved in the preparation of the closing documents. I simply went to closing sometime, I believe, October 4th. Prior to the closing, I did review the title commitment and then went to closing. And that basically was, in a nutshell, the extent of my involvement in the acquisition.

Thrash Senate Testimony, Jan. 31, 1996, at 94-95; Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 11.

152 Clinton Interview, Feb. 14, 1996, at 55. Thrash and Thomas say they have no independent recollection of their work. Thrash Interview, Dec. 1, 1995, at 8:17-9:3, 10:22-11:2. Thomas Interview, Dec. 19, 1995, at 6:23-7:4, 8:13-17. Thrash does not think he ever saw the agreement after August 20, 1985. Thrash Interview, Dec. 1, 1995, at 26:26-28:23.

153 DKRT11 000875, 76, 96, 907.

154 There are no billing memoranda (prebills) for matter 5 covering these months, so one cannot be sure that no time was recorded; in any event, no time was ever billed.

155 OTS doc. 048756. August 25, 1985 was a Sunday, so perhaps the meeting and the party occurred on Friday, August 23, or Monday, August 26, 1985.

MR. SCHAUFELE: That's the reason I remember the meeting. The first time I ever met the man, he had on a Hawaiian shirt and was the president of a bank. My father has worked for a bank since 1964, and I know a lot of bankers; and I met this guy and I went: This is the president of a bank?¹⁵⁶

Schaufele said that he and Ward visited McDougal to discuss tax issues relating to Ward's purchase of the Levi Strauss warehouse (a portion of the IDC property). Schaufele is quite sure the meeting occurred after the IDC purchase because before the meeting, "Mr. Ward took me out to show me what he had bought."¹⁵⁷ At the meeting, Ward, Schaufele and McDougal discussed how Ward was to give Madison an option to buy back Ward's part of the IDC parcel. The meeting lasted several hours. Schaufele had the impression that the paperwork for the option had not been drafted yet, but he is not sure of this.¹⁵⁸

After the meeting, Ward and Schaufele called Hubbell to discuss another matter. During the conversation, Ward raised the IDC transaction. Hubbell told Ward and Schaufele: "I can't talk to you about this, Mike," adding that a "conflict" prevented him from working on such matters.¹⁵⁹ The point about the conflict is especially interesting, because Ward said the same thing:

A Once we made our verbal agreement, Mr. McDougal appeared to me to become somewhat excited. And he assumed the leadership role. He stated that Madison would make — purchase it. And he gave me several memorandums and directives. Since none of them violated the terms of our verbal agreement, I didn't object. Now — so we went to reduce this in writing. I asked Webb Hubbell if he would help me. And Webb

156 Schaufele Interview, Jan. 11, 1996, at 5. *See generally id.* at 5-16.

157 Schaufele Interview, Jan. 11, 1996, at 6. This could be read to mean that the meeting was shortly after October 4, 1985, the closing, but in light of the testimony about McDougal's birthday, it seems more likely that Ward was speaking in the colloquial sense and took the approval of IDC's shareholders on August 19, 1985 as proof this was a done deal.

158 *Id.* at 5-16. Again, this tends to confirm the August date. As shown in the next section of this report, much paperwork (albeit perhaps unsatisfactory paperwork) documenting the terms of the agreement between McDougal and Ward was drafted before October.

159 *Id.* at 11.

said no, that he couldn't because his firm represented Madison.¹⁶⁰

As August moved in September, apparently without the participation of Rose Law Firm lawyers, Dover continued to generate drafts of the agreement.¹⁶¹ For the most part his drafts rejected language suggested by the Rose lawyers and returned to his earlier language. Thus, for a time, "affiliate" was again substituted for "entity or individual."¹⁶² Then, at some point in early September, probably on or before September 5, the "entity or individual" language returned to the Dover drafts and stayed. The final version contains this language, as do the four drafts immediately preceding it.¹⁶³

The final version was signed on September 13, 1985 by Brick Lile for IDC, Seth Ward for Madison Financial, Bob Wilson for Union National Bank, Charlie Cook for First Commercial Bank and someone whose signature is illegible for Worthen Bank.¹⁶⁴ Under the agreement, Madison Financial or its assignee agreed to purchase all of the IDC property for \$1,750,000.

After execution of the agreement, papers were sent to the title company, which started to get ready for the closing. At some time in late September, probably after September 23, the title company was told that Seth Ward was to be the assignee.¹⁶⁵ On September 30, Thomas Thrash resurfaces, making

160 Ward Deposition, Feb. 12, 1996, at 16. Ward goes on to say that the agreement he wanted reduced to writing is the September 24, 1985 letter (discussed below), but this is exactly the sort of detail as to which Ward often is inconsistent. Schaufele's recollections seem to provide the sounder basis for placing this in time.

161 Neither Dover's files nor the Rose Law Firm's billing records indicate any work performed by Thrash or Thomas in this period. Also, the later drafts of the agreement do not look like they were generated using Rose Law Firm word processing equipment. The Wang identifying numbers do not appear, as they do on the Rose drafts.

162 FDICHRC 0067, 68. Most of the changes had to do with title insurance and other matters of no apparent relevance for present purposes.

163 FDICHRC 0069-73.

164 IG Ex. III-38. Seth Ward signed this agreement on behalf of "Madison Guaranty Savings & Loan Association" even though Madison Financial, and not Madison Guaranty, was the party to the agreement.

165 E. A. Bowen, president of Beach Abstract, the title company that closed the transaction, says he does not think the transaction was restructured to make Ward a vendee of a portion of the Castle Grande property until after September 23, 1985. IG Ex. III-43, at 1. Signed Madison Financial minutes dated September 12, 1985 approved a \$600,000 acquisition. IG Exs. III-36, III-37. As explained above, most Madison Financial minutes were drafted and signed long after the fact, so there is no reason to place much weight on this date. In contrast to the August 20, 1985 minutes, which Thrash said he prepared (a fact confirmed by his
(continued...)

telephone calls to Bowen (president of the title company that handled the closing) and to Ward.¹⁶⁶ On October 3, Thrash spoke again to Ward and others apparently about the upcoming closing. On October 4, 1985, the deal closed, with Thrash in attendance. The title company's file shows that Madison Financial bought a portion of the land for \$600,000 and Seth Ward bought the remainder in two pieces (\$400,000 for the sewer and water facilities and \$750,000 for the land north of 145th Street) for a total of \$1.15 million; the file states that the money came from "Madison" but does not otherwise disclose anything that would suggest the transaction was not an all-cash deal.¹⁶⁷ On October 8, 1985, the warranty deeds were recorded.¹⁶⁸ Thrash talked to Ward once again, on October 7, and then disappeared finally from the billing records.¹⁶⁹

The disappearance of the Rose Law Firm lawyers during the drafting phase of the transaction is peculiar, but neither that nor the circumstances described above provide any substantial basis for a trier of fact to find that the lawyers knew Ward was a straw and with such knowledge substantially assisted with improper aspects of the deal. The agreement, in any of its various drafts, is an innocent-looking document that would place nobody on notice of a Rule V(C) violation. Even the change in the language from "affiliate" to "entity or individual" is not the sort of thing that would have suggested incipient wrongdoing. This was an all-cash deal from the seller's point of view. Therefore, IDC and the banks really could care less to whom Madison Financial might assign part or all of the property.¹⁷⁰

For purposes of argument, however, one might assume that Ward could have told Thrash and Thomas that he was the assignee and therefore needed to have the language encompass him, an individual but not an affiliate.¹⁷¹ Even

165(...continued)

timesheets), Thrash said he had never seen these minutes before. Thrash Interview, Dec. 1, 1995, at 25:21-26:7.

166 DKRT11 000876.

167 IG Ex. III-42.

168 IG Exs. III-44, III-45, III-46; DKRT11 000876.

169 DKRT11 000876. The subject of this meeting was a bill of assurances, a kind of covenant restricting land use. Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 11.

170 Thrash Senate Testimony, Jan. 31, 1996, at 107, 120.

171 In his testimony before the Senate, Thrash speculated that this happened:

(continued...)

so, this would not have put the lawyers on notice that Ward would have no equity in the deal, would give Madison Financial a 270-day option to buy all his land back at cost and would receive commissions on everything that was sold. Thrash and Thomas both say they knew none of these things and a number of circumstances support their testimony.¹⁷² Furthermore, even if they had known some of these things, it does not follow that they knew anything about Madison Guaranty's Rule V(C) problem, and both men deny knowing anything about the rule or Madison Guaranty's problem with it.¹⁷³ As shown in the next section below, there is no evidence that any Rose Law Firm lawyers (other than Hubbell) knew of these terms, and little reason to think that they had anything to do with this aspect of the deal.

c. The deal between McDougal and Ward.

Except for the discussion of the meeting among McDougal, Schaufele and Ward on McDougal's birthday, the presentation thus far has focused on the negotiations with IDC. The presentation now turns to the agreements between

171(...continued)

MR. GIUFFRA: And you met with Mr. Ward on the 19th, correct?
That's what your billing records show.

MR. THRASH: Yes, that's correct.

MR. GIUFFRA: Now, do you know whether you made this change in the draft after meeting with Mr. Ward?

MR. THRASH: What I think happened, counsel, is on the 9th I sent a draft agreement over to Mr. Dover which contained the affiliate language. I believe I was getting tied up in other transactions, and I asked Dave Thomas to come on and assist me in this transaction. Dave came on, he made some changes, he had several telephone conferences with Mr. Dover, I believe one with Seth Ward. This is -- I'm speculating a little bit, because I don't remember Mr. Ward contacting us asking us to make this change. But I think that's probably what happened, Mr. Ward asked us to make this change and probably asked Dave Thomas and he made that change.

Thrash Senate Testimony, Jan. 31, 1996, at 107-08.

172 Thrash Interview, Dec. 1, 1995, at 31; Thomas Interview, Dec. 19, 1995, at 17, 19-23. The supporting circumstances include: Ward's financing was not executed until after closing and after Thrash's last timesheet entry. SW1-040; FDICHR 0089; DKRT11 000876. The Beach Abstract file, closing statements and title commitments do not mention financing. IG Ex. III-42. Thrash's timesheet entries tend to specify the documents he reviewed and nothing pertaining to financing is mentioned. DKRT11 000875-76. See Letter from Alden L. Atkins to Bruce A. Encson, Feb. 2, 1996, at 1-2, which makes these points, among others.

173 Thrash Interview, Dec. 1, 1995, at 24-25; Thomas Interview, Dec. 19, 1995, at 18-19.

McDougal and Ward. As stated earlier, the main issue here is whether anyone at the Rose Law Firm knew of or worked on these agreements. The evidence just discussed strongly suggests that Thrash and Thomas had no such knowledge and did no such work. This leaves the others, who knew Ward far better than Thrash or Thomas did, and who and might reasonably have been expected to help him—namely, Mrs. Clinton and Hubbell.

The terms of the deal between McDougal and Ward are ambiguous, were sharply disputed and resulted in litigation that lasted for years. Those terms were set forth in five documents dated in September and October 1985, as well as in a host of documents executed the following spring. The five documents from September and October 1985 are:

<u>Date</u>	<u>Document</u>
Sept. 3, 1985	Memorandum from McDougal to Ward dividing the land and giving Madison Financial an option to buy Ward's part.
Sept. 13, 1985	Assignment of real estate to Ward.
Sept. 24, 1985	First letter from Ward to McDougal, countersigned by McDougal; marked "void"; gives Ward a commission; gives Madison Financial an option but places no price on the option; does not give Ward any real estate to keep after exercise of the option.
Sept. 24, 1985	Second letter from Ward to McDougal; backdated to Sept. 24, 1985; gives Ward a commission; pays Ward \$35,000 for the option; gives Ward 22.5 acres ("Holman Acres") to keep after exercise of the option.
Oct. 15, 1985	Loan of \$1.15 million from Madison Guaranty to Ward, purportedly to finance Ward's acquisition of his part of Castle Grande, entered into 11 days after IDC sold the real estate to Ward and Madison Financial. ¹⁷⁴

¹⁷⁴ Evidently Madison Guaranty financed the sale on its own before documenting the loan to Ward. The loan, once documented, showed that Ward had borrowed the entire purchase price of \$1,150,000 on a non-recourse basis; Ward put no money of his own at risk. IG Ex. III-48; *Ward v. Madison R.T.* 24-25.

The first four of these documents will be discussed in turn below; nothing new regarding the fifth document has been discovered.

Except for the September 13, 1985 assignment (which is silent on the point), all these documents have one similarity: They all provide that Madison Guaranty will finance 100 percent of Ward's purchase. There is no documentary evidence as to how agreement on this 100 percent financing arose. Virtually the only testimony on point, and by far the most complete version, is that offered by Ward in his recent deposition. In a passage quoted above, Ward said that McDougal, when first presented with the deal, offered non-recourse financing.¹⁷⁵ Later in his deposition, Ward explained this in more detail:

MR. GIUFFRA: How you were going to finance your portion of this, in terms of whether Madison would give you a loan, was that done before the closing?

A. As I understand your question; how was I going to finance it?

MR. GIUFFRA: Yeah. Was that decided before the closing?

A. Yes.

MR. GIUFFRA: So whether Madison was going to give you a loan for the purchase price --

A. Yes, I told you that.

MR. GIUFFRA: And that was going to be a non-recourse loan?

A. I told you that when I told him when I was going to buy the property, he wanted to share it with me, and he said that -- at that point I told him that I would raise my own financing. He said, "Well, Madison will handle the financing for you." And then is when he told me it's such a -- "because it's such a good deal, you won't have to -- it will be a non-recourse note."

Q. BY MR. COLE: And that was a discussion between you . . . and Mr. McDougal?

A. Yes.

175 Ward Deposition, Feb. 12, 1996, at 13-14.

Q. Was anyone else present that you recall?

A. I don't recall.

Q. Were there any lawyers present?

A. No.

Q. And this was a discussion that took place prior to the closing?

A. Yes.

MR. COLE: Thank you.

A. I would have had no problem whatsoever financing it myself.

Q. (BY MR. COLE) You were prepared to purchase the property yourself if Mr. McDougal had not offered to buy --

A. If he hadn't offered to buy it, I was going to.

Q. You would have bought the entire parcel?

A. I would have bought the entire parcel. In retrospect, I wish I had.¹⁷⁶

Later yet in this deposition, Ward again was asked about the nonrecourse financing:

Q. Mr. Ward, did you ever put up any money in connection with the IDC transaction that you were involved with?

A. No. I offered to.

Q. Did you ever assume any risk in connection with those transactions?

A. No, but I offered to.

Q. You made the offer to Mr. McDougal?

¹⁷⁶ Ward Deposition, Feb. 12, 1996, at 34-36.

A. Sure. I told him I would arrange my own financing.

Q. And he said you didn't need to?

A. Didn't need to. That they would do it. As a matter of fact, it was such a good deal, they could do it on a non-recourse note.

Q. What risk did you assume in connection with the IDC transactions in which you were a party?

A. I don't think that I was -- got involved in this business that had too much risk.

Q. So you, in fact, didn't bear any risk; isn't that right?

A. Well, in effect, that's what it amounted to. But that's not the way I had planned it.

Q. But you were offered a transaction that was basically risk free to you by Mr. McDougal?

A. Yeah, and I took that. And you would have too.¹⁷⁷

It is difficult to say exactly when these discussions occurred. A reasonable hypothesis is that they occurred shortly before the birthday meeting (held around August 25, 1985) among McDougal, Ward and Schaufele. The first of the five documents, the September 3, 1985 memorandum, refers to a meeting the previous Friday, which would have been August 30. In any event, by the September 3 memorandum, the 100 percent financing was implicitly if not explicitly in place.

¹⁷⁷ *Id.* at 111-12.

The September 3, 1985 memorandum from McDougal to Ward: This memorandum, written on Madison Guaranty stationery, is succinct:

September 3, 1985

TO: Seth Ward
FROM: Jim McDougal
SUBJECT: Industrial Property

The following is a summary of our conversation of last Friday:

1. You will purchase all land north of 145th Street and the utility plants for \$1,150,000.
2. Madison will take an option for 270 days to purchase those properties for \$1,187,000, plus accrued interest on the loan you will make to purchase the property. If any tax consequences should arise for you from the transaction, Madison will pay those taxes.
3. You will have the present IDC manager collect the rent and utility payments and forward the net proceeds to Greg Young here. Greg will then apply this income monthly to the accruing interest on your loan.
4. Madison will provide you with a letter requiring that you drive a prestigious automobile while you are in charge of this project.

JM/ss¹⁷⁸

Ward says he deemed this September 3 letter "totally inadequate" but did not explain why.¹⁷⁹ In testimony given in 1988, his only detailed criticism was of the "prestigious automobile" provision.¹⁸⁰

178 SW1-004, Def. Ex. 31 in *Ward v. Madison*.

179 Ward Deposition, May 19, 1988, at 48-49.

180 *Id.* at 49-50. Ward heaped scorn on the notion that he had angled for a "prestigious automobile"; he said McDougal pressed him to take the car because "Everyone down there drove Mercedes and he had one he was trying to sell me." *Id.* Although Ward did not mention it, he ended up driving a red 1985 Mercedes-Benz 380 SL that he bought from McDougal with a \$40,000 loan from Madison Guaranty. Denton Deposition at 30-31.

It is fairly obvious that this memorandum was not drafted by a lawyer, at least not one of the ability of Mrs. Clinton or Hubbell.¹⁸¹ The same is even more true of the next document.

The September 13, 1985 assignment from Madison Financial to Ward: This is even shorter than the September 3 memorandum. A crudely drawn one-page document, it assigns to Ward the rights belonging to Madison Financial under the agreement executed September 13, 1985 with IDC to purchase

. . . [a]ll real estate and [sic] improvements north of 145th Street including water and sewer systems less 6.6 acres which is leased the [sic] Levi Strauss¹⁸²

It seems likely that Ward did not take either of these documents particularly seriously. They were unilateral; he signed neither. Therefore, if they were less than complete statements of the deal, he had no particular reason to care. As he volunteered at his deposition (not really in response to any question):

A. Once we made our verbal agreement, Mr. McDougal appeared to me to become somewhat excited. And he assumed the leadership role. He stated that Madison would make -- purchase it. And he gave me several memorandums and directives. Since none of them violated the terms of our verbal agreement, I didn't object. Now -- so we went to reduce this in writing. I asked Webb Hubbell if he would help me. And Webb said no, that he couldn't because his firm represented Madison.

MR. COLE: And what were you asking Mr. Hubbell to help with you?

A. Write the agreement.

181 Mrs. Clinton denies ever having seen this memorandum. Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 49, at 6-7; Clinton Interview, Feb. 14, 1996, at 59. Hubbell says he may have seen it but not until Ward brought it home after the closing. Hubbell Interview, Dec. 27, 1995, at 16-17.

182 IG Ex. III-39; Pl. Ex. 38 in *Ward v. Madison*. See *Ward v. Madison* R.T. 14-15. Thrash and Thomas do not recall having even seen or worked on this assignment. Thrash Interview, Dec. 1, 1995, at 26:1-15; Thomas Interview, Dec. 19, 1995, at 19. Mrs. Clinton says she never saw it. Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 49, at 6-7; Clinton Interview, Feb. 14, 1996, at 59. Hubbell says he did not prepare this assignment. Hubbell Interview, Dec. 27, 1995, at 18. It seems highly unlikely that any competent lawyer would have drafted an assignment this crude and full of typographical errors.

MR. COLE: To write the agreement with Mr. McDougal?

A. Write the agreement.

Q. (BY MR. GIUFFRA) And is this the agreement that was dated September 24, 1985?

A. Yes.¹⁸³

The two letters dated September 24, 1985—and a first draft dated September 23, 1985¹⁸⁴:

These letters, unlike the previous two documents, could well have been drafted by an attorney.¹⁸⁵ The last version of these letters is, according to Ward, the definitive version of his agreement with McDougal. It was backdated, perhaps only a few days but perhaps by as much as a few weeks. This, plus other evidence, has led to speculation that Mrs. Clinton or Hubbell might have had something to do with these letters.¹⁸⁶ That other evidence, in brief, is evidence that Mrs. Clinton started working on matter 5 in November 1985, that Hubbell and Mrs. Clinton discussed matter 5 in November 1985 and that Mrs. Clinton performed approximately 14.5 hours of work on matter 5 for which there are no timesheets or detail on billing memoranda. That theory is explored for the remainder of this section (pages 70-90), starting with a description of the three letters themselves.

The September 23, 1985 draft: The *Rose Report* discussed the two signed versions of the letter dated September 24, 1985. In his recent deposition, however, Ward mentioned a third, which he says he dictated to Hubbell's secretary but did not show to Hubbell:

Q. By "three agreements," you mean agreements between yourself and Mr. McDougal?

183 Ward Deposition, Feb. 12, 1996, at 16-17.

184 In his recent deposition, Ward mentioned a third version of this letter: a draft dated September 23, 1985. Ward Deposition, Feb. 12, 1996, at 17-19. So did Ward's former lawyer, Alston Jennings. Jennings Deposition, Feb. 6, 1996, at 120-22.

185 Clark Senate Testimony, Jan. 18, 1996, at 24-26.

186 As set forth below, Mrs. Clinton, Hubbell and Ward all deny that Mrs. Clinton or Hubbell had anything to do with the preparation of these letters.

A. Uh-huh. And I -- I will give you that in a second. I asked Webb could I use his secretary to type an agreement for me, and he said yes. Well --

Q. Now, was that something you occasionally did?

A. No, but I needed a secretary.

Q. Okay. So you did not normally use Mr. Hubbell's secretary to be your secretary or to type things up for you?

A. No, no, no. I asked him if he could -- if I could use her and he said yes, I could. And I dictated her an agreement to her. And after -- I had never dictated an agreement to her before. And after it was completed, I read it. And I decided that it wasn't what I wanted. It didn't include what all that I wanted. So neither Jim McDougal or myself executed it. But it was dated September the 23rd. You can have a copy of it.

Q. Thank you, sir.

MR. COLE: Did you show that to Mr. McDougal and discuss it with him or did you just look at it yourself and decide --

A. I just looked at it myself.

Q. (BY MR. GIUFFRA) Did you show this agreement to Mr. Hubbell?

A. I didn't use Mr. Hubbell.

Q. No. But did he look at it after it was typed for you?

A. No.

Q. So he never saw this document that's dated --

A. Not as far as I know.

Q. -- September 23, 1985?

A. Not as far I know. I didn't — after he told me that he didn't want to represent me on this, I certainly wasn't going to involve him.

187

The two September 24, 1985 letters: Both of these letters were signed by Ward and McDougal. Both further detail the terms of the arrangements between them with respect to commissions, the option, taxes and (in the second version) a specific 22.5-acre parcel, often referred to in the testimony as "Holman Acres." There are material differences between the two letters.¹⁸⁸ Ward says that the first of the two letters actually was written on September 24, 1985, while the other was backdated to that date.¹⁸⁹ Neither was found in Madison Guaranty's or Madison Financial's files.¹⁹⁰

The first of the two September 24 letters was later marked "Void."¹⁹¹ In his 1988 deposition, Ward testified that McDougal drafted this letter even though it purports to be from Ward to McDougal.¹⁹² According to Ward, McDougal prepared the first September 24 letter and McDougal's secretary, Sue Strayhorn, typed it.¹⁹³ This seems correct: the letter bears her initials and she confirmed this at trial.¹⁹⁴ In his 1996 deposition, Ward confirmed that Sue Strayhorn typed this version.¹⁹⁵ In 1988, Ward testified that he signed this letter without studying it carefully:

187 Ward Deposition, Feb. 12, 1996, at 18-19.

188 Appendix B to the *Rose Report* contains a red-lined version of the two letters.

189 The first letter, marked void, is SW1-008 through SW1-009; Pl. Ex. 5 in *Ward v. Madison*. The second letter is RIC109218-19; IG Ex. III-134, at 4-5; SW1-005 through SW1-007; Pl. Ex. 4 in *Ward v. Madison*. Regarding the backdating, see Ward Deposition, May 19, 1988, at 51-53. As Denton said, "dates aren't sacred at Madison." Denton Deposition at 85.

190 *Ward v. Madison* R.T. 196.

191 Ward Deposition, May 19, 1988, at 50, discussing SW1-008 through SW1-009.

192 "Q. All right. So Mr. McDougal wrote a letter to himself? A. Uh-huh. He did that several times." *Id.* At trial, however, Ward was less sure who prepared this letter. He testified: "I honestly don't recall. I imagine it was somebody with Jim McDougal's staff." *Ward v. Madison* R.T. 36.

193 Ward Deposition, May 19, 1988, at 53. *But see* Ward's trial testimony, where he said he did not know who prepared this letter; he knew only that he had not prepared it. *Ward v. Madison* R.T. 37.

194 *See Ward v. Madison* R.T. at 194-95.

195 Ward Deposition, Feb. 12, 1996, at 19-21.

He wrote this and we both signed it, but after the fact. I'm not a lawyer and I don't -- I don't like the fine print and I don't normally study what I'm signing carefully enough; but shortly after I signed this, I recognized that this still did not cover our agreement, so I wrote [the second September 24 letter]. And I said, "Jim, this is the agreement that we've agreed to; read it and see if that's not, in fact, the agreement." He did and he agreed it was the agreement, and so we signed [the second letter] and voided [the first letter].¹⁹⁶

Ward says the second September 24, 1985 letter is the definitive version. It covers five topics: Ward's purchase of a portion of the Castle Grande property and Madison Guaranty's financing of that purchase; Madison Guaranty's option to buy back that land, less 22.5 acres; joint efforts to sell portions of the property and the application of the proceeds to Ward's debt; Ward's commissions on any sale of the property; and taxes. The terms may be summarized as follows:

1. Ward will take all the property north of 145 Street plus the water and sewer improvements (some of which were south of 145th Street) pursuant to the September 13, 1985 assignment.¹⁹⁷ In turn, Madison Guaranty will finance 100 percent of the purchase price, with the financing secured by the property.

2. Madison Guaranty will pay Ward \$35,000 for a 270-day option to purchase part or all of the property (excepting the 22.5-acre Holman Acre parcel) for a pro rata amount equal to at least the principal still owed on the note plus all accrued interest.¹⁹⁸ (The 22.5-acre parcel is noteworthy because the parties' intentions with respect to it were sharply disputed in *Ward v. Madison*.)

3. Madison Financial and Ward will attempt to sell parcels of Castle Grande as quickly as possible. The sale price of any parcel sold "will be mutually approved by [Ward] and Madison Financial Corporation."¹⁹⁹ The

¹⁹⁶ *Id.* See also *Ward v. Madison* R.T. 15-17.

¹⁹⁷ RIC109218-19; IG Ex. III-134, at 4-5. The water and sewer facilities later were sold to Castle Sewer and Water Company, which was established in December 1985 by Jim Guy Tucker and R. D. Randolph. See *A Report on Certain Real Estate Loans and Investments Made By Madison Guaranty Savings & Loan and Related Entities* 19-23 (Dec. 19, 1995).

¹⁹⁸ RIC109218-19; IG Ex. III-134, at 4-5.

¹⁹⁹ RIC109218; IG Ex. III-134, at 4. It is not entirely clear whether this provision applies to all the property or only the portion being acquired by Ward subject to the option. The parties later acted as though it applied only to Ward's portion of the property.

proceeds less Ward's commissions will be applied to his debt to Madison Guaranty. At Madison Financial's discretion, any particular parcel may be deeded back to Madison Financial prior to a sales transaction.

4. Ward will receive commissions on all sales of Castle Grande property, regardless of whether Ward or Madison Financial owned the parcel in question and regardless of who secured the sale. The rate of the commission, however, will depend on whether the property was intended for industrial use, in which case the commission will be 10 percent, or residential use, in which case the commission will be 4 percent.²⁰⁰

5. Madison Financial will pay all "taxes, special assessments, dues, insurance premiums, etc." during the 270 days of the option.

According to Ward, the main differences between the two letters were that the first did not specify adequately the \$35,000 payment for the option, and did not grant Ward the 22.5-acre Holman Acres parcel that he wanted.²⁰¹

Authorship of the September 24, 1985 letter: In the *Rose Report*, various theories were explored regarding the authorship of this letter. The theories focused on Hubbell; in the absence of the billing records there was little then to suggest that Mrs. Clinton had had much contact with Ward. The evidence then available was described as "far from conclusive" but sufficient to support a reasonable inference that Ward prepared the letter in consultation with Hubbell.²⁰² The new evidence, particularly Ward's testimony, tends to weaken that inference. Here is a summary of the old evidence and the new:

1. *The backdating:* The *Rose Report* noted the evidence that the letter was backdated but the evidence then available gave little idea as to how long after September 24 the letter was written. In 1988, Ward could not recall exactly when it was drafted or executed.²⁰³

200 RIC109219; IG Ex. III-134, at 5.

201 *Ward v. Madison* R.T. 18-20. At the time of trial, the 22.5 acres was valued at somewhere between \$170,000 (Madison Guaranty's estimate) and \$400,000 (Ward's contention). Madison Guaranty presented an appraiser who testified to the figure of \$170,000. *Id.* at 170-79.

202 An alternative theory, advanced by the Rose Law Firm through counsel, is that John Latham, and not anyone at the Rose Law Firm, structured Ward's participation in the Castle Grande transaction. This theory was rebutted in the *Rose Report* and nothing has been heard of it since. None of the new evidence supports it.

203 *Ward v. Madison* R.T. 17-18.

Ward's new testimony offers more detail, and suggests for the first time that the letter might have been backdated weeks rather than days, but the new evidence is problematic and contradicted by other new evidence. At his February 1996 deposition, Ward had a better, if still not definite, recollection on the point. The discussion here starts somewhat confusingly with the September 23 draft and then refers to the first September 24 version (the one marked "void"):

Q. And why was this -- why did this agreement dated September 23, 1985 not set forth your agreement with Mr. McDougal?

A. That didn't include all that I wanted in there. That's all.

Q. What was missing?

A. Well, I would have to compare it at this point in time. But, right off the bat, I can tell you the commissions weren't proper. I didn't use it. But, anyhow, they had Ms. Strayhorn write it. And at a later time, and I don't recall how -- whether it was a week or two weeks or a month or when, I discovered that this agreement marked "void," written on the 24th, did not include the exclusion of Holman Acres.

Q. Okay. So this was about ten days to two weeks after September 24?

A. Sometime thereafter. I don't know the exact times.

Q. Do you know how -- was it a month?

A. I don't recall.

Q. Okay.

A. I know it was afterwards.

Q. Was it a substantial period of time afterwards or just several days?

A. I would say -- I don't know. I would say several weeks.

MR. COLE: Let me ask you this, Mr. Ward. The documents that we have indicate that the closing took place on October 4th. And we can show you those documents. Do you recall whether it was before or after the closing that you noticed that this --

A. It would be after the closing.

MR. COLE: It was after the closing?

A. It would have had to have been. But, anyhow, when I discovered that --

Q. (BY MR. GIUFFRA) Why do you say it had to be after the closing?

A. Because I think I would have observed it at the time of closing; that's why.

Q. So you think you may have observed there was a problem --

A. Also, the -- also, the legal descriptions were passed out at closing and I would have noticed it.

Q. So you think you may have noticed the problem with the letter that Ms. Strayhorn drafted at the closing?

A. I didn't -- I did not notice it at closing.

Q. So it would have been after the closing?

A. That's what I say.

Q. Okay.

A. Now, when I observed it, I asked two lawyers; one being Webb Hubbell, on a hypothetical basis, not as a -- not as a representative of Madison or anything, what my problem was and asked if there would be any problem in replacing the first agreement with the second agreement corrected with the same date. He says, "No, it would be -- if you want to -- if there's an error in the first agreement and both parties agree to the change, it's perfectly legal and perfectly proper to replace the original one with a new original one of the same date." And since this has come up in the hearing, which I've heard, I've also checked with a couple of other lawyers, and they all confirm that that was perfectly proper.

Q. Okay. So Mr. Webb Hubbell told you you could do this back in 1985?

A. I said, "on a hypothetical basis." I checked with him and another lawyer before.

Q. Do you remember who the other lawyer was?

A. No. But give me time, and I might remember.

MR. COLE: So what happened next, after you checked with the lawyers?

A. I wrote it out myself, this time on yellow paper, and asked Webb if his secretary would type it for me, and she did. And Mr. McDougal and I both executed it.

Q. (BY MR. GIUFFRA) Did Mr. Hubbell look at any of the -- the draft that you had written on the yellow pad?

A. No.

Q. So he never -- did he see it after it was typed?

A. No, not that I know of.

Q. So he never reviewed it, as far as you're concerned?

A. Webb stayed hands -- hands-off.

Q. So this would be on the second letter dated September 24, 1985?

A. Yes.

Q. And he stayed hands-off because he did not want to get involved because Rose was representing Madison?

A. That's what he had told me.

Q. Did he tell you that back in 1985?

A. Yeah, he told me early on that he -- when I first -- the first time he told me was when I first asked him to write -- help me write a letter. That's when he said he couldn't do it.²⁰⁴

This testimony, if credited, puts the final version of the September 24, 1985 letter into October or possibly even November--in other words, closer to the time when Mrs. Clinton started to record time on this matter and the time

204 Ward Deposition, Feb. 12, 1996, at 20-24.

when she met with Hubbell and Ward.²⁰⁵ Such an interpretation, however, leans heavily on Ward at exactly his weakest point: details such as dates and sequences of events. In addition, Ward's testimony is hard to reconcile with other evidence on the subject:

Ward's lawyer Jennings, for example, is emphatic that in the past Ward has indicated that the September 24, 1985 letter was backdated at most a day or two:

Q. And to be as clear as we can, recognizing that this was many years ago, all three agreements were prepared over the space of a few days around September 24th?

A. That's correct.

Q. That's your best understanding?

A. Yes.

Q. And Mr. Ward was quite clear on that point?

A. Yes.

Q. So, the third agreement was not prepared weeks or months later and then backdated?

A. Absolutely not.²⁰⁶

Ward's testimony that Hubbell declined to help him with the September 24 letter also is problematic. The reason he states, a conflict, parallels Mike Schaufele's account of the conversation that he and Ward had with Hubbell the day of Jim McDougal's birthday party, which was in August, roughly a month before September 24.

In addition, there is documentary evidence that Ward had been in Europe for some time between the closing on October 4, 1985 and his first meeting with Mrs. Clinton on November 14, 1985; a November 20, 1985 memorandum from McDougal to Ward apologizes "for being slow on getting

205 Her first matter 5 time entry was for November 14, 1985. Her meetings with Hubbell were on November 20 and 26, 1985. DKRT11 000880, 98, 904. On the latter two occasions she also met with Ward.

206 Jennings Deposition, Feb. 6, 1996, at 123-24. See also *id.* at 26, 120-24. Jennings' only source is Ward, but it is Ward in 1987 and 1988, before his accident.

you an update since you returned from France."²⁰⁷ A trip to France obviously does not foreclose further revisions to the September 24 letter, but on balance it seems likelier that the revisions would have occurred before Ward went away, and hence weeks before Mrs. Clinton's first timesheet entry.

Even if the creation of this letter were shown to have occurred in November 1985, it hardly follows that Mrs. Clinton or Hubbell wrote the letter. All that has been shown is that Mrs. Clinton and Ward spoke three times at roughly one-week intervals, and once or twice with Hubbell.²⁰⁸ That is a long way from proof that Mrs. Clinton drafted a letter that Hubbell had declined to touch for fear of a conflict of interest.

2. *The use of legalese in the letter.* The *Rose Report* pointed out that the letter, and particularly the real property description attached to it, appear to be the work of a lawyer. The language is marked by legalese ("thereon," "commonly referred to as," "the aforementioned property," "the pro rata amount of the note," "the property or any portion thereof"). Ward is not a lawyer. He dropped out of Arkansas State Teachers College in 1941 to join the Marines;²⁰⁹ and by his own admission, "I don't like the fine print and I don't normally study what I'm signing carefully enough"²¹⁰

207 MG000555; FDICHRC 0091.

208 On November 20 and 26, 1986, it appears that Mrs. Clinton had separate meetings with Hubbell and Ward, not joint meetings. DKRT11 000898, 904.

209 Ward, who has been watching the hearings, took particular offense at this observation, as repeated by an unidentified senator:

A. . . . And I've been accused of everything imaginable on -- in these hearings. One Senator or somebody said, "I wasn't smart enough to draft an agreement. I was just a college dropout." As a matter of fact, our country was at war and I quit college to join the service. After the war, I had an opportunity to stay in the service and I did. Now, maybe -- maybe I'm not smart enough to write that agreement, according to the Senator or whoever made that remark. But I started my own business from -- literally from scratch.

Q. This was after you left the service?

A. After I left the service. And at one time I hired approximately 1,000 people. I'm not familiar with that Senator's military record or his business record. I apologize for having made that comment, but I was deeply offended when I heard that on television.

Ward Deposition, Feb. 12, 1996, at 41. No offense was intended; the only point was that most non-lawyers do not descend to legalese.

210 Ward Deposition, May 19, 1988, at 5, 7, 51. *Ward v. Madison* R.T. 5. On the other hand, the letter is ambiguous in some respects.

The new evidence cuts both ways:

a. Rose Law Firm Chief Operating Officer Ronald Clark was inclined to agree that this letter was the work of a lawyer, but there is no suggestion that he was familiar with Ward's prose style.²¹¹

b. Mrs. Clinton suggested that Ward did not participate much in the drafting of legal documents:

Q Tell me a little bit about him as a client. Again, I don't mean individually, but in a representative capacity. Is he the sort of client who would actively seek to participate in the work? What I'm specifically getting at, is he the sort of client who would want to edit any written product heavily or perhaps even take a crack at a first draft of a letter or paper he might be looking at?

A I don't know that I would characterize him in that way. . . .²¹²

Later, however, she also noted that Ward would bring documents drafted elsewhere, and perhaps by him, to the office to be typed:

Q Let's turn, then, to tab 19. It's a letter dated September 24, 1985 from Seth Ward to Jim McDougal. I take it from your interrogatory answer that you had nothing to do with the preparation of this letter?

A That is correct.

Q Knowing Mr. Ward the extent you do, can you express any view as to whether he could or did draft this letter?

A I do not know, Mr. Ericson.

Q In your experience, working with him, can you ever recall an occasion in which he would have prepared a draft of a document for your review as opposed to, say, leaving it for you to prepare the

211 Clark Senate Testimony, Jan. 18, 1996, at 24-25, 47-48.

212 Clinton Interview, Feb. 14, 1996, at 13.

document?

A I do not recall specifically, but Mr. Ward had many irons in the fire, and it would not surprise me that on one or more occasions, he would show up with documents that he had drafted elsewhere or had had someone type for him.

Q But I take it nothing about the prose style, if you will, about this letter suggests to you who the author was?

A I don't know anything about these letters and have no opinions about them.²¹³

c. Hubbell testified that Ward has training as a real estate broker:

MR. CHERTOFF: Now, is Mr. Ward a lawyer by training?

MR. HUBBELL: No.

MR. CHERTOFF: So I take it he's not in a position to do legal drafting on the specifics of property agreements that set forth, you know, meets and bounds and all the technical lawyer stuff that you get in real property documents -- is that right?

MR. HUBBELL: Well, I don't agree with that -- not as a lawyer -- but certainly he's capable of doing that, because he has a brokerage license. They're trained to do that.

MR. CHERTOFF: So you think he was capable of preparing and drafting legal documents that set forth transfers of land?

MR. HUBBELL: Yes.²¹⁴

3. *Hubbell's secretary typed this letter, and Hubbell often performed legal services for his father-in-law without recording the time:*

a. The *Rose Report* noted that Webster Hubbell's secretary told the Inspector General that she believed she typed this letter but could not otherwise

213 Clinton Interview, Feb. 14, 1996, at 59-60.

214 Hubbell Senate Testimony, Feb. 7, 1996, at 5.

recall the circumstances.²¹⁵ Hubbell said that Ward occasionally asked Hubbell's secretary to type things for him.²¹⁶ As Hubbell described it, on occasion Ward would bring draft letters into the Rose Law Firm, then sit in Hubbell's office and drink coffee while Hubbell's secretary typed up the letters. Hubbell's secretary would then bring in the finished letter:

Q. And you [Hubbell] might have read it over and talked to him [Ward] briefly?

A. Yeah. Or he might have gave it to me to read it, or vice versa, or not at all.

Q. Okay. But with respect to this particular letter, do you have any recollection of whether you did read it and discuss it with Mr. Ward?

A. No.²¹⁷

The new evidence is consistent with this. The letter was found in files maintained by the Rose Law Firm.²¹⁸ Inquiries made about the type of equipment used to type the letter reveal that the equipment, even if it could be located, would not yield information as to the author, date of creation or date of modification of the letter.²¹⁹

b. The *Rose Report* noted that the Rose Law Firm has indicated through counsel that, unbeknownst to the firm until much later, Webster Hubbell "often assisted Mr. Ward on various matters. However, Mr. Hubbell did not open client/matter numbers for those matters . . ."²²⁰ Hubbell confirms that he

215 IG Ex. III-134, at 2. The secretary, Martha Patton, could not recall typing the letter but recognized the type, the formatting of the second page and "her style of typing." She had no knowledge of the issues discussed in the letter.

216 *Id.* at 24.

217 Hubbell Interview, Dec. 27, 1995, at 21:17-24. See generally *id.* at 19:18-22:16.

218 It is RIC-109218 through RIC 109219.

219 Ms. Patton probably used an IBM Mag-card machine. Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 13. The mag-cards did not record author or date information; each mag-card simply contained a page of text.

220 Letter from Alden L. Atkins to Bruce A. Ericson, Oct. 31, 1995, at 11. It seems far more unlikely that Mrs. Clinton would have performed services without recording her time. She says she always recorded her time on paying matters. Clinton Interview, Feb. 14, 1996, at 2-8. Other evidence supports this and suggests that Mrs. Clinton was far more punctilious about

(continued...)

represented Ward on various matters, denies that he did so with respect to Madison Guaranty and disputes the Rose Law Firm's assertion that it did not know of his work for Ward until after he left the firm.²²¹ Ward, in his recent deposition, confirms that Hubbell sometimes represented him but denies that Hubbell did so with respect to Madison Guaranty.²²²

4. *The dispute over whether Ward was a client of the Rose Law Firm for purposes of matter 5:* The *Rose Report* noted that Hubbell states that the Rose Law Firm represented Madison Guaranty, Madison Financial and Seth Ward, both individually and as an agent or employee of Madison Guaranty, in this matter, while others took the position that Ward was not a client.²²³ The inference that might be drawn from this is that a lawyer (Hubbell) who regarded both Madison Financial and Ward as clients might find it easier to draft an agreement between them than would the lawyer who received the request from someone (Ward) he deemed not a client.²²⁴

The new evidence shows that the question of whether Ward was a client continues to be disputed. The new evidence also shows that, either way, the conflicts issue might not have been clearly perceived:

a. Hubbell continues to say that Ward was a client:

MR. CHERTOFF: Well, you understood at the time, back in 1985, that in fact the firm was, at least in the initial stages of the IDC purchase, representing Madison and Ward at Madison Financial?

MR. HUBBELL: That's correct.

220(...continued)

recording her time than were others. For example, Mrs. Clinton has recorded conferences or telephone calls with other lawyers on numerous occasions where they have not noted the communication on their own timesheets.

221 Hubbell Interview, Dec. 27, 1995, at 4:23-6:24.

222 Ward Deposition, Feb. 12, 1996, at 6. See also Hubbell Senate Testimony, Feb. 7, 1996, at 24.

223 IG Ex. III-69, at 8; Hubbell Interview, Dec. 27, 1995, at 27:7-28:3. In contrast, Thrash asserts that Ward was not a client of the Rose Law Firm for purposes of this matter. Thrash Interview, Dec. 1, 1995, at 8:17-9:3. The Rose Law Firm, through counsel, seems to agree with Thrash. Letter from Alden L. Atkins to Bruce A. Ericson, Oct. 31, 1995, at 11-12.

224 The inference is fairly weak. Either way a conflict of interest (albeit one that might be waived) would be created.

MR. CHERTOFF: So all three of these supposedly distinct parties -- Madison Financial, which bought part of the property; Seth Ward, which bought the other part on behalf of Madison Financial; and Madison Guaranty which did the financing -- all three were represented by one firm?

MR. HUBBELL: That's correct.²²⁵

b. Mrs. Clinton, however, agrees with the Rose Law Firm's position that Ward was not a client:

Q Now, with respect to this matter 5, did you regard, if you recall, your firm as having one client or more than one client, and if so, who were the clients with respect to the matter?

A I believe the billing records reflect that the client was Madison Guaranty.

Q Well, certainly, it would appear that Madison Guaranty received the bill and paid the bill. Did you regard yourself as having multiple clients, and in particular, would you or did you regard Mr. Ward as also being a client, albeit not the one who paid the bills, with respect to this matter 5?

A I do not recall thinking anyone was the client, other than Madison Guaranty.

MR. KENDALL: And by "Madison Guaranty," can we have an understanding that that means its subsidiaries as well?

THE WITNESS: Certainly, everything associated with Madison Guaranty.²²⁶

c. While Hubbell and Mrs. Clinton take opposite positions on this issue, the testimony of each creates some paradoxes. If, as Hubbell says, both Ward and Madison were clients, it is not entirely clear why Hubbell would tell Ward that the Rose Law Firm's representation of Madison prevents Hubbell

225 Hubbell Senate Testimony, Feb. 7, 1996, at 3.

226 Clinton Interview, Feb. 14, 1996, at 48-49.

from helping Ward, as both Schaufele and Ward say he did.²²⁷ Conversely, if, as Mrs. Clinton says, only Madison was a client, it is not entirely clear why Mrs. Clinton drafted an option between non-client Ward and client Madison Financial (this is the May 1, 1986 option, discussed below) after speaking with Ward and his accountant Schaufele but perhaps without speaking to anyone at Madison or obtaining a written waiver:

Q The option is an agreement between Mr. Ward on the one hand and Madison Financial on the other, so there are two parties to it. Yet, the time records indicate you talked to Mr. Ward. They indicate you talked to Mr. Schaufele, who is Mr. Ward's accountant. They don't indicate you talking to anyone other than Mr. Ward associated with Madison.

In a matter such as this, where you're drafting something, an agreement – strike that. Let me put it this way.

Your client was Madison, not Ward; right, and this is an agreement between Madison and Ward, yet so far, as the billing records indicate, you talked only to Ward and to Ward's accountant.

Do you think you would have talked to someone at Madison to ascertain whether this is what they wanted to do?

A Well, in most of my dealings in the last months preceding this on behalf of Madison, I dealt with Mr. Ward. He was the person I dealt with on the brewery issue. He was the person that we dealt with on the utility issue. He was Madison so far as I was concerned.

Q You dealt virtually exclusively with him as opposed to Latham or McDougal?

A In the late 1985, 1986 period, that's correct.

Q What I'm getting at is, what distinguishes

²²⁷ As noted, the conflict could easily be waived if the parties consented.

this in my mind from that representation, here you have at least the possibility – feel free to disagree with me – of a conflict and yet this is a transaction between Ward and Madison. It's not Ward simply acting as agent of Madison, but you didn't speak to anyone at Madison?

A I may have. I don't recollect that, and the time records don't reflect that, but I can't tell you, sitting here today, I did not speak to anyone at Madison.

MR. KENDALL: I think in fairness, certain other time records do reflect conversations with other Madison personnel during this period. They're billed to other matters, but for example, there's time reported with Denton, telephone calls, perhaps some others.

MR. ERICSON: Yes, okay. That's certainly true.²²⁸

5. *Schaufele said that Hubbell was Ward's lawyer:* The *Rose Report* noted that Mike Schaufele, Ward's accountant, gave testimony in 1988 suggesting that Webster Hubbell represented Ward with respect to matters concerning Ward's compensation for this deal. Schaufele testified that he met with Ward and McDougal and an unidentified man at Madison Guaranty on Jim McDougal's birthday to discuss the tax ramifications of the Castle Grande transaction, particularly the tax ramifications to Seth Ward.²²⁹ There was discussion of how to apply rents from a portion of the property to Ward's debt to Madison Guaranty without having that rent become income to Ward. "They [presumably McDougal and the unidentified man] said they would take care of the collection of the rent and apply it directly against the interest."²³⁰

228 Clinton Interview, Feb. 14, 1996, at 86-88. Mrs. Clinton spoke to Denton on April 9, 1986, roughly three weeks before she prepared the opinion. DKRT11 000926. She also spoke to Denton on May 1, 1986, but recorded that time to matter 6, Babcock, whereas her work on the option that day was recorded to matter 4. DKRT11 000922, 26. Her next conversation with someone at Madison Guaranty (again Denton, and again matter 6) occurred on May 6, 1986, the day after the final version of the option was signed. DKRT11 000926.

229 Mark Schaufele Deposition, May 27, 1988, at 5-7.

230 *Id.* at 9.

Q. So the discussion was to work out how best Mr. Ward would have no taxable consequence from the purchase and flow through and sale by Madison?

A. Yeah, of that transaction, realistically, or how it was going to be handled from that standpoint.

Q. Were any decisions made?

A. My recollection is, is that Jim McDougal suggested that he write a memorandum outlining their proposal as far as the purchase -- Mr. Ward's purchase, and then the option that Madison wanted to enter to buy it, to show to Mr. Ward so that he could take it to his attorney to see if that met with Mr. Ward's, you know, it was fine with Mr. Ward's attorney.²³¹

.....

Q. Have you had any other discussions with anyone other than Seth Ward concerning Mr. Ward's commissions?

A. At the time of the original transaction, I discussed it with Mr. Ward's attorney, Web Hubbell.

Q. Anyone else?

A. No.²³²

The new evidence contradicts this. In Schaufele's 1996 interview (quoted above), he said that Hubbell declined to act as Ward's lawyer in the matter.

6. *Direct evidence from Ward.* The *Rose Report* noted that Ward's testimony as to the authorship of this letter has varied. In his 1988 deposition, Ward said that he prepared the second letter but he does not recall who typed it.²³³ At the 1988 trial, however, he was less sure of this:

231 *Id.* at 9-10.

232 *Id.* at 13. In February 1986, McDougal referred to the Rose Law Firm as Ward's attorneys. IG Ex. III-63.

233 *Id.* at 53-54. Ward did not have a secretary. He speculated that his wife may have typed the letter.

Q. The second letter, dated September 24th, 1985, from Seth Ward to Jim McDougal, did you prepare this letter?

A. I think I had it prepared.

Q. By had it prepared, what do you mean?

A. Well, I either wrote it or dictated it or something.

Q. And had someone type it for you?

A. Yes.²³⁴

In his new testimony, Ward is far more emphatic in saying that he wrote the letter and that Mrs. Clinton and Hubbell had nothing to do with it:

Q. (BY MR. GIUFFRA) Let me show you a document which bears Bates number SEN 32695 through 97. It's a letter from Seth Ward to Jim McDougal, dated September 24, 1985. Is it your best recollection that you drafted this document?

A. Yes. That was part of the agreement, the verbal agreement we had made.

Q. But you think that you were the one that actually drafted this on a legal pad?

A. Which one are you talking about?

Q. The September 24, 1985 letter. You think you are the draftsman of this letter?

A. I know I was.

Q. Why do you know you drafted this letter?

A. Because I wrote it out in longhand.

Q. There's a legal description contained on page SEN 32697. Do you think you would have drafted this legal description?

A. No.

234 *Ward v. Madison* R.T. 37.

Q. It was copied out of another document?

A. It must have been.

Q. In the course of your work as a businessman, prior to coming to Madison Guaranty, did you draft legal agreements on occasion?

A. Well, as a businessman, I might have.

Q. You've reviewed legal agreements on a number of occasions?

A. Yes.

Q. Mr. Hubbell did not help you prepare this document dated September 24, 1985?

A. I wrote it out myself.

Q. And he did not review it?

A. No. I told you earlier he wouldn't help me on it.

Q. Because he said that the Rose Law Firm was representing Madison?

A. That's right.

Q. Did he say anything more to you about what kind of legal services the Rose Law Firm was providing to Madison?

A. No.

Q. Have you ever discussed this September 24, 1985 agreement with Mr. Hubbell?

A. I don't think I did.

Q. Since then, in the last three or four years, have you ever discussed it with him?

A. I don't recall.

Q. And you don't believe that Mrs. Clinton drafted the September 24, '85 letter?

A. No, I don't think so.

Q. Do you think she ever reviewed it?

A. This?

Q. Yes, the September 24, 1985 letter.

A. I don't think she did.

Q. Okay. But you can't be sure one way or the other?

A. If I was shooting craps -- of course, I don't now why she would have seen it.²³⁵

On balance, it must be allowed that the case for arguing that Mrs. Clinton or Hubbell wrote this letter is very weak. To make such a case, one would have to impeach all three witnesses: Mrs. Clinton, Hubbell and Ward. To do so, one would have little more to work with than the circumstantial evidence developed above. As illustrated over the past 20 pages, theories can be spun, but it is unlikely that a trier of fact would find them at all compelling.

4. Post-acquisition developments between October 1985 and June 1986.

a. Introduction.

As of the issuance on December 28, 1995 of the *Rose Report*, relatively little was known about the services of the Rose Law Firm after the October 4, 1985 closing with IDC. The new evidence illuminates this period to a considerable extent, revealing that the Firm in general and Mrs. Clinton in particular had far more contact with Ward than was previously known.

Despite the new documentary evidence, the witnesses' recollections of this period remain quite vague. Refreshed by documents, Mrs. Clinton and Richard Donovan (the two principal timekeepers in this period) recall performing legal research with respect to a liquor issue and a sewer utility issue, both of which were well-documented in files available before December 28, 1995. Their recollections, however, leave some questions unanswered, and some circumstances and coincidences leave room to draw an inference that their services might have extended to other subjects.

235 Ward Deposition, Feb. 12, 1996, at 96-99.

With or without the participation of lawyers from the Rose Law Firm, three events of note happened in the nine months between the closing of the IDC deal (October 4, 1985) and the Rose Law Firm's cancellation of its retainer arrangement with Madison Guaranty (July 14, 1986). Roughly in chronological order, these events are: the sale of most of the IDC land to friends of Jim McDougal; the liquor and sewer research, which seems to have been incidental to these sales; and the estrangement of Ward and McDougal over Ward's belief that McDougal had not paid Ward his IDC commissions. The evidence, new and old, suggests that the Rose Law Firm had little or nothing to do with the sales as such, much to do with the research, which in and of itself seems quite innocent, and a little but not much to do with Ward's relations with McDougal.

b. Madison Financial's sales of portions of the IDC land.

Shortly after the closing, Madison Financial began to sell portions of Castle Grande. All of the larger sales were to friends of McDougal; almost all were financed by Madison Guaranty.²³⁶ Many of these larger transactions were suspect; this subject is addressed at length in the report dated December 19, 1995 entitled *A Report on Certain Real Estate Loans and Investments Made By Madison Guaranty Savings & Loan and Related Entities* (the "Real Estate Report").

For the reasons stated in the *Real Estate Report*, a number of the sales of IDC parcels to McDougal's friends appear to have been sham transactions designed to create the illusion of profits. There is no evidence, however, that the Rose Law Firm had anything to do with these sales; in essence, the evidence suggests that these transactions were put together by McDougal and others at Madison Guaranty, on occasion with the cooperation of others such as David Hale, Dean Paul and Jim Guy Tucker.

The first two of these transactions occurred in October 1985, at a time when nobody at the Rose Law Firm was recording much time to Madison matters.²³⁷ The other suspect transactions occurred closer in time to Rose Law Firm services, but nothing other than the coincidence of dates suggests that the Rose Law Firm's work could have related to these transactions. For ease of reference, these transactions are:

236 See *Real Estate Report* at 6-29.

237 DKRT11 000876, 880, 907.

<u>Transaction</u>	<u>Date</u>
Fitzhugh/Levi Strauss	Oct. 25, 1985
Tucker/35 acres	Oct. 25, 1985
Larry Kuca	Nov. 14-21, 1985
Fulbright	Jan. 15-Feb. 28, 1986
Tucker/Castle Sewer & Water	Feb. 14-28, 1986
Dean Paul, Ltd. loan	Feb. 28, 1986
Master Developers	Mar. 10-Apr. 30, 1986

Of these transactions, all but the Fulbright transaction appear to be suspect.

c. The liquor and sewer legal research.

After the acquisition, the Rose Law Firm performed some legal research with respect to two Castle Grande-related matters late in 1985 and early in 1986. The first concerned whether a brewery could be built on the property. The second concerned whether the sewer and water facilities on the property might extend services to properties outside of Castle Grande. Both projects presented straightforward legal issues, as to which legal research was performed and opinions were rendered.

The liquor research: A month after the purchase of Castle Grande, McDougal attempted to sell "2 acres of our best property" to Bill Lyon for erection of a brewery and tasting room.²³⁸ In a memorandum from McDougal to Ward dated November 20, 1985 and sent to Ward upon his return from France, McDougal noted that the property needed "ABC" approval:

Subject to approval by the ABC, Bill will place his brewery in the shell building, along with a tasting room. I have spoken with the Governor on this matter, and expect it will be approved. We must be very careful to not mention that there will be a 'tavern' in the location, as word is already out to that effect and it is causing us problems in the area. Bill's operation must be sold both to the state regulators and to the public as a tourist attraction.²³⁹

McDougal seems to have regarded this deal as close to fruition, but Lyon now says he was less than enthusiastic:

MR. CHERTOFF: . . . [A]m I correct that Mr. McDougal had a number of conversations with you trying to get you to buy a

238 IG Ex. III-57, at 1.

239 *Id.*

piece of property instead of a brewery within this Castle Grande property?

MR. LYON: Yes.

MR. CHERTOFF: In fact, you had done some timber removal at Castle Grande.

MR. LYON: That's right.

MR. CHERTOFF: And you understood, by the way, I guess everybody referred to that area as Castle Grande.

MR. LYON: Right.

MR. CHERTOFF: Well known part of the area south of Little Rock.

MR. LYON: Very well advertised.

MR. CHERTOFF: Very well advertised.

Now, with respect to this opening of this brewery just -- and I have a moment or two left, let me just finish this up. Am I correct that one of the problems that you had was -- or one of the issues was whether there was a dry -- it was a dry county or part of a dry part of the county.

MR. LYON: There were several issues with it. We did find out that it was in dry county, yes, or in a dry part of the county.

MR. CHERTOFF: Now, did you have any discussions with Mr. McDougal about what he would try to do to get permission to open up a brewery in this dry part of the county?

MR. LYON: Mr. McDougal was trying very hard to get rid of -- it was a large shed, and he told me that he thought he could handle it.

MR. CHERTOFF: And what did you say?

MR. LYON: I told him that I really wasn't interested because Arkansas is a southern state, a lot of Baptists, you get in an election like that, you know. I really didn't want any part of that.

MR. CHERTOFF: So eventually you lost interest in buying that piece of property.

MR. LYON: No, and it started -- he asked if I would move the brewery, be interested in moving it, that he had a building, and that's when we looked at the shed, Mr. Ward and I. It didn't necessarily occur to me that he was going to sell me the building and I was going to do all of the improvements, until it came out later. And I really did not have the finances to do anything like that.

MR. CHERTOFF: Now, you said you went to look with Mr. Ward. Who is Mr. Ward?

MR. LYON: Mr. Ward -- well, I'll tell you who he is now, but I didn't know -- let me tell you who he was then.

MR. CHERTOFF: All right. Who did you know him to be then?

MR. LYON: He was a very fine gentleman that I thought sold real estate for Madison Guaranty.

MR. CHERTOFF: And you went with him a few times to look at the building on the property, and then eventually you decided you didn't want to go through with doing the improvements.

MR. LYON: To look at the shed. It was not a building.

MR. CHERTOFF: Last question. During the period of time that you were considering getting into this, or considering moving your brewery or putting up a brewery there, did you know that Mr. McDougal had asked the Rose Law Firm to do some legal work concerning how you might get permission to open up a brewery there?

MR. LYON: No, sir.²⁴⁰

Seth Ward also remembers the brewery proposal, and he, like Lyon, did not take it too seriously:

240 Lyon Senate Testimony, Jan. 23, 1996, at 26-27.

Q. Let's turn to another entry on the billing records. This is dated 29 -- this is Bates No. 29006. There's an entry on December 26, 1985, right after Christmas, half hour, it says, "Conference with Seth Ward," then it has, "telephone conference with Election Commission." No recollection of speaking to Mrs. Clinton the day after Christmas in 19 --

A. No, I don't. And I'd like to make a comment here, if I might.

MR. COLE: You certainly may.

A. Well, I've been shown this before, and I asked, "What Election Commission are they talking about?" Well, it seems that south of 145th Street there was a shell building; that is, just the upright columns and a roof, no floor, no sidewalk. It was just an unfinished building. One afternoon when I went into the office, McDougal was in one of the lower offices downstairs visiting with a friend of his. And he called me back and said, "I'd like you to meet" so and so, I forget his first name, "Lyons."

Q. (BY MR. GIUFFRA) Bill Lyon?

A. I don't remember his first name, but his name was Lyons. And he said, "What do you think of having a brewery in that shell building?" Well, what in the world would I think, one way or the other. If they want to have a brewery in that shell building, I could care less. And he said that, "Mr. Lyon already has a brewery." And I said, "Where?" And he said, "In a warehouse down here on Cantrell Road." I couldn't imagine a brewery being down there. He said, "We're thinking of putting it -- moving it out here in that shell building and having a brewery and tavern." And he, again, asked me what I thought. I said, "I don't know." It wasn't my property. Well, that afternoon, as I went home, I got curious. I just couldn't believe that there was a brewery down -- and a warehouse off of Cantrell. And I stopped where he -- by the way, I'll interrupt myself. He asked me if I'd show him that building and I did. And that's when he explained to me where the brewery was.

MR. COLE: So you did show Mr. Lyon the building?

A. I showed Mr. Lyon the shell building. And driving home I went by the warehouse and went in. And sure enough, there was a brewery in there. It wasn't very much space. I would say 30 feet by 60 feet. It had a bunch of tanks and what not in

there and white plastic pipe. They were making beer. I asked him, "What was the name of the beer?" It didn't have a name. "Well, where did he sell it?" He said, "Well, he sold it at taverns. They used it as house beer." Well, I do recall later on, maybe a week or two weeks or three, whatever, I saw McDougal. I said, "Whatever happened to your brewery deal?" He said, "Well, the water wasn't any good out here." On that Election Commission, I was told that the area where that shell building was located was once in another county and that county has since been absorbed into Pulaski County. But while it was in a previous county, they held an election whether they wanted to be wet or dry and they voted it dry. And --

MR. COLE: So there was a legal issue as to whether or not that location was wet or dry?

A. And I have later received a handwritten note from Hillary Clinton saying that they could have a brewery there. And if I received it, fine. I didn't remember seeing it, but it was addressed to me. I must have received it and passed it on to Bill Clinton. I mean, to --

Q. (BY MR. GIUFFRA) Jim McDougal?

A. -- Jim McDougal. So that's my involvement with the -- and to the full extent of me and the so-called brewery and this Election Commission. I don't recall ever discussing --

Q. The brewery with Mrs. Clinton?

A. No, I do not. I must have, because she gave me that -- she gave me that handwritten note, and it was addressed to Seth. And I had forgotten it, and I still don't remember getting it, but I must have. And I passed it on to -- and if I did, I passed it on to Jim McDougal.²⁴¹

Whether or not the brewery proposal was serious, Mrs. Clinton and Richard Donovan researched the question of whether the proposed site was "dry." The issue was whether the proposed site for the brewery [a Castle Grande commercial parcel] fell within Union Township's "dry area."²⁴² The work involved recreating the history of certain Arkansas townships, legal

241 Ward Deposition, Feb. 12, 1996, at 72-75.

242 RLF2 02981-86; IG Ex. III-58.

research and interviews.²⁴³ A paralegal (Rebecca Arnold) was instructed to search through the county clerk's records.²⁴⁴

Although Donovan's typewritten memorandum associates the project with Madison Guaranty (and no one else), an undated handwritten memorandum from Mrs. Clinton to Donovan states:

I visited with Seth Ward and gave him a copy of your memorandum and with Ken Shemin [a Rose Law Firm partner]. Please see Ken about a strategy to approach the ABC to argue the "dissolved township" theory. Thanks. Hillary. Charge Madison Guaranty IDC.²⁴⁵

Jim McDougal obtained the same memorandum and sent it to Jim Guy Tucker under a memorandum dated February 7, 1986, which reads: "It looks like our township is dry. Attached is an opinion Seth got from his attorney."²⁴⁶

The only peculiar aspect of this work is that it took so long. As noted above, Mrs. Clinton first recorded time to matter 5, and first talked to Seth Ward about Madison matters, on November 14, 1985.²⁴⁷ She then had a series of conversations with Ward through February 1986:

243 RLF2 02965-80, RLF2 02998-3019, RLF2 03106-3121; IG Ex. III-62.

244 RLF2 02968; IG Ex. III-61.

245 RLF2 02988; IG Ex. III-60.

246 IG Ex. III-63. Richard Donovan does not remember any of the documents pertaining to his liquor research. IG Ex. III-68, at 3-4. On several timesheets reflecting this work, Donovan identified the client as "Seth Ward." RIC118711-12.

247 DKRT11 000880.

<u>Year</u>	<u>Date</u>	<u>Matter</u>	<u>Lawyer</u>	<u>Hours</u>	<u>Dollars</u>	<u>Summary</u> ²⁴⁸
85	11-14	5	Clinton	0.5	\$62.50	Con. Ward regarding purchase from Brick Lile
85	11-20	4	Clinton	1	\$125.00	Con. Ward; con. Hubbell
85	11-26	1	Clinton	1	\$125.00	Con. Ward; con. Thrash; con. Hubbell
85	12-06	5	Clinton	0.3	\$37.50	T/c Ward; Dover
85	12-10	5	Clinton	0.5	\$62.50	T/c Ward; t/c Dover
85	12-11	5	Clinton	0.5	\$62.50	T/c Ward
85	12-19	5	Clinton	0.5	\$62.50	T/c Ward
85	12-20	5	Clinton	1	\$125.00	T/c Ward; search for map
85	12-23	5	Clinton	1	\$125.00	T/c with, to and from Ward's office
85	12-24	5	Clinton	1	\$125.00	T/c Ward
85	12-26	2	Clinton	0.5	\$62.50	Con. Ward; t/c election commission
86	01-07	5	Clinton	1	\$125.00	Con. Ward; Con. Shemin
86	02-28	5	Clinton	0.8	\$100.00	*Seth Ward"

Donovan's legal research, however, did not start until December 30, 1985.²⁴⁹ As impatient as Ward is said to be, desiring the answer today, if not yesterday, it seems odd that he would have been satisfied to postpone the resolution of this issue, or any issue, that long. The answer may be that, as he said in his testimony (quoted above), "I could care less" about the brewery. That, however, raises the question of why so many calls.

Two other peculiarities are the telephone calls to or meetings with Darrell Dover and Webster Hubbell. Neither remembers these events and Dover at least doubts that the subject could have been a brewery:

MR. GIUFFRA: Now, Mr. Dover, if I could just call your attention on -- there's a phone call at 12/6/85 for -- it looks like a little bit less than a third of an hour -- involving yourself. And then there's another call on the 10th for about a half hour. And there's a conference with D. Dover. Do you know why you might have been speaking to Mrs. Clinton on 12/6 or 12/10/1985?

MR. DOVER: No, I don't. The transaction closed, I believe, on October 4th or 5th of that year.

MR. GIUFFRA: Do you think those calls could have had anything to do with the brewery?

248 These descriptions are abbreviated, not verbatim. DKRT11 000898, 902, 044, 07,

249 DKRT11 000907.

MR. DOVER: I don't know. I do not think so. I frankly don't ever remember talking with Ms. Clinton on this transaction. I talked to Mr. Thrash a number of times, but I don't recall talking to Ms. Clinton.²⁵⁰

MR. GIUFFRA: Well, this was -- do you recall any other work that Rose did after the sale was completed?

MR. DOVER: That Rose did?

MR. GIUFFRA: Yes. As far as you were concerned.

MR. DOVER: No, I'm not privy to --

MR. GIUFFRA: So you had no further dealings with Rose after the transactions?

MR. DOVER: -- to what Rose does.

MR. GIUFFRA: And you don't recall speaking with anyone from Rose about a brewery or a utility that was on the property?

MR. DOVER: After the closing?

MR. GIUFFRA: Yes.

MR. DOVER: No, sir.²⁵¹

The only other possibility that has been suggested in the Senate hearings is that the third and final version of Seth Ward's September 24, 1985 letter might have been drafted this late. Ward's testimony as to when the letter was drafted does not exclude this possibility.²⁵² Ward denies that Mrs. Clinton had anything to do with the letter, and so does Mrs. Clinton.²⁵³ As discussed

250 Dover Senate Testimony, Jan. 31, 1996, at 82.

251 *Id.* at 105.

252 Ward Deposition, Feb. 12, 1996, at 21-22; *but see* Jennings Deposition, Feb. 6, 1996, at 120-24. Ward went to Europe shortly after the closing, so it is possible he did not return to business until November.

253 Ward Deposition, Feb. 12, 1996, at 96-99; Clinton Interview, Feb. 14, 1996, at 59-61.

in detail above, the circumstantial evidence to the contrary is far from compelling.

The sewer and water research: This work apparently began in October 1985, when David Thomas researched some issues and prepared a memorandum (which has not been located) to Webster Hubbell.²⁵⁴ Apart from that memorandum, the legal work on the sewage issue is well documented.²⁵⁵ The issues here seem to have been determining the powers of Castle Sewer & Water Company and deciding whether it needed certain permits to exercise these powers.²⁵⁶

The sewer and water research stretched on into February and March 1986.²⁵⁷ Again, one is struck by how long the work took to complete, given Ward's notorious impatience.²⁵⁸ The timing of this work raises two other issues, one relating to certain adjustments to the January 1986 bills and the other relating to Mrs. Clinton's time entry on February 28, 1986.

The adjustments: The matter 5 bill for January 1986 was adjusted upward between the billing memorandum (prebill) stage and the final invoice. In particular, the charge for Mrs. Clinton's time was increased from \$912.50 to \$2,731.75. In her interview, Mrs. Clinton was asked a number of questions about this:

Q Let's look for a moment at the billing record number 907. It's a bill or memorandum for matter 5 dated January 1986.

Let me direct your attention to the bottom part of the page where there's something called a time summary by attorney and there are several columns, one of which is "amount to bill," and

254 RIC118729; Thomas Interview, Dec. 19, 1995, at 13. Perhaps this explains Mrs. Clinton's conversations with Hubbell on November 20 and 26, 1985. DKRT11 000898, 904. Nobody can recall the substance of those conversations. Clinton Interview, Feb. 14, 1996, at 73-74.

255 RLF2 02892-02964; IG Exs. III-66, III-67.

256 Again, Richard Donovan remembers nothing about this work. IG Ex. III-68, at 4.

257 DKRT11 000907, 09, 12.

258 It is doubtful that Ward was as blasé toward this work as he says he was toward the brewery issue. The sewer and water facilities were worth good money and Ward had contracted to keep them in service so long as he owned them. In the circumstances, selling these facilities must have been reasonably important to Ward.

there's some handwritten entries there.

And in particular, with respect to you, there was an indication of your total time, 7.3 hours and a standard value of \$912.50.

Would that standard value simply be your time of 7.3 hours times your standard billing rate?

A I believe that's correct.

Q The next column says "matter value," and the number there is \$912.50. Can you tell me what that represents?

A I think it represents the same as "standard value." I don't really know the difference. I can't recall at this time what the difference is.

Q The next column says "amount to bill," and here someone has written in some numbers. With respect to you, the number is \$2731.25.

Can you tell me what that is about? Let me be a little more precise. What it looks like here, looking at the numbers, is that with respect to you, rather than billing the client \$912.50, the client was billed \$2731.25. And my question is first, is that indeed what happened, and second, why?

A It did happen and I believe, as others from the Rose Firm have already testified, January was the end of our fiscal year and a tremendous effort was made to bill, not only all matters and hours that had already been recorded in the computer, but any work in progress as well to try to clear the decks before the end of the fiscal year.

I believe that the amount to bill represented work in progress that was not in the computer and not likely to have been entered into the computer, but which I had reported, kept track of and turned over to the billing department.

Q So this memorandum apparently was printed out January 21, 1986, and the close of your fiscal

year would have been the 31st or whatever --

A Right.

Q So you say the difference between the \$912 and the \$2731 would represent time that you had spent performing services for the client other than the time we see printed out here?

A That's right.

Q For one reason or another, it had not made it into the computer?

A That's right.

Q Do you have any idea or understanding as to over what period those services would have been rendered?

A I believe that they would have been rendered in January, most likely between the date of my last entry, which on this page is January 14th and the end of the month.

Q Now, if we take the number that was actually charged, the \$2731.25, and if we subtract from that the \$912.50, we get a number, which if we divide by your billing rate of \$125, gives us approximately but not exactly 14-1/2. It's actually 14.55. You billed in tenths of an hour at the time?

A Yes.

Q Does this suggest to you that you put in roughly 14-1/2 hours in the latter part of January?

A That's what it suggests to me.

Q Any explanation as to why the division doesn't work out exactly? It's 14.55 rather than 14.5. Any idea why that --

A I can't recall at this moment why that would be, Mr. Ericson.

Q I take it that time, that roughly 14-1/2 hours, whatever, would have been time you put in on matter 5 as opposed to some other matter?

A Based on the billing records, I would assume that, but there are other mistakes in the billing records of things being misapplied, which happened, clerical mistakes, transcription mistakes, but based on the billing records, that's what it appears.

MR. KENDALL: And I think indeed this bill shows some time transferred to matter number 5 from another matter. I don't recall how much that is, but there was also a transfer in from misbilling to another matter.

BY MR. ERICSON:

Q All I meant to get at is this is what I would call matter level billing as opposed to client level, and so this sheet we're looking at, 907 is the time recorded to a particular matter as opposed to all matters?

A That's what it appears to be.

Q Again, subject to an inadvertent error, it appeared that you had roughly another 14-1/2 hours, if it was correctly recorded would be on matter 5, as opposed to some other matter?

A That's what the billing records suggest.²⁵⁹

Counsel for the Rose Law Firm and the firm's Chief Executive Officer both support this explanation of the adjustment.²⁶⁰ Mrs. Clinton's explanation makes good sense, and it appears fairly unlikely that her missing time would have dated from much before January 14, 1986, the date of her last timesheet entry. Cutting the other way, however, is that fact that 14.5 hours is, for Mrs. Clinton, a relatively large amount of time to devote to Madison Guaranty in

259 Clinton Interview, Feb. 14, 1996, at 62-67.

260 Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 28-29; Clark Senate Testimony, Jan. 18, 1996, at 9.

a two-week period; in the last two weeks of December, for example, Mrs. Clinton logged five hours.²⁶¹ In any event, there seems to be no way to check the matter further; Mrs. Clinton's timesheets were discarded in July 1988.²⁶²

Mrs. Clinton believes that the missing services pertained either to the wet/dry issue or to the sewer and water utility issue:

Q Do you have any recollection as to what these services consisted of?

A Mr. Ericson, I do not have a specific recollection. Based on my review of the time records and my review of various memoranda and other documents that have been produced, I believe that the time had to do with two questions concerning the possible development of the IDC property, one concerning the possibility of a brewery being placed on the property and the other concerning the possibility of a utility being created on behalf of Madison for the property.

Q Between November 1985 and April 1986, according to these billing records, you spoke to Mr. Ward a number of times, roughly a dozen more or less.

To the best of your recollection, would those conversations have concerned the two matters you've just described to me?

A To the best of my recollection, that's what those conversations concerned.

Q Let me ask you about this. One thing that perplexes me a little, the series of conversations with Mr. Ward start, I believe, around November 14, and they continue into December, and there's a number of them in December, half a dozen or so. The actual legal research associated with these two projects, to which we've seen many documents, the actual legal

261 DKRT11 000902, 04, 07.

262 Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 3; RIC 000007G-71.

research -- first of all, the legal research was performed mainly by Richard Donovan as opposed to yourself?

A I believe Mr. Donovan prepared the memoranda that we have that are in that binder. And again, I'm only speculating because I do not have an independent recollection, but I believe I also conducted research and explored possible issues pertaining to those, both on my own and in partnership with Mr. Donovan.

Q Are there any particular time entries you can point to in these records that suggests to you or tend to confirm your belief that you yourself performed legal research as opposed to delegating it to Mr. Donovan?

Here's what I'm getting at. I'm not sure I recall seeing anything that uses the word "research" or struck me as being descriptive of research as opposed to a telephone call or meeting or something like that.

So I'm wondering if you can say why you have this belief that you yourself performed legal research on this?

A Well, I think if you go back and look at the time records, I have an entry showing that I was the first one to search for a map, that I made a call to the Election Commission. The two memos that Mr. Donovan prepared are in this January period, I believe, the first January 3, the second January 23rd.

Again, this is not based on a specific recollection, but knowing Mr. Ward, he would not have been happy with the conclusion reached in the first research memo by Mr. Donovan, and I'm sure would have made his opinion known quite adamantly to me since I was the one who he had the contact with. And again, just speculating, I believe I would have had to conduct additional research and pursue additional issues in order to satisfy Mr. Ward that the initial memo was legally correct and discussed with him

possible avenues that could be pursued despite the legal research.

In the midst of this period, there's a handwritten memo where I had a meeting about the dissolved township theory. I would not have known anything about the dissolved township theory, but I'm sure I would have educated myself about the dissolved township theory.

So these pieces of information suggest to me that during the January period, especially following what Mr. Ward would have viewed as unsatisfactory news in the first Donovan memo, would have entailed my involvement in a much more direct way.

Q Let me ask you this. In this period, when you're dealing with Mr. Ward with some frequency with respect to these issues, what was your understanding as to his role with respect to this property?

A I believe my understanding was that he was, in some manner, employed by Madison to help them develop property around Little Rock.

Q See if you can help me with this. As I mentioned a moment ago, your entries showing conversations with Mr. Ward start about the middle of November. And then there's quite a few in December. Mr. Donovan's first entry is the 30th of December, I believe, and he works thereafter. And you yourself referred to searching for a map and talking to someone or another. I believe both of those are in late December, and I trust someone will correct me if I'm wrong, but here's what I'm getting at.

You've painted a pretty clear picture of Mr. Ward as a fairly impatient, fairly demanding client, the sort of person who wants the answer when he wants it, if indeed not yesterday. What I have a little trouble with, it seems like you were talking to him for a month, maybe even six weeks before the research starts.

Are you sure that the things you were

talking to him about in November and early December are the things that were researched in January and February, or could there have been other matters you discussed with Mr. Ward in November and December?

A I don't recollect any other matters, other than uses he had in mind to develop the property, and the only two that I recall are the proposed brewery with a tasting room and the utility development.²⁶³

The missing 14.5 hours must apparently remain somewhat of a mystery, but there is no persuasive reason not to credit Mrs. Clinton's explanation. It is quite plausible that the missing time was from late January 1986 and if so it seems quite plausible that it pertained to the two and only matters then under way: the liquor matter and the sewer matter. The alternate theory--that the time might have been spent much earlier (say, September through November 1985) and therefore might have pertained to something more suspect--makes no sense. If the time really had been spent on some sort of intentional misconduct (say, drafting the September 24, 1985 letter, knowing it to be in aid of a deliberate violation of Rule V(C)), it is hard to imagine that the time would have been written down, deliberately not entered into the computer but then manually added to the January 1986 bill, right down to a fraction of a dollar.

The entry for February 28, 1986:

This was a big day in Madison Guaranty's history. Madison Financial sold the Castle Grande sewer and water facilities to Castle Sewer and Water Company for \$1.2 million. Madison Guaranty loaned \$850,000 to Dean Paul, Ltd., and some of that money went to fund or enable Castle Sewer's down payment and Capital Management's \$300,000 loan to Susan McDougal. In all several million dollars changed hands that day in transactions that by and large are the subject of the upcoming criminal trial involving the McDougals and Jim Guy Tucker.

This was a fairly big day for Seth Ward as well. His \$1.15 million loan of October 15, 1985 was marked "paid in full" and replaced by a new loan of approximately \$70,000.²⁶⁴

263 Clinton Interview, Feb. 14, 1996, at 67-72; Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 64, at 12-13.

264 SW1-040; FDICHC 0040. See SEN 33153.

On this day, Mrs. Clinton recorded 0.8 hours to matter 5. Her timesheet entry reads, uncharacteristically cryptically, "Seth Ward."²⁶⁵ In her interview, she was questioned extensively about this as well:

Q Let's turn to tab 20. This is a document pertaining to a loan from Madison Guaranty to Mr. Ward for \$1,150,000, and it's dated October 15th. If you look about halfway down the page, there's some handwriting there. It's a little hard to read, but I believe it says "paid in full 2/28/86." 2/28/86 is the day, according to the billing records, in which you spent -- I'm not sure what -- but you recorded 8/10 of an hour in your time sheet entry, at least as it's referred to and the billing records simply says "Seth Ward." It doesn't say telephone call or conference or meeting. It simply says "Seth Ward."

Do you know what you did on February 28, 1986 with respect to Seth Ward?

A I do not recall what I did on that day. I don't recall ever seeing this document either.

Q Whether or not you saw this document, do you have any recollection of ever discussing with Mr. Ward the cancellation or payment in full of his debt to Madison Guaranty of \$1,150,000?

A I don't recall ever having any such conversation with Mr. Ward.²⁶⁶

.....

Q I've already asked you a little bit about your entry for February 28. Let's look at it very briefly. It's on page 912. Curiosity, if you will, but the entry seems different in the sense that you usually are fairly specific and say telephone call or meeting or something like that. And here it just says "Seth Ward."

265 DKRT11 000912.

266 Clinton Interview, Feb. 14, 1996, at 61-62.

Any reason why this entry would be shorter or less descriptive than others?

A Oh, I think Mr. Ericson, there must have been just a failure to record either a CFW or a TCFW ^[267] or maybe it was one of those occasions when I told my secretary something orally and didn't write it down. I don't know.

MR. KENDALL: There may also be a garble in recording it because if you look at the various time entries, next to one is HRC and one says RAA don't make sense. What is recorded after them syntactically is incomplete, so there may have been just a failure to put something down there.

THE WITNESS: I think that is a good point because if you look at the next one, conference with and telephone conference with Jane Dickey regarding port. It doesn't go any further and the next one, regarding Union Township. So this may have just been one of those occasions when whoever was doing the transcribing, either couldn't read handwriting or was just careless.

BY MR. ERICSON:

Q Indeed, the reference to Jane Dickey, who I believe was a partner of yours --

A That's true.

Q -- regarding port, does it even have to do with Madison?

A I have no idea, unless again, I'm strictly speculating, since I have no recollection. Knowing Mr. Ward, he may have had an idea about a port. I cannot tell you, Mr. Ericson, how many ideas Mr. Ward would have, but he was certainly fertile in coming up with ideas.

267 *CFW* was a standard timesheet abbreviation for "conference with"; similarly, *TCFW* was an abbreviation for "telephone conference with." E.g., RIC-118729.

Q In the case of Mr. McDougal, it was more often swamps instead of ports. Just sitting here, you can't be sure this even pertains to Madison.

Could it possibly pertain to another client, such as the Airport Commission?

A I have no recollection at this point, 11 years later.

Q As a result of your work and that of Mr. Donovan regarding the utility issue, that had to do with the existing sewer and water facilities on the property; is that correct?

A My best recollection is that as early as November or December, according to the time records, there was a beginning discussion about whether Madison, which had purchased from IDC -- as I recall, reconstructing it from these documents -- a utility that IDC ran out there for tenants of the property, that the Madison folks wanted to explore whether they should either expand the services or create some new utility, and that's my best recollection of what they were interested in.

Q What came of that? What disposition, if any, was made of the sewer and water facilities?

A Well, according again, to our time records and our documents, it's not clear that we were involved in any disposition. Again, it was more a matter of discussion and research and information being provided to the client, and I have no direct knowledge of what did occur with respect to the disposition.

BY MR. ERICSON:

Q In particular, to the best of your recollection, you were not told or did not otherwise hear that the sewer and water facilities were sold on February 28, 1986?

A No. Mr. Ericson, I have no recollection of that. I have since learned that, mostly during the

last year or two in preparation for answering questions posed to me. But I don't recall knowing it at the time.²⁶⁸

In analyzing this answer, it should be borne in mind that February 28 is Mrs. Clinton's only recorded contact with Ward in the period between Rick Donovan's first memorandum on the sewer issue, which is dated February 17, and his second memorandum on the issue, which is dated March 4.²⁶⁹ Here again, there is no persuasive reason not to credit Mrs. Clinton's answer.

As noted in the *Rose Report*, the liquor and sewer research projects are well-documented and appear to have involved straightforward legal work. No theory has been advanced that this work aided any sort of wrongdoing. The only theory that has attracted any attention is the theory that some of the time spent during this period must have been spent on something other than these unremarkable projects. As discussed above, that theory is unlikely to persuade a trier of fact that anyone engaged in fraud or intentional misconduct.

d. Seth Ward's debt and commissions, and the option.

After February 28, 1986, virtually nothing is left of matter 5 except for a little more work on the last of the sewer memoranda.²⁷⁰ Other than matter 6, two loan workouts unrelated to IDC/Castle Grande that present no issues of interest here, very little work in general remains before Mrs. Clinton terminates the retainer arrangement in Madison Guaranty in July 1986:

<u>Date</u>	<u>Matter</u>	<u>Lawyer</u>	<u>Hours</u>	<u>Dollars</u>	<u>Summary</u>
03-21-86	4	Clinton	0.1	\$12.50	T/c Latham
04-07-86	5	Clinton	0.2	\$28.00	T/c Denton
04-16-86	4	Massey	1.5	\$112.50	Con. Heritage; r. Huntsville files
05-01-86	4	Clinton	2	\$280.00	Con. Ward; t/c Ward re option; t/c Schaffler; dr. option
06-10-86	4	Clinton	0.4	\$56.00	T/c Massey; Con. Ward

268 Clinton Interview, Feb. 14, 1996, at 76-80. Ward has no recollection of the meeting and is vague about the sale of the sewer and water facilities. Ward Deposition, Feb. 12, 1996, at 85-89.

269 RLF2 02928-43.

270 DKRT11 000912, 20. The last of these entries, Mrs. Clinton's April 7, 1986 conversation with Don Denton, probably pertains to matter 6.

The events in this period (February 28, 1986 to July 14, 1986) are of interest principally as they pertain to the option for Seth Ward that Mrs. Clinton prepared on May 1, 1986. There are two theories about this option. The first, and simple, theory is that it is what it appears to be: simply an option, bought from Ward for \$1,000 because McDougal thought he might want back the 22.5 acre Holman Acre parcel. The second, and complex, theory is that the option is part of a scheme to turn Ward's IDC/Castle Grande commissions, which exceeded \$300,000, from ordinary income into long-term capital gains.

If the simple theory is accepted, the preparation of the option is an event of no interest for present purposes. It is an innocent-looking document; it did not harm Madison Guaranty (indeed, it was never exercised); and to draft it, its author need not have known anything about Ward's commissions.

If, however, the complex theory is accepted, and if a trier of fact were to conclude that the option's author knew its purpose, then the situation might be different. In that case, one might argue that the option was part of an elaborate scheme (a) to fool federal regulators with respect to the basis for paying Ward the commissions, (b) to continue to disguise the aspects of the IDC acquisition that arguably make it a Rule V(C) violation and, perhaps, (c) to protect Ward against the risk that the government would reject his claim to commissions should Madison Guaranty fail and be taken over by the Federal Savings and Loan Insurance Corporation ("FSLIC").

The simple theory takes virtually no explanation. Under it, the option is what it purports to be, it was put together in two hours and nothing more need be said. The complex theory, however, requires a detailed exposition of Ward's commissions and Ward's debt to Madison Guaranty, which shall take the remainder of this section.

The debt and the commissions: As discussed above, Seth Ward incurred \$1.15 million in nonrecourse debt when buying his portion of the IDC property. Under the letter of September 24, 1985, 90 percent of the proceeds from sales of Ward's IDC property would go toward the reduction of that debt, and the other 10 percent would be commissions to Ward.²⁷¹

Several large parcels of IDC/Castle Grande were sold between October 1985 and February 28, 1986. By February 28, 1986, these sales had reduced

271 Ward also earned commissions upon the sale of the portions of the IDC property that he did not own, some at the rate of 10% and some at the rate of 4%. RIC-109218 through RIC-109219.

Ward's debt to approximately \$70,000, if not less.²⁷² The major portion of the proceeds came from the sale of portions of Ward's IDC holdings to former Senator J. William Fulbright and to Castle Water and Sewer Company.²⁷³

After February 1986, relations between Ward and McDougal deteriorated, in large part because McDougal could not pay Ward his commissions.²⁷⁴ McDougal responded by entering into a complex new series of agreements with Ward. The three main elements of these agreements were: Ward's commissions, estimated to be in excess of \$300,000; the \$70,000 remaining on Ward's mortgage; and the 22.5 acres known as Holman Acres. These three elements were intertwined in ways that the parties later disputed in litigation.

For present purposes, it is not necessary to unravel all these elements, but one issue is significant: the treatment of the 22.5 acres.²⁷⁵ Ward said it was additional compensation to him, above and beyond the \$300,000+ in commissions and the \$35,000 option payment. Madison Guaranty witnesses, in contrast, testified in 1988 that the 22.5 acres never was intended to end up in Ward's hands but had been carved out for him in the letter of September 24, 1985 in an attempt to make Ward's commissions taxable not as ordinary income but as long-term capital gains.²⁷⁶

272 This was a disputed issue in *Ward v. Madison*. Ward said he thought the proceeds had paid off his debt in full; Madison Guaranty, however, said that \$70,000 was still owing. Ward signed a new promissory note in that amount but it was later released when additional property sales netted another \$70,000. *Ward v. Madison* R.T. 26, 32-33, 48, 51-54, 84-85.

273 *Ward v. Madison* R.T. 122-25. Ward's mortgage loan was reduced by \$450,000 from the Castle Sewer and Water transaction and approximately \$680,000 from the Fulbright transaction. *Id.*

274 McDougal's world began to fall apart in the spring of 1986. His debts became increasingly burdensome. As a consequence, he and his wife entered into increasingly questionable transactions, such as the \$300,000 loan from David Hale's Capital Management Services, Inc. At the same time, the FHLBB examiners entered Madison Guaranty to begin an examination that would last six months and lead to a cease and desist order and to McDougal's forced resignation from his positions with Madison Financial (he had resigned as a director and officer of Madison Guaranty in 1984, after the imposition of a supervisory agreement).

275 Ward described this as "[c]hoice property," "the prize property, the prize location." Ward Deposition, May 19, 1988, at 84-85.

276 The 22.5 acre Holman Acres parcel figures in two options, which has confused some witnesses in the recent Senate hearings. The 22.5 acres was excluded from the 270-day option that Ward gave Madison Financial as part of the final version of the September 24, 1985 letter. RIC-109218. In other words, Madison Financial did not have this land under option; Ward was to keep it. The same 22.5 acres then was the subject of the May 1, 1986 option. SW1-063 through SW1-068; FDICHR 0133-38. In other words, the one piece of land not

(continued...)

By the spring of 1986, portions of IDC/Castle Grande had been sold for a total of approximately \$3.8 million.²⁷⁷ Ward asked to be paid his \$35,000 option and his commissions, which he calculated to total somewhat in excess of \$300,000.²⁷⁸ Ward needed the money for undisclosed personal reasons, so he pressed the matter.

On March 31, 1986, Madison Guaranty loaned Ward \$400,000, \$100,000 of which he returned within a week or so.²⁷⁹ A week later, on April 7, 1986, Ward purported to loan Madison Financial \$300,000 plus another \$70,943.47, although no money actually changed hands.²⁸⁰ The purported loan of \$300,000 was made, it is said, so that there would be some written evidence for the FHLBB examiners to see of Ward's entitlement to the commissions.²⁸¹

The \$400,000 loan, later reduced to \$300,000, had an additional twist not covered in the *Rose Report*. It also involved Bob Wilson, late of Union National Bank (one of IDC's creditors) and by now a consultant to Madison Financial with respect to its Campobello project. As Wilson explained in an interview, he loaned Madison Financial \$400,000 at about the same time as

276(...continued)

covered by the September 24, 1985 option was covered by the May 1, 1986 option. Yet more confusion has been occasioned by the fact that there are two signed versions of the May 1, 1986 option: one covering the 22.5 acres and another, signed in error, covering the Levi Strauss warehouse that had been sold to Davis Fitzhugh back in October 1985. In his deposition, Alston Jennings was shown only the Levi Strauss version of the May 1, 1986 option, and this confused him to some extent, although probably not with respect to the substance of his testimony. Jennings Deposition, Feb. 6, 1996, at 28-30.

277 *Ward v. Madison* R.T. 29-31. Madison Guaranty had financed virtually all of this; many of the sales later fell through and Madison Guaranty had to take back the real estate.

278 At trial, Ward ultimately sought \$391,840 less a \$93,000 set-off that he conceded. *Ward v. Madison* R.T. 31-33.

279 Def. Ex. 1 in *Ward v. Madison*. The \$400,000 was secured by Ward's 22.5-acre parcel. *Ward v. Madison* R.T. 29, 49-52, 81-82. Hubbell does not know why Ward wanted the money; he speculates that taxes may have been the reason. Hubbell Interview, Dec. 27, 1995, at 24:8-25:13.

280 Pl. Ex. 19; Def. Ex. 35-36 in *Ward v. Madison*. The loans, dated April 7, 1986, were due June 6, 1986. Hubbell recalls Ward talking about this loan but cannot remember its rationale. Hubbell Interview, Dec. 27, 1995, at 25:14-26:1. In June, Ward released Madison Financial's \$70,943.47 note after Madison Financial released Ward on his \$70,000 note. *Ward v. Madison* R.T. 85-86 and Def. Ex. 37; FDICHC 0139 through FDICHC 0139.6.

281 *Ward v. Madison* R.T. 27-29, 49-54, 101-02, 114-15. In a sense, the April 7 loans counterbalance the remaining \$300,000 plus the \$70,000 allegedly still owing on the note that replaced the original mortgage.

Ward borrowed his \$400,000, and Wilson invited his old friend Seth Ward to participate in this venture, an invitation that, after some reflection, Ward declined. In his May 1994 interview, Wilson said:

Q: . . . You were saying that McDougal needed money and when you say McDougal needed money, Madison Financial I take it needed some money?

A: Right.

Q: Now, you lent some money?

A: I lent them \$400,000.

Q: Tell us about that. How did that come about?

A: Well, Jim said that, you know, he had, I guess based on what I had seen, I felt like he had a pretty good chance of making the thing work. He told me, he said, "Bob, you know I think if I can get over the financial hump here I think that this thing's going to be okay." And he said, "You know, I've a lot of assets that are unencumbered," and he said, "I know you lend money from time to time." And he said, "If I could show you something that's a gut cinch deal for you would you do it?" And I said, "Well, you know, if the collateral's there," I said. I'm not like a bank. I don't have to have a major source of repayment. I'll look at the collateral. If the collateral will support the loan the I would think about it. So he proposed giving me a first mortgage on all the land south of 145th Street which as I recall was about, I think it was 400 acres and I looked at it and I thought that based on the fact that they had sewer and water and I'm thinking the land ought to be worth twice that or maybe three times that. I didn't get an appraisal on it but we did have it surveyed and I got a title policy and I lent them \$400,000.

Q: Is that what McDougal wanted?

A: Yeah.

Q: Or is that what you guys negotiated?

A: No, he said \$400,000. He said, "I need to borrow \$400,000." He said, "I'd put this land up." And I thought that was a good deal as far as I was concerned, a good business transaction.

Q: He was borrowing the money for Campobello?

A: What?

Q: He was borrowing the money for use at Campobello or did I misunderstand?

A: I assumed that's what it was, you know, he had a lot of things going and, you know, I don't know what Jim did, how he handled some things but he said that he needed about \$400,000.

Q: Was this also in '86?

A: Yeah, I think it was. It was during the time that I was up there he discussed it with me and I think we lent him the money in '86, yeah.²⁸²

Wilson, an experienced banker, had no trouble discerning why Madison Financial wished to borrow from him instead of from Madison Guaranty. Although he made mistakes with respect to the percentage (6%, not 3%) and the number to which it is applied (assets, not deposits), he spotted the Rule V(C) issue without much difficulty:

Q: Right. Did you ever ask him why he didn't pull it out of Madison Guaranty?

A: No. Well, that's pretty obvious, isn't it? I mean, you have the limitation of how much money the savings and loan could put in the service corporation. So any way, at that time where 3% of the deposit base or something like that. So whatever you had that was the maximum we could put into from the savings and loan.²⁸³

Wilson asked Ward to participate in the loan to Madison Financial, but Ward declined:

Q: Do you, in your dealings with Madison, Madison Financial and your dealings with Seth Ward at the time that you were both there, was there ever an occasion where the two of you, you and Ward, had to team up to help out Madison Financial or?

A: At one time, right after, right after, Jim talked to him about lending the money on it, I told Seth I was thinking about doing it. I said, you know, I'd really like to have some support if you want to do it. I think it's a good deal but I prefer not to put \$400,000 directly. And Seth at one

282 Wilson Interview, May 10, 1994, tape 1, at 12-13. Documents confirm that this loan occurred in April 1986. FDICHC 0120.1-3.

283 *Id.*, tape 2, at 3.

time said, well yeah I want to do it, but then he changed his mind. I think maybe he thought we would leave [tape garbled].

Q: Do you know if at the same time that you made your \$400,000 loan did Seth Ward receive any of that money?

A: I have no way to know. No.

Q: Do you know where any of the money would have gone?

A: I do not.²⁸⁴

Most of the foregoing is fairly undisputed. At the trial of *Ward v. Madison*, however, the witnesses differed as to the fate of the \$300,000 note from Madison Financial to Ward and the fate of the 22.5 Holman Acre parcel: Ward's testimony on these points conflicted with Latham's.²⁸⁵

Ward testified that he did not pay back the \$300,000 he had borrowed from Madison Guaranty; instead, in December 1986, he gave Madison Guaranty a deed in lieu of foreclosure on the 22.5-acre Holman Acre parcel.²⁸⁶ As for the \$300,000 note Ward had received from Madison Financial, Ward said that it remained outstanding, providing additional evidence of the commissions and option that had never been paid.

Latham agreed in part and disagreed in part. He agreed that, in June 1986, Madison Financial had released Ward from personal liability on his \$300,000 note to Madison Guaranty, leaving Madison Guaranty with recourse only to the 22.5-acre Holman Acre parcel.²⁸⁷ He knew nothing about Ward giving Madison Guaranty a deed in lieu of foreclosure because by then Latham had left Madison Guaranty.²⁸⁸ As for Madison Financial's \$300,000 note to Ward, Latham thought it had been canceled and nothing further was owed Ward, but Latham had to admit that, so far as he knew, the note had never been demanded or returned.²⁸⁹

284 *Id.*, tape 2, at 4-5.

285 McDougal did not testify. Nobody knew where he had gone. Ward said, "Somebody told me he was in Mexico. I don't know where he is." Ward Deposition, May 19, 1988, at 116.

286 *Ward v. Madison* R.T. 32, 81-84.

287 *Ward v. Madison* R.T. 103-05, discussing Def. Ex. 4.

288 *Ward v. Madison* R.T. 109. See Pl. Ex. 35-37 in *Ward v. Madison*.

289 *Ward v. Madison* R.T. 112-14.

The testimony just summarized has taken us ahead of our story, chronologically speaking. Both the release of Ward from personal liability, which happened on June 6, 1986, and the deed-in-lieu of Holman Acres, which happened on December 12, 1986, occurred after the option of May 1, 1986.

The purpose of the option of May 1, 1986: On May 1, 1986, for \$1,000, Ward gave Madison Financial an option to buy the Holman Acres parcel for \$400,000.²⁹⁰ Before discussing the circumstances of the creation of this option, it helps to develop further the competing theories regarding its purpose. At the trial of *Ward v. Madison*, the parties disagreed on this point and in particular disagreed about whether the option had anything to do with Ward's commissions:

1. Ward took the position that the acreage represented additional consideration to him, above and beyond his \$300,000 in commissions. Ward also said that the option had nothing to do with his commissions: McDougal simply wanted the 22.5 acres.²⁹¹

2. Madison Guaranty (through Latham), in contrast, said that the 22.5-acre parcel simply secured the commissions, with the intention being that Madison Guaranty would exercise the option and thereby pay Ward the commissions owed.²⁹² In other words, most of the \$400,000 ostensibly paid for the 22.5 acres really would be payment of the commissions.

Ward's case: At trial, Ward did not offer a particularly compelling explanation of why he wanted Holman Acres. In his recent deposition, however, Ward explained in some detail why originally he wanted this land and yet in December 1986 deeded it back to Madison Guaranty. The explanation occurred in the midst of Ward's lengthy narrative, so the following quotation will begin in mid-stream, without the question:

A. . . . At that time [when McDougal and Ward were negotiating the IDC acquisition], in the newspapers here in Little Rock, there was a description of a new highway that was going to circle the

290 *Ward v. Madison* R.T. 55-56, 101-04; Def. Ex. 3. Counsel for the Rose Law Firm states that this option was created at the Rose Law Firm and that the letter "g" in the word processing code identifies the author as Mrs. Clinton. There is no dispute about the little "g". Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 33, at 2-4.

291 Ward Deposition, May 19, 1988, at 35-36. Jennings supports Ward. Jennings Deposition, Feb. 6, 1996, at 28-31, 34, 36-37, 41-42, 45, 49-52.

292 *Ward v. Madison* R.T. 101-03, 107-09. The option is Def. Ex. 3.

south side of Little Rock. It went from Highway 30 to Highway 68, I believe it is, which is the Little Rock/Pine Bluff highway.

MR. COLE: Highway 65?

A. 65. And it would dissect Highway 65 right there at 145th Street. Now, the property which would be in the northeast quadrant of that intersection, 21 acres known as Holman Acres, would have been an ideal location for a shopping center. So I didn't want to sell it, and I excluded it from my -- from the deal.

MR. COLE: When you say you excluded it from the deal, does that mean that --

A. He could not sell it.

MR. COLE: -- the option that you gave Mr. McDougal for 270 days did not include --

A. It did not include it.²⁹³

.....

Q. And you had told us -- you had begun to tell us about the sale of the water and sewer utility?

A. Well, that's when I decided I was in a new ballgame. I made a few notes here myself. I demanded that I get -- be paid my commission. And I was told that -- by John Latham, that Madison Financial Corporation was not in a financial position at that time to pay me.

Q. Who was Mr. Latham at that time?

A. He was president of the company.

Q. At Madison?

A. Yes. He said, "We'll you -- if you need the money, we'll loan you some money." I said, "Well, you owe me money and then you loan me more money, I'll owe you twice as much and that's not -- that doesn't make sense." He said, "Well, we'll loan you -- we could loan you -- if you need some cash." And I needed -- I needed -- I had a need for

²⁹³ Ward Deposition, Feb. 12, 1996, at 15-16.

some cash. "We'll loan you \$400,000 and secure it with the -- with a mortgage on the Holman Acres." I said, "So." "Yes, but then we will give you -- we'll have Madison Financial give you a note for \$300,000 to offset it."

Q. And that \$300,000 note would evidence what you contended Madison owed you for commissions?

A. That, plus. Now --

Q. And when you say, "that, plus," you felt they owed you --

A. Because the commissions amounted to more than that.

Q. You felt they owed you more than \$300,000?

A. That -- now, later on, and I can't tell you how late it was. I don't know. But I saw that the rode [sic] was not going to come through.

MR. GIUFFRA: Madison was not going to come through?

A. The road. The new highway I was talking about.

Q. (BY MR. COLE) The bypass that would intersect --

A. Yes.

Q. -- Highway 65 where your property was located?

A. I learned that rode [sic] was not going to be built. I also learned that McDougal wasn't going to build all the houses that he had promised to build. McDougal wanted that property and --

Q. "That" being the property that's referred to as Holman Acres?

A. Yes.

Q. In the northeast quadrant?

A. He wanted it. So I deeded it back to him as collateral. And so they had my property, which in effect they had purchased for \$300,000. Now, I had borrowed 400, but I had paid back a 100. And this was another time -- another thing that took place after the waterworks. I told you I didn't know anything about their financial structure. A friend came to me one day, and said that, "Mr. McDougal

needed some cash in Madison Financial and would we loan him \$200,000?" And I said, "Well, I don't exactly have \$100,000 to lend." He said, "Well, Madison Guaranty Savings & Loan will lend it to us." I said, "Well, that's like robbing Peter to pay Paul." He said, "But it doesn't make any difference where it came from as long as it doesn't come from McDougal." "Okay, I'll loan a hundred." So that's when I increased the loan that was made on the Holman Acres from \$300,000 to \$400,000. But then two days later a friend came back and said, "McDougal under estimated the amount of money he needed. He needs \$400,000." And I said, "Well, that's more than I want to get involved in." He said, "Well, he'll collateralized [sic] it with all the uncommitted property south of 145th and that's certainly excellent collateral." I said, "Yeah, I know. But you're the real estate man and I'm not."

Q. Who was the friend that you had this discussion with?

A. Well, Mr. Bob Wilson. I said, "You're the real estate man and I'm not. So I think I'll back out of the deal." So I got my \$100,000 back and reduced the loan which amounted to \$400,000 on the Holman Acres back down to \$300,000. And I understand that Mr. Wilson did, in fact, lend the \$400,000 out of his own pocket to McDougal and he secured it with the property.²⁹⁴

Q. Just one final bit of questions. With regard to the Holman Acres parcel, it's your testimony this was additional compensation to you above the commissions that you were owed; is that right?

A. No, that's not my testimony.

Q. What is your testimony?

A. I said I excluded the property from our agreement.

Q. So you excluded it from the parcel that you had optioned back?

A. I excluded it from my agreement, because it had too much of a potential for a shopping center area.

Q. And so the property that you purchased for \$1.15 million --

A. Included that.

294 Ward Deposition, Feb. 12, 1996, at 36-40.

Q. -- included that. But the Option Agreement gave to Madison, you purposefully excluded Holman Acres, because you thought it had a lot of potential?

A. I wanted to develop it myself.

Q. So the litigation in the "Ward versus Madison" case concerned whether the 22.5 Holman Acres parcel represented your commissions or whether you were owed the money in addition to the 22.5 acres?

A. They wanted -- when they loaned me actually \$400,000 reduced back to \$300,000, that was collateralized by Holman Acres. And when McDougal -- when I saw that the road wasn't coming through, and I saw that McDougal wasn't going to build the houses they had talked about building, I sent them back the deed and they accepted it, which offset the note of \$300,000. The note originally was for \$400,000. I told you. So that meant, in effect, they bought my property for \$300,000. But they still owed me my commissions.²⁹⁵

Put another way, Ward's version of the facts is the "simple theory" described at the start of this section: The May 1, 1986 option has nothing to do with the commissions; McDougal simply decided he wanted the 22.5 acres after all. The \$400,000 loan to Ward was secured by the 22.5 acres, but this too had nothing to do with the commissions; Ward borrowed \$400,000 because he needed the money, and the 22.5 acres provided convenient security, because McDougal wanted it. The \$300,000 loan from Ward to Madison Financial was indeed evidence of the Ward's entitlement to commissions, but it had nothing to do with the 22.5 acres.

Madison Guaranty's case: In contrast to Ward, Latham and Young testified that the option was a vehicle for paying the commissions. Latham's testimony suffered from a major defect: It could not be reconciled with the second September 24, 1985 letter, a point Latham conceded.²⁹⁶ Madison Guaranty's position at trial was that it was not bound by the second September 24, 1985 letter, because the letter never had been approved by Madison Guaranty's or Madison Financial's board of directors. Indeed, defendants argued, the letter was not to be found in Madison Guaranty's files. Latham and Strayhorn testified that they had never seen it before May or June 1986.²⁹⁷

²⁹⁵ *Id.* at 109-11.

²⁹⁶ *Ward v. Madison* R.T. 110.

²⁹⁷ *Ward v. Madison* R.T. 196:3-8; Latham Deposition at 18-19, 33-34.

By questioning the bona fides of the September 24, 1985 letter, Latham attempted to avoid its clear meaning, but this by itself provided no affirmative justification for deeming the May 1, 1986 option a device to pay commissions. Madison Guaranty's former Chief Financial Officer Greg Young then stepped into that breach by offering a tax rationale for deeming the 22.5 acres security for the commissions. According to Young, Latham's \$70,000 in remaining debt was to become the tax basis for Ward's 22.5-acre parcel. Ward, in the meantime, had held the parcel for six months. When Madison Financial exercised the option, it would pay Ward \$400,000. This, less the \$70,000 still owing, was an amount roughly equal to Ward's commission, but the money would look like a profit on the sale of a parcel of land held for over six months, and Ward would be taxed at the lower capital gains tax rate then available.²⁹⁸

The evidence on this theory was disputed, with Ward supplying some of the confusion. In his May 1988 deposition, Ward testified that he had agreed to wait six months for his commissions:

Well, initially, he [McDougal] prepared a statement of moneys due me, but told me that, if he retained the commissions for six months, I would benefit with long-term capital gains. After verifying the accuracy of his contention, I agreed to do just that, and I let the commissions accumulate for a six-month period.²⁹⁹

By trial, however, Ward said his accountant had told him this idea would not work.³⁰⁰

The "complex theory" presented by Latham and Young has met with various responses. The jury obviously rejected it; Ward won at trial. After a two-day trial, the jury found for Ward and against Madison Guaranty, implicitly agreeing with Ward that ownership of the 22.5 acres was additional compensation to Ward rather than an attempt to obtain long-term capital gains

298 *Ward v. Madison* R.T. 124-25, 166.

299 Ward Deposition, May 19, 1988, at 29-30, 66-67.

300 *Ward v. Madison* R.T. 39-42. Neither side called him at trial, but in deposition Ward's accountant, Mike Schaufele, testified that McDougal had quizzed him in Ward's presence as to how long Ward would have to hold real estate to qualify for the long-term capital gains rate. Schaufele answered "six months" but said he did not know if anything further came of the discussion. Schaufele Deposition, May 27, 1988, at 11. Hubbell says he heard of the option and does not recall its rationale but is skeptical of the notion that Ward's commissions could have been deemed long-term capital gains. Hubbell Interview, Dec. 27, 1995, at 26:10-27:6, 28:4-31:7.

treatment for his commissions.³⁰¹ Jennings to this day describes the complex theory as "totally idiotic."³⁰² When presented with the theory in his interview, Hubbell more or less laughed, although that is not entirely apparent from the transcript:

Q Did you ever hear that an effort was made with respect to those commissions to structure the transaction in such a way that they might be taxed not as ordinary income but as long-term capital gains?

A No. I don't think he could do that, could he? I'm not a tax lawyer.

Q That makes two of us. I'm the worst person to ask that.

A No, I am.³⁰³

Ironically in light of this understandable skepticism, Ward did end up treating the \$300,000 he received from Madison Guaranty as a long-term capital gain. The option was never exercised, but as already noted, on June 6, 1986 McDougal made Ward's loan from Madison Guaranty nonrecourse. The agreement making the loan nonrecourse was made:

In consideration of the outstanding profitability of the land acquisition Seth Ward has made for Madison Financial Corporation, which has been most beneficial for all concerned . . .³⁰⁴

Then, in December 1986, Ward deeded Holman Acres to Madison Guaranty. Because the debt was nonrecourse, this meant that Ward could keep the \$300,000 he had borrowed, and he did. Now that the money was his to keep, however, he had to pay tax on it, so he did at the long-term capital

301 Ward obtained a verdict and judgment for \$353,502.57--the full amount he sought less a setoff he conceded. After the failure of Madison Guaranty and a great deal of appellate activity, Ward and the RTC ultimately settled for mutual general releases and the return by Ward to the RTC of \$325,000.

302 Jennings Deposition, Feb. 6, 1996, at 41-42.

303 Hubbell Interview, Dec. 27, 1995, at 30-31.

304 FDICHRC 0139 and 0139.1, ¶ 1.

gains rate, in effect treating the cancellation of the recourse provision and the deed-in-lieu as a sale of an asset (Holman Acres) held for over six months.³⁰⁵

The drafting of the option of May 1, 1986: For present purposes the option of May 1, 1986 is of interest because it, or at least some version of it, was drafted at the Rose Law Firm by Mrs. Clinton. As noted in the *Rose Report*, Hubbell, Thrash and Thomas could not identify this as a Rose Law Firm document, say they did not prepare it and could not identify the notaries who signed it as Rose Law Firm employees.³⁰⁶ Nevertheless, counsel for the Rose Law Firm has confirmed that this document was created at the Rose Law Firm and bears word-processing markings indicating that it was created by or for Mrs. Clinton.³⁰⁷ In particular, the small letter "g" on the option stands for Mrs. Clinton.³⁰⁸

It is curious that Mrs. Clinton, a litigator, would have prepared an option. Richard Donovan, her colleague in the Rose Law Firm's litigation section, has said he would not have attempted such work:

SEN. BOND: If you were preparing an option for the -- for a transaction, would you, in the normal course of your work as an attorney, have to find out who owned it? In other words, you'd have to know who had the title and whether was a mortgage on it, would you not?

MR. THRASH: No, sir, I don't think you would -- you'd need to do that. No, sir.

SEN. BOND: To prepare an option for real estate?

305 Schaufele Interview, Jan. 11, 1996, at 17-19, 24-26, 29-34.

306 Hubbell Interview, Dec. 27, 1995, at 26:10-31:7. Thrash Interview, Dec. 1, 1995, at 33:4-34:12. Thrash, however, could not identify his own secretary either. *Id.* at 40:1-3. Thomas Interview, Dec. 19, 1995, at 23:21-25:25.

307 Compare SW1-063 through SW1-068 (Def. Ex. 3 in *Ward v. Madison*) and SW1-070 through SW1-074 with IG Ex. 40, at 16-31 (drafts of the purchase agreement prepared by the Rose Law Firm) and RTCKC41005-06 (litigation letter to Peat, Marwick, Mitchell and Company).

308 Counsel for the Rose Law Firm confirmed this on December 21, 1995. The inquiry was an outgrowth of a statement by Davis Thomas on December 19, 1995 that the letter in this code stood for a particular attorney, although he could not remember his own letter, let alone the letters assigned to others. Thomas Interview, Dec. 19, 1995, at 16:8-17:7. That the letter "g" was associated with Mrs. Clinton tends to be confirmed by RTCKC41005-06, a letter she signed that also bears a "g."

MR. THRASH: If a client came in and asked me, "Would you prepare an option on this property," I wouldn't go to a title search to see if the client owned it. I would prepare the option, as he requested.

SEN. BOND: Mr. Donovan, that -- you didn't have to -- you would not -- would you prepare any -- make any search of any title?

MR. DONOVAN: Senator, I'm a trial lawyer. If I even dabbled in real estate it would be malpractice waiting to happen. I wouldn't venture an opinion.³⁰⁹

In her interview, Mrs. Clinton was asked about this subject. Before turning to her statements, however, it helps to remember that there are two signed versions of this option. One describes Holman Acres;³¹⁰ the other described the Levi Strauss warehouse that, by May 1986, Ward did not own.³¹¹ Ward testified that the Holman Acres version was the correct version and replaced the Levi Strauss version, which was a mistake.³¹² That makes sense; in addition, the Holman Acres version was notarized on May 5, 1986, whereas the Levi Strauss version was notarized on May 1, 1986.

Counsel for the Rose Law Firm recently found the word processing disk containing the option and printed it out. What resulted was a duplicate not of the Holman Acres version but of the earlier Levi Strauss version,³¹³ suggesting that the Holman Acres version was not produced at the Rose Law Firm.

With this background, here is Mrs. Clinton's explanation:

Q Let's talk for a minute about the option that was drafted on or about May 1, 1986. And by this, I mean the option that appears behind tabs 31, 32 and 33.

309 Donovan and Thrash Senate Testimony, Jan. 31, 1996, at 99.

310 SW1-063 through SW1-068; FDICHRC 0133-38.

311 SW1-070 through SW1-074; FDICHRC 0128-32.

312 Ward Deposition, Feb. 12, 1996, at 47-53.

313 Letter from Alden L. Atkins to Bruce A. Ericson, Jan. 25, 1996, producing RIC 120853 through RIC 120858.

Now, the billing records and the word processing codes indicate that you have something to do with the drafting of this option. But you're a litigator, as you've told us. Had you had occasion before this to draft options for real estate purposes?

A No. That was not part of my practice, and I have no recollection of doing this. I can only go by what the billing records describe. And I think it's unlikely that I would have drafted this option from scratch, that I would have had conversation with Mr. Ward and Mr. Schaufele and a conference with Mr. Ward all within a two-hour period.

Q Mr. Hubbell suggested in testimony that the Rose Firm maintained form files that were available to people when they were drafting various kinds of legal documents and at least made the suggestion that this is something he or others might have used for a purpose like this.

In your practice, would you on occasion, use these form files when you had to draft documents with which you were unfamiliar?

A I might have on occasion. I don't have any recollection of having done it in this instance. I don't know what Mr. Ward handed me. I don't know what had already been prepared. I don't have any recollection of the two hours at all, other than what the time records say.

Q Mr. Donovan, in his testimony, said rather colorfully, for him, he would have regarded drafting an option as malpractice waiting to happen. And I wonder, is what you're saying that this is not something you would have been comfortable doing on your own? You would have involved somebody else?

A I have no recollection of what occurred, Mr. Ericson. It's also possible that since only two hours were recorded, that Mr. Ward had something that had already been prepared by somebody else and wanted my secretary to make some changes in it. That was not uncommon for Mr. Ward, and I would have talked to

him about it and maybe he needed some piece of information from Mr. Schaufele.

I'm totally speculating now, but Mr. Ward often walked around our firm asking our people to help out on certain legal matters that were pressing, so far as he was concerned and insofar as we were able, we tried to accommodate him.

Q Do you have any recollection of ever talking to Mr. Schaufele about the IDC property or Mr. Ward's work with respect to it?

A I have no recollection. All I can point to is the billing record that reflects a telephone conference with Mr. Schaufele.

.....

BY MR. ERICSON:

Q The three copies of the option we have here behind tabs 31 and 32 and 33, there are little differences between them. Two describe one piece of land and the third describes a different piece of land. Two, I believe, are signed; one isn't.

Mr. Ward has testified elsewhere that he originally prepared and signed the option, described the wrong piece of land and had to be changed. And indeed, the version behind tab 33, which he said was the correct version, at least according to the notary's signature, was signed at a later date, May 5.

Do you have any recollection of being asked to correct or change the property description with respect to this option?

A I have no recollection of that.

Q The first version or the version behind tab 31 is the version that's been represented to me by a lawyer from Vinson & Elkins as being the document as it can be found to this day on the disk, the actual disk from the word processor, and so it appears to be

the final version on the disk. Yet, Mr. Ward's testimony is that the version behind tab 33 is the final version.

Do you have any understanding or knowledge as to whether someone outside the Rose Firm might have altered or amended this document after you finished with it?

A Well, I have no recollection or knowledge, but looking at the document behind 33, the word processing code does not appear on the first two pages. So it appears that the first two pages were prepared somewhere other than the Rose Firm.

Q Typically, the word processing code would appear on every page other than the first page?

A Well, I think if you look at the options behind 31 and 32, that's what happens, yes.

MR. KENDALL: It also appears that those first two pages are initialed in the bottom lower right corner. I don't find those initials on pages 3, 4 and 5.

MR. ERICSON: That's right.

BY MR. ERICSON:

Q And yet, another thing I'll note for you, look at the page numbers under tab 33.

MR. KENDALL: Ah.

THE WITNESS: Yes, the page numbers are also different.

BY MR. ERICSON:

Q There aren't the little dashes, are there?

A That's right.³¹⁴

314 Clinton Interview, Feb. 14, 1996, at 83-90.

The evidence, taken together, suggests that Mrs. Clinton prepared this option in two hours and probably without much discussion as to its purpose. As she explained, Ward had a habit of dropping by and demanding product immediately. This looks like one such occasion.

Furthermore, the evidence strongly suggests that the option as drafted described the wrong property and therefore was modified, on or about May 5, 1986, by somebody other than Rose Law Firm personnel. In all probability the first two pages simply were retyped elsewhere to describe Holman Acres rather than the Levi Strauss warehouse--hence the initials, the lack of the word processing code and the differing page numbers. This suggests that Mrs. Clinton had not been told the entire reason, or perhaps any reason, for the option; after all, she had evidently misunderstood what property it was to cover.

5. The Rose Law Firm's withdrawal from representing Madison Guaranty.

On July 14, 1986, the Rose Law Firm, in a letter from Mrs. Clinton, terminated its retainer arrangement with Madison Guaranty, returned the unearned money and ceased representing Madison Guaranty except for finish up the two loan workouts (matter 6).³¹⁵ No theory has been suggested why the mere act of ceasing to represent Madison Guaranty would create liability on the part of the Rose Law Firm; the termination of the retainer has significance (if at all) only if it sheds light on the state of mind with which the firm had approached its previous work for Madison Guaranty.³¹⁶

The Rose Law Firm's explanation for terminating the retainer is that its work for the FHLBB and the FSLIC led it to minimize its representation of savings and loans. The alternative theory that has been advanced is that the firm received advance word that the FHLBB would remove McDougal in July 1986 and therefore decided to distance itself from McDougal and Madison Guaranty.

In December 1985 or January 1986, the Rose Law Firm began representing the FSLIC with respect to Guaranty Savings, an Arkansas thrift that had failed in December 1985.³¹⁷ Vincent Foster took charge of this

315 RLF2 03062-63.

316 State of mind has significance because the RTC Completion Act limits the available claims to intentional causes of action (fraud and intentional misconduct). *See Rose Report* at 3-4.

317 Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 13, 1996, at 45.

representation; Mrs. Clinton recalls that she helped with this matter by performing some legal research.³¹⁸

In the first week of March 1986, the FHLBB began an examination of Madison Guaranty. The examination had long been anticipated, and there is evidence (not tied to the Rose Law Firm in any way) that Madison Financial minutes were created and files were altered in anticipation of the examiners' arrival.³¹⁹

By June 1986, the examination had been under way for several months and the examiners were asking hard questions about Campobello and Castle Grande, among other projects. In addition, people such as Seth Ward and Bob Wilson were beginning to have their doubts about what they were seeing. In April 1986, Wilson had been willing to loan Madison Financial \$400,000. By June, however, he wanted out for reasons he explained at his interview in May 1994:

Q: Now, on the, a couple questions about Campobello. On the consulting arrangement that you had when you went up there. I saw a letter from you to McDougal terminating that relationship, okay? Let me ask you this. Did you feel that it was important that you sort of formally terminate the relationship?

A: Yes.

Q: How come?

A: Well, you know, the cloud was over the whole dad-gum thing and I wanted to be sure that there was no continuing involvement there. It wasn't, by June of that year, it was pretty obvious that something was going to happen. I mean there too many things going on.³²⁰

On June 19, 1986, in the midst of the examination, the FHLBB wrote to the Board of Directors of Madison Guaranty to report on its interim findings with respect to the operating practices of Madison Guaranty. This letter alleged a violation of the 1984 supervisory agreement. It also noted Madison Guaranty's continued failure to comply with the FHLBB's net worth requirements, stating that, as of April 30, 1986, Madison Guaranty's net worth was approximately

318 Clinton Interview, Feb. 14, 1996, at 20-22.

319 See, e.g., *Madison Guaranty Savings & Loan and Whitewater Development Company, Inc., A Supplemental Report to the Resolution Trust Corporation* 22-24 (Dec. 13, 1995).

320 Wilson Interview, May 10, 1994, tape 1, at 16.

\$1.65 million short of the minimum requirement. The letter ordered Madison Guaranty to take a number of actions immediately, including ceasing all "direct investments" without the FHLBB's prior written approval, ceasing to finance any sales of real estate owned by Madison Guaranty or Madison Financial, and ceasing to do business with a whole list of entities, including IDC, Castle Sewer and Water, The Wilson Company (Bob Wilson's mortgage brokerage firm) and virtually every other entity associated with Madison insiders. Finally, the letter asked the Board to meet with FHLBB officials in Dallas.³²¹

A copy of this letter was sent to the state regulator responsible for Madison Guaranty, Beverly Bassett (now Beverly Bassett Schaeffer), by early July, and she send a warning to the Governor's Office:

MR. CHERTOFF: All right. Let's put the note up. It's No. CCBW- 884. And I guess this is your handwriting; right?

MS. SCHAEFFER: It is.

MR. CHERTOFF: And it's to Sam -- that's Sam Bratton (sp); right?

MS. SCHAEFFER: That's right.

MR. CHERTOFF: And it reads as follows: "Madison Guaranty is in pretty serious trouble. Because of Bill's relationship with McDougal, we probably ought to talk about it. The meeting referred to in the attached letter has been moved up to July 11, 1986, and the FHLBB" -- that's the Federal Home Loan Bank Board; right?

MS. SCHAEFFER: Right.

MR. CHERTOFF: "-- has asked me to be at the meeting. Please note that while all of the FHLBB restrictions in the letter are serious, number 5 and 6 effectively put Madison out of business. Thank you for your support. BB." And BB is you; right?

MS. SCHAEFFER: Mm - hm.³²²

321 RTCKC33989-91; ASD1841-43; FDICHR 0140-42.

322 Schaeffer Senate Testimony, Jan. 25, 1996, at 7.

Apparently this warning reached the Governor by July 14, as a note from him to Betsey Wright of that date refers to it and attaches a copy of the FHLBB's June 19, 1986 letter:

MR. CHERTOFF: Well, let me see, just to make sure we know whether you have any familiarity with it, I want to put up CCBW-888. It's another Betsey Wright document. It's a slip of paper that says, "State of Arkansas, Office of the Governor." It says, "To Gov" and there's a little check mark, "from BW, Betsey Wright." It's dated July 14th. It says: "Whitewater stock, McDougal's company, do you still have? Pursuant to Jim's current problems, if so I'm worried about it." And then there's, in other handwriting, scrawled, "No, don't have any more" and there's a "B". Now, I take it you're not that "B"?

MS. SCHAEFFER: That "B" is for "Bill".

MR. CHERTOFF: So that's Bill Clinton's handwriting?

MS. SCHAEFFER: Yes.³²³

On July 10, 1986, Rose Law Firm partner Herb Rule sent a memorandum to all lawyers informing them that the FSLIC had announced that it would require law firms working for it to cease the representation of thrifts if it wants to keep their FSLIC work. By this point, Rule explained, the FSLIC work (mostly Guaranty) was accruing fees at a rate of roughly \$600,000 a year.³²⁴ Massey responded to the memorandum, noting the work for Madison Guaranty and noting that it "has continually had regulatory net worth problems."³²⁵

On July 11, 1986, the FHLBB met with Madison Guaranty's Board of Directors in Dallas. Beverly Bassett attended the meeting. The Board was accompanied not by anyone from the Rose Law Firm but by attorneys from the Mitchell, Williams firm: John Selig and his associate Breck Speed. The FHLBB regulators outlined Madison Guaranty's problems, starting with a net worth

323 *Id.* at 12. The Betsey Wright note, with the June 19, 1986 FHLBB letter attached, are CCBW 884-88. Governor Clinton was mistaken in thinking that he no longer owned any Whitewater stock; that was not disposed of until December 1992. See *Preliminary Report on Whitewater* at 137-38.

324 RIC 120859.

325 *Id.*

deficiency.³²⁶ Madison Guaranty's directors were instructed to remove Jim McDougal or, in effect, have the FHLBB do it for them.³²⁷ Selig bargained for a consulting arrangement or a voting trust for the McDougals. The FHLBB Supervisory Agent Walter Faulk said no: The McDougals, Latham and Bill Henley must go.³²⁸ Within days they resigned. The same month, McDougal suffered a nervous breakdown. He later was diagnosed as manic depressive and had an operation to clear an artery running to his brain.³²⁹

On July 14, 1986, Mrs. Clinton returned Madison Guaranty's retainer and took steps to have her firm cease representing Madison Guaranty. On that day, Mrs. Clinton sent a letter to McDougal and Latham at Madison Guaranty by hand delivery.³³⁰ The letter attempted to do four things. First, it memorialized the April 1985 monthly retainer arrangement (\$2,000/month) between the Rose Law Firm and Madison Guaranty. Second, it stated that Madison Guaranty "continues to rely on a number of other law firms to provide ongoing representation, and that our representation has been for isolated matters and has not been continuous or significant." Third, Mrs. Clinton returned the July monthly retainer check of \$2,000 and the Rose Law Firm issued a check to Madison Guaranty for a retainer credit of \$4,622.53. Fourth, Mrs. Clinton stated that any future representation will be on a case-by-case basis. The "bcc's" are Vincent Foster and Herb Rule.³³¹

On July 15, 16 and 17, 1986, Mrs. Clinton talked to or corresponded with Harry Don Denton regarding the Babcock matter.³³² On July 17, 1986,

326 See ASD1833-35 (Beverly Bassett's notes of the meeting). See also IG Ex. III-25, at 14-15 (Bassett's description of the meeting, including her desire to remove McDougal from office).

327 Steve Cuffman Interview, Apr. 26, 1994, at 15-16; John Selig Interview, June 8, 1994, at 10-11. Sarah Hawkins said the FHLBB "moved in" on July 11, 1986. Hawkins Deposition taken Apr. 9, 1990 in *RTC v. Frost & Company*, No. LR-C-89-216 (E.D. Ark.), at 14. See ASD1833-35 (Beverly Bassett's notes of the meeting).

328 RTCKC33981-88. At the time, Jim McDougal was president of Madison Financial, but he held no position at Madison Guaranty, having resigned as chairman and a director in 1984.

329 Reporter's Transcript of *United States v. McDougal* (the 1990 criminal trial) at 905, 929-30.

330 RLF2 03062-63; IG Ex. III-77. Latham said the letter was not preceded by any discussion of the end of the retainer arrangement. IG Ex. III-29, at 2.

331 RLF2 03059. Rule had been working on the Babcock Center and Tulsa Econolodge workouts. Foster does not appear on the Madison Guaranty invoices, but he had handled litigation for Madison Bank & Trust Company in 1981 and 1982, as described above.

332 DKRT11 000934.

Mrs. Clinton wrote an inter-office memorandum to Herb Rule advising Rule (and Foster) of the July 14, 1986 correspondence. The memorandum confirms that the Rose Law Firm was "continuing to do work on only one matter, namely the Babcock and Econolodge loans."³³³

On July 22, 1986, Frost & Company resigned as auditors for Madison Guaranty after FHLBB examiners raised questions about Frost's independence in light of the fact that one of Frost's partners had borrowed money from Madison Guaranty.³³⁴ At about this time, rumors of problems at Madison Guaranty began to circulate.³³⁵ By July 25, 1986, Madison Guaranty's problems made the *Arkansas Democrat*. Rumors of its insolvency, according to an article, were circulating "widely throughout Little Rock."³³⁶ The article made no mention of McDougal's and Latham's removal.

On September 8, 1986, Madison Guaranty notified the FHLBB's district director of examinations of Frost's resignation.³³⁷ Peat, Marwick, Mitchell and Company replaced Frost & Company as Madison Guaranty's auditors. On September 30, 1986, Mrs. Clinton responded to a Peat, Marwick, Mitchell & Company audit letter for Madison Guaranty. Her letter states that the Rose Law Firm was not made aware of any pending or threatened litigation, claims or assessments against Madison Guaranty.³³⁸ The letter notes that Madison Guaranty owed the Rose Law Firm \$2,160.55 for services and expenses as of June 30, 1986. As noted, Mrs. Clinton's July 14, 1986 letter had refunded \$4,622.53 to Madison Guaranty and returned the \$2,000 retainer check for July 1986. No clear explanation has been offered for why this money was not

333 RLF2 03059. This seems to be accurate. According to a phone message slip, on July 9, 1986, Don Denton called Mrs. Clinton. RLF2 03061. Denton requested the original files for the Babcock Center and Tulsa Econolodge matters for the "examiners review." On July 10, 1986, Kevin Burns (a Rose associate) wrote a cover letter to Denton enclosing those files (with a copy to Mrs. Clinton). RLF2 03060; IG Ex. III-76, at 13.

334 RTCKC42744-45.

335 Some people had an inkling of problems even before this. Seth Ward told Webster Hubbell in the spring of 1986 that he "had some sense Madison was having trouble" and was "very anxious" about whether he was going to be paid the commissions he was owed. Hubbell Interview, Dec. 27, 1995, at 43:21-44:12.

336 David Wannemacher, "Third S&L Reportedly Facing Difficulty," *Arkansas Democrat*, July 25, 1986, RLF2 01624.

337 RTCKC42743-44.

338 RTCKC41005-06. There is no indication of this letter in the billing records, but apparently the Rose Law Firm charged a flat fee for such letters rather than an hourly rate. That is what occurred when a second such letter was written in March 1987. DKRT11 000937.

applied to the outstanding receivable for \$2,160.55 rather than being refunded by Mrs. Clinton.³³⁹

The Babcock and Econolodge work (matter 6) continued sporadically and at a low level (a total of 3.9 hours after July 14, 1986) until late November 1986.³⁴⁰ That ended the Rose Law Firm's representation of Madison Guaranty except for preparing a "litigation letter" for Madison Guaranty's auditors (Peat, Marwick, Mitchell) in March 1987.³⁴¹

Webster Hubbell continued to do some work for Ward, or at least to let his secretary do some work. When, in December 1986 (as described above) Ward deeded the Holman Acres parcel back to Madison Guaranty, the quitclaim deed bore a word processing code indicating that Hubbell was the author.³⁴²

There may have been several reasons why Mrs. Clinton decided to return the retainer and write her July 14, 1986 letter. According to a statement made by Mrs. Clinton in 1994, once it was determined that Madison Guaranty could not meet the requirements imposed by Beverly Bassett for the issuance of preferred stock, Mrs. Clinton wrote the July 14, 1986 letter.³⁴³ More recently, in her interrogatory answers, Mrs. Clinton attributed the return of the retainer to the Rose Law Firm's increasingly active practice representing the Federal Savings and Loan Insurance Corporation ("FSLIC"). Asked why she returned the retainer with the letter of July 14, 1986, she answered as follows:

This was a letter intended to terminate the "retainer arrangement" with Madison Guaranty, and the decision to terminate was made shortly before the letter was sent. In view of the increasing work the Rose Law Firm was doing for FSLIC, particularly with regard to the receivership of the Guaranty Savings and Loan Association in Harrison, Arkansas, the firm had decided in early July, 1986, generally to avoid taking on any new or expanded representations of S&L's or their affiliates.

339 Mrs. Clinton does not know why the Rose Law Firm returned the balance of the retainer to Madison Guaranty when work was still ongoing and the Rose Law Firm was owed money. Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answer to Interrogatory No. 17(g)(4), 17(h), at 37-39.

340 IG Ex. III-76, at 14-21; DKRT11 000934-35.

341 DKRT11 000937.

342 Telephone conversation of Alden L. Atkins and Bruce A. Ericson, Feb. 9, 1996.

343 Text of Mrs. Clinton's April 22, 1994 press conference, as transcribed by Federal News Service, at 15. The timing of this is difficult to verify, given that the preferred stock matter had been dormant for some time.

Accordingly, I wrote to Madison Guaranty on July 14, 1986, to terminate the monthly "retainer arrangement." In any event, as my letter indicated, the firm had not done a significant amount of work for Madison Guaranty: the S&L "has run a credit in its account at the end of every month" and Madison Guaranty "has been relying and continues to rely on a number of other law firms to provide ongoing representation."³⁴⁴

In any event, apparently the return of the retainer had nothing to do with the removal of Messrs. McDougal and Latham by the FHLBB. As of when she wrote her July 14, 1986 letter, Mrs. Clinton says she knew nothing of this.³⁴⁵

Q Let's turn to tab 37 for a moment. Would this be an unsigned copy of a letter you sent to Mr. McDougal and Mr. Latham on July 14, 1986?

A It appears to be, yes.

Q And you had hand-delivered?

A That's what it says on the first page of the letter.

344 Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answer to Interrogatory No. 17(g)(2), at 36-37. Hubbell's statement to the IG is consistent with this. IG Ex. III-69, at 10. So is his recent testimony before the Senate Special Committee. Senate Hearing Transcript, Dec. 1, 1995, at 154:1-155:6. Vincent Foster supervised the Guaranty Savings work. Hubbell Interview, Dec. 27, 1995, at 44:13-45:9. The FHLBB took over Guaranty Savings on December 6, 1985. FHLBB Press Release dated Dec. 6, 1985. The Rose Law Firm was retained to handle the Guaranty Savings work in January 1986, roughly six months before Mrs. Clinton's letter.

345 *Id.*, answer to Interrogatory No. 17(g)(5), at 38 ("When I wrote my July 17, 1986, memo to Herb Rule (RLF2 03059) and my July 14, 1986 letter to Messrs. McDougal and Latham (RLF2 03062-03063), I do not believe I had heard anything about a July 11, 1986 meeting in Dallas between FSLIC and Madison Guaranty personnel."). Hubbell says that these matters had nothing to do with the decision to stop representing Madison Guaranty. IG Ex. III-69, at 10-11. His Senate testimony is ambiguous:

Mr. Chertoff. Was that [the decision to cease representing Madison Guaranty] shortly before the bank examiners finally insisted that Mr. McDougal be tossed out of the bank.

Mr. Hubbell. I believe Mr. McDougal was already out of the bank, but I may be wrong, by that time.

Senate Hearing Transcript, Dec. 1, 1995, at 154:7-11. Compare Hubbell Interview, Dec. 27, 1995, at 340:18-41:10, where Hubbell says he recalls Seth Ward telling him, before McDougal's resignation, that "the regulators are all over, and McDougal may be getting out."

Q Why did you send this letter?

A I believe, based on the documents, which I have reviewed that the letter was in response to a decision by the firm that at the request of FSLIC, the general counsel's office, that the firm not take on any savings and loan representation, particularly with respect to associations in financial difficulty, and I'm reading from the memorandum from Herb Rule to all attorneys dated July 10, 1986.

And again, I have no specific recollection, but I believe that in response to this memorandum, Mr. Massey advised Mr. Rule that we had done work for Madison and that work was considered by the firm to be such that, in response to the Office of General Counsel, we should no longer continue it.

And I don't recall this, but again, just putting together the pieces of the documentation, I believe that I was asked to advise Mr. McDougal and Mr. Latham, which I did in this letter. We returned their accumulated retainer and on July 17, in a memo to Herb Rule, I advised him that we had sent the letter to Mr. McDougal and Mr. Latham.

Q Now, the July 10 memo to which you made reference is the memo behind tab 36; is that right?

A Yes, that's correct.

Q And the July 17 memo is the memo behind tab 38?

A That's right.

Q Now, when you wrote your letter, the letter behind tab 37, it's correct, is it not, that you knew nothing about a meeting that had occurred a few days before between representatives of the Federal Home Loan Bank Board and the board of directors of Madison Guaranty?

A That's correct.

Q And when you wrote your letter, had you

seen or heard about the letter dated June 19, 1986 that's behind tab 35?

A I do not recall knowing about this letter, Mr. Ericson.

Q Beverly Bassett Scha[e]ffer has testified recently that she told her liaison to the governor's office about the Federal Home Loan Bank Board meeting on July 11 a few days in advance of that meeting. And I'm afraid this is not in the book because I got the copy yesterday.

I have here and I'd like to show you some documents that have been marked CCBW 884 through 888, which I received yesterday from counsel for Betsey Wright. The first page I understand to be a handwritten memo from Beverly Bassett.

The second, third and fourth pages are the June 19 letter we just looked at, and then the last page is, what I understand to be from testimony, a note from Betsey Wright to your husband dated July 14.

My first question is whether you've ever seen any of this before?

A No, I do not recall seeing any of this before, unless I saw it from my lawyers during the last year or two.

Q I meant at the time. As of July 14, 1986, had you learned from any source, including your husband, that the federal regulators were about to take action or contemplating action with respect to Madison Guaranty or McDougal?

A I do not recall learning that from any source.

Q Were you aware that an examination of Madison Financial was underway and had been underway for some months?

A I do not recall knowing that.

Q Going back to tab 36 for a moment, just a couple of questions -- just one really. At the bottom here, Rick Massey has written a note, the last part of which says "Madison has continually had regulatory net worth problems."

Was that something you knew at this time?

A Well, I knew the idea behind the preferred stock offering was to try to raise money for Madison to be able to meet its capital requirements. I knew that back when the representation was undertaken by Mr. Massey.

Q And you knew also, didn't you, that unless and until Madison met its capital requirements, the securities department was not going to let Madison go ahead with the broker-dealer action?

A That's right. The securities commissioner had conditioned Madison's being able to go forward on its meeting its regulatory requirements.

Q Looking at tab 38 just for a second, is there any particular reason you would have cc'd Vince Foster on this July 17 memorandum?

A I believe that Mr. Rule mentions Mr. Foster in his memorandum that we were just looking at in the last sentence. "If you have any other questions, give me or Vince Foster a call." Mr. Foster was the attorney I worked for on the FSLIC representation and I assume that because he was mentioned in Mr. Rule's memo, I cc'd him.³⁴⁶

D. Analysis.

1. Matters 1-4 and 6.

The *Rose Report* found no basis to bring a claim based on the Rose Law Firm's work for Madison Guaranty with respect to these matters. As noted above, nothing in the new evidence changes that analysis. In addition, the tolling agreement does not cover these matters.

346 Clinton Interview, Feb. 14, 1996, at 91-96.

2. Matter 5.

a. Introduction.

The investment in Castle Grande has been questioned on numerous grounds, but most of these have nothing to do with the Rose Law Firm. The acquisition of Castle Grande did, however, involve the Rose Law Firm to some extent. The acquisition can be questioned on the theory that Ward, having given Madison Financial an option on the land and having placed no money of his own at risk, was really a straw man purchaser for Madison Financial pursuant to a scheme to circumvent Arkansas law. This theory seems first to have been advanced in the *Ward v. Madison* litigation, in which Madison Guaranty and Madison Financial (two years after McDougal and Latham had been removed) stated the following in an answer to an interrogatory asking about their "unclean hands" defense:

Plaintiff [Seth Ward] personally profited from the transactions with Jim McDougal. With knowledge, the Plaintiff agreed to purchase a section of the Undeveloped Property [Castle Grande] in his name so that Madison Financial Corporation would not exceed its investment limitations, imposed by the FHLBB, of 6% of the assets of the corporation. In effect, Plaintiff acted as a straw man for the real estate purchase for the mutual benefit of himself, Jim McDougal and other individuals.³⁴⁷

Arkansas law (Rule V(C)) limits the amount of money that an Arkansas savings and loan may invest in real estate to six percent of assets.³⁴⁸ At the time of Madison Guaranty's last examination before the Castle Grande transaction, in 1984, Madison Guaranty had been criticized for violating this limitation, and in response Madison Guaranty's Board of Directors had promised to bring it into compliance with this limitation.³⁴⁹

347 Defendants' Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, dated June 2, 1988 in *Ward v. Madison*, answer to Interrogatory No. 18, at 11-12. Defendants did not do much with this theory at trial. Also, the regulation at issue is a state regulation, not an FHLBB regulation.

348 Rule V(C) of the Rules and Regulation of the Arkansas Savings and Loan Association Board. See *Ward v. Madison* R.T. 119; Latham Deposition at 7. See also IG Ex. III-50, at 2, minutes of Madison Financial's board of directors dated Jan. 21, 1985, which authorize McDougal "to make any acquisitions he deems necessary, with the requirement that such acquisition not cause the Savings and Loan to exceed its 6% of assets limitation for investment in the Service Corporation"

349 According to the Report of Examination as of January 20, 1984, Madison Guaranty's total investment in Madison Financial was \$2,386,590, or 14.1 percent of assets. PMS0331.
(continued...)

According to Madison Guaranty's Chief Financial Officer, Greg Young, the investment limitation meant that Madison Guaranty could not purchase the entire Castle Grande parcel itself.³⁵⁰ McDougal and Ward developed the idea of having Seth Ward purchase part of Castle Grande, so that the purchase price of the remainder to be purchased by Madison Financial would not exceed the limit. According to John Latham, there were at least three attractions to structuring the transaction this way:

- Complying with the Arkansas statute.
- Providing Ward with an opportunity to make some money.
- Obligating Madison Financial only to purchase the portion of the property that it really wanted--the portion it hoped to use for a residential development, as opposed to the portion set aside for industrial development.³⁵¹

Two issues are apparent: Did the structure, rather than complying with Arkansas law, unlawfully seek to circumvent it, or was it even fraudulent? If creation of the structure was fraudulent or intentional misconduct, did the Rose Law Firm have anything to do with its creation, and therefore any responsibility for the illegality?

b. The legality of the acquisition.

The first question is whether the acquisition of Castle Grande was fraudulent or otherwise intended to violate Arkansas law. The short answer is that a court might hold that the acquisition, as structured, was fraudulent and violated Rule V(C) of the Rules and Regulations of the Arkansas Savings and Loan Association Board.

Fraud: McDougal seems to have concealed the terms of his agreement with Ward from Madison Guaranty's and Madison Financial's Boards of

349(...continued)

The board said it would comply with the regulation and had taken steps to do so by collecting on a loan made to Chris Wade in connection with Campobello. PMS0357.

350 *Ward v. Madison* R.T. 121. For reasons explained below, Young may have been wrong in supposing that Madison Financial could lawfully buy any of Castle Grande.

351 IG Ex. III-29, at 3. Latham recalled these three general objectives but could not recall any specific conversations on the subject or, for that matter, who developed the structure. The Rose Law Firm's Response to the Reports of the Inspectors General, dated Sept. 12, 1995 ("Rose Response to IG"), suggests that Latham himself developed the structure and flatly asserts that "Madison masterminded the structure of the purchase . . ." (Rose Response to IG at 52-53) but the cited evidence does not establish either proposition.

Directors; at the very least, Latham and Strayhorn testified that the Boards had not approved the terms, that they did not know the terms and that they could not find the relevant documents (notably the second version of the September 24, 1985 letter) in Madison Guaranty's files or Madison Financial's files.³⁵² This evidence, if credited, would establish concealment by someone who, as a director of Madison Financial, had a duty to disclose the facts. It would not, however, establish fraud on the part of anyone else. Ward as a consultant did not have the same duties as McDougal as a director. No evidence has been found suggesting that Ward knew McDougal would conceal the terms of this deal from McDougal's Boards.

An alternative theory of fraud is that the use of Ward as a straw purchaser was itself fraudulent, because it concealed Madison Financial's intent to acquire the entire parcel. That theory is best explored in light of the issue of whether the acquisition violated the Arkansas regulation and if so whether the use of Ward was designed to conceal that violation.

Violation of the Arkansas regulation: Rule V of the Rules and Regulations of the Arkansas Savings and Loan Association Board pertains to service corporations. Rule V(A) permits their creation and lists their permitting activities, which include "[a]cquisition of unimproved real estate lots, and other unimproved real estate for the purpose of prompt development and subdivision" Rule V(C) limits a savings and loan's investment in its service corporations. It provides:

C. Limitations:

An association may make any investment under this section if its aggregate outstanding investment in the capital stock, obligations, or other securities of service corporations and subsidiaries thereof (including all loans, secured or unsecured, to service corporations, or any subsidiaries thereof, and to joint ventures of such service corporation or subsidiaries, whether or not the association is a stockholder in such service corporations) would not exceed thereupon six (6%) percent of the association's assets. For the purpose of this section, the term "aggregate outstanding investment" means the sum of amounts paid for the acquisition of capital stock or securities and amounts invested in obligations of service corporations less amounts received from the sale of capital stock or securities of services corporations and amounts paid to the association to retire obligations of service corporations.

352 *Ward v. Madison* R.T. 196; Latham Deposition at 18-19, 33-34.

To read the testimony of Latham, it would appear that the issue here is whether Madison Guaranty's investment in its service corporation Madison Financial includes the \$1,115,000 loaned to Seth Ward to pay for his portion of the IDC property as well as the \$600,000 that Madison Financial paid for its portion of the IDC property. Ironically, Madison Guaranty may have violated the regulation regardless of how it structured the deal.

With one exception (from May 1985), the weekly reports prepared by Greg Young and entitled "Investment in Service Corporation" have not been located. Therefore, it cannot be said with assurance what Latham and McDougal knew about their Rule V(C) situation when it came time to close the IDC acquisition. The most that can be said is that financial statements as of September 30, 1985 show that Madison Guaranty was roughly \$360,000 in excess of the limit as of that date, five days before the closing.³⁵³ Therefore, whether Madison Guaranty's investment includes only the \$600,000, or the \$1,115,000 as well as the \$600,000, the acquisition of Castle Grande would violate Rule V(C).

Be that as it may, the parties seemed to think that by reducing the investment to \$600,000 they would have avoided a violation of Rule V(C).³⁵⁴ As intent matters, the analysis turns on whether Seth Ward should be deemed

353 Madison Guaranty's assets totaled \$93.2 million. Madison Guaranty's Monthly Report to the FHLBB as of September 30, 1985, line 050. Six percent of this is \$5.6 million. According to Madison Guaranty's Monthly Report to the FHLBB as of September 30, 1985, Madison Guaranty's investment in Madison Financial totaled \$5.96 million, or roughly \$360,000 in excess of the limit. *Id.*, § K, line 005.

354 Alternatively, Madison insiders might have thought the transaction did violate the rule. Davis Fitzhugh suggested as much in his recent testimony when he was asked why McDougal had pressured him to buy the Levi Strauss building:

SEN. GRAMS: No, you're an employee of Madison and you said you were instructed to buy this parcel. Mr. McDougal told you to buy it. Did he explain why he wanted you to buy it again, because he had to shift some notes or dollars away from Madison; they were overbooked, so to speak, on land, and that they needed to move some of this land around, flip-flop, so to speak? Was that the way the instructions came to you?

MR. FITZHUGH: Well, it was well-known at Madison at the time that because of this land purchase, they had more money -- or not more money; more assets in the financial corporation than they should. And this Levi Strauss Building was only one of many pieces of property that the savings and loan sold off. So I was not singled out to purchase something. It occurred with several other people and several other parcels.

Fitzhugh Senate Testimony, Jan. 31, 1996, at 37.

a bona fide borrower in his own right, separate and distinct from Madison Financial, or whether he should be deemed a straw man or nominee, who is simply holding the land for Madison Financial, so that the land did not show up on its books as a violation of Rule V(C). There are no reported cases construing Rule V(C). Nevertheless, the situation is similar to that presented by the federal regulation limiting loans to one borrower.³⁵⁵ That regulation limits total lending to one borrower to a percentage of an institution's assets. The pertinent issue is whether a borrower that appears to be separate and distinct actually is a straw or nominee.

A case from the United States Court of Appeals for the Ninth Circuit, *United States v. Brown*,³⁵⁶ is instructive. An Oregon thrift, State Federal Savings & Loan Association, had financial difficulties—in particular, a lot of foreclosed real estate (in savings and loan parlance, "real estate owned," or "REO") on its books that earned little revenue. New management wanted to get this REO off of State Federal's books. Management agreed with a real estate developer and borrower, Nevis, to loan him money so that he could buy the REO. State Federal's loans to Nevis, however, already exceeded the limit imposed by the loans to one borrower regulation. Therefore, State Federal's management entered into a series of transactions designed to put money into Nevis' hands while concealing that fact. One such transaction involved defendant Brown. The Court of Appeals described that transaction as follows:

He [Brown], in effect, had one of his companies (Marin Federal) purchase certain property from Nevis and obtain a loan from State Federal to finance that purchase. The money went to Nevis, and Nevis retained possession of and the right to repurchase the property. Brown guaranteed the loan but Nevis agreed to pay it off. The sale would not have been made had repurchase not been agreed to in advance. Brown and his company were quite clearly no more than nominees and vehicles for getting cash from State Federal to Nevis.³⁵⁷

355 Now 12 C.F.R. § 563.93 (1995). At the time, it was 12 C.F.R. § 563.9-3 (1985). An even closer analogy would be presented by the FHLBB's direct investment regulation, which, like the Arkansas regulation, limited investment in service corporations. 12 C.F.R. § 563.9-8 (1985), later renumbered 12 C.F.R. § 563.98 (1990), expired July 13, 1990.

356 912 F.2d 1040 (9th Cir. 1990). See also *United States v. Tullos*, 868 F.2d 689, 691-96 (5th Cir.), cert. denied, 490 U.S. 1112 (1989); *United States v. Kindig*, 854 F.2d 703, 704-08 (5th Cir. 1988); *United States v. Griffin*, 579 F.2d 1104, 1109-10 (8th Cir.), cert. denied, 439 U.S. 981 (1978).

357 *United States v. Brown*, 912 F.2d at 1041.

On these facts, the Court of Appeals affirmed Brown's conviction for aiding and abetting bank fraud and false entries by management, but reversed his conviction for conspiracy.³⁵⁸

Compare the situation in *Brown* with the situation here. Madison Guaranty funded 100 percent of Ward's acquisition of his portion of Castle Grande, and did so weeks before Ward's loan application was approved. The loan was nonrecourse; Ward placed none of his own money at risk.³⁵⁹ Madison Financial had an option to buy back all of Ward's land, save perhaps for 22.5 acres. Madison Guaranty acted in all respects like an owner: It took charge of selling Castle Grande, including Ward's part, and sold the land; Ward probably did not have a chance to approve the sales prices. It conveyed parcels to the purchasers; typically, the deeds reflected Madison Financial, not Ward, as the vendor. Until parcels sold, Madison Financial, not Ward, collected the rents and paid all taxes, insurance and fees. On these facts, it seems highly probable that Ward would be deemed a straw. Indeed, Madison Guaranty alleged as much in defense of *Ward v. Madison*.³⁶⁰

As noted above, the use of Seth Ward as a straw has some of the earmarks of a fraudulent or intentional attempt to violate the law. Madison Guaranty's books and records were made to reflect a loan to a third person, not a straw. The terms of Ward's agreement with McDougal seem to have been hidden from others. Latham and Strayhorn say they knew nothing of the second letter of September 24, 1985, and Strayhorn says no copy of it could be located in Madison Guaranty's or Madison Financial's files.³⁶¹ At a minimum, it would seem that McDougal handled the transaction in a manner designed to mislead FHLBB examiners and regulators.

Even if this conduct were not deemed fraudulent, however, it seems likely that it would be deemed an intentional violation of the Arkansas regulation, and that would be actionable as an intentional breach of McDougal's fiduciary duties.

358 *Id.* at 1042-45. The court found ample evidence that "Brown engaged in activities which misrepresented the true borrower and true purpose of the loans, all with the intention of deceiving State and Federal officials, FSLIC, and FHLB," and therefore affirmed the aiding and abetting count. On the other hand, the court found no evidence that Brown, who participated in only one transaction, knew of the other defendants' broader conspiracy, and therefore reversed the conspiracy count.

359 In contrast, Brown had guaranteed Nevis' repayment.

360 Defendants' Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, dated June 2, 1988 in *Ward v. Madison*, answer to Interrogatory No. 18, at 11-12.

361 Latham Deposition at 16-20, 34-36; *Ward v. Madison* R.T. 194-95.

A fiduciary is not automatically liable for violating the law. Good faith attempts to manage a corporation's affairs may not give rise to liability even if a statute or regulation is violated.³⁶² But conversely, a fraudulent or intentional effort to violate a statute or regulation will almost certainly constitute a violation of a fiduciary's duty of care—indeed, as the *Brown* case illustrates, it may be criminal. Thus, while the business judgment rule is recognized in Arkansas,³⁶³ the rule obviously has no application to fraudulent or intentional attempts to violate the law.³⁶⁴

While this transaction looks like an intentional effort to violate the Arkansas regulation, and to cover up that violation, some evidence suggests that the parties might have thought the acquisition as structured would be lawful. Neither side in *Ward v. Madison* seriously urged that the transaction was unlawful. Hubbell, who paid some attention to the *Ward* trial and attended the closing arguments, doubts that Ward was a straw, at least as Hubbell understands the term:

Q. In 1985, did you give any thought whatsoever as to whether, given the terms as you understood them, Mr. Ward might be considered a straw man or nominee?

A. Yeah. You know, you use the word, and I remember it back in law school. But I didn't give it any consideration, you know. "Straw man" means, to me, somebody who you clear title through. So I don't think that's the way I would look at it, if I sold property, and you're trying to clear it to sell it through a straw man.³⁶⁵

In addition, the question was put to Latham, who testified in deposition that he believed the transaction was lawful:

Q. You said that Madison Financial could not have taken a deal as large as the I.D.C. deal that Mr. Ward brought because of regulations.

362 *E.g.*, *FDIC v. Benson*, 867 F. Supp. 512, 521-22 (S.D. Tex. 1994) (applying Texas law).

363 *Hall v. Staha*, 303 Ark. 673, 678, 800 S.W.2d 396, 399 (1990); *RTC v. Eason*, 17 F.3d 1126, 1133-34 (8th Cir. 1994) (applying Arkansas law).

364 3A William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* § 1040, at 51-52 (rev. ed. 1994). No Arkansas case on point has been located. To establish liability under Texas law, however, a plaintiff must show that the fiduciaries "participated in acts that they knew were illegal at the time." *FDIC v. Benson*, 867 F. Supp. at 522.

365 Hubbell Interview, Dec. 27, 1995, at 22:17-26.

A. I think at that point in time that was correct.

Q. Madison Financial could have taken the deal. could it not, if it had received financing from someone other than Madison Guaranty?

A. Yes.

Q. And there was no violation of the regulations from Mr. Ward to receive financing from Madison Guaranty?

A. I don't think so, as long as Seth had the financial ability to assume that obligation on his own.³⁶⁶

Given the apparent attempts to conceal the substance of the arrangements between McDougal and Ward, one may question whether Latham seriously believed what he said. In any event, the conclusion he reached is of doubtful merit. One can assume that Seth Ward had the ability to assume the obligation on his own.³⁶⁷ Even so, two problems remain with Latham's position. First, factually speaking, Ward had no reason or incentive to pay the loan unless he could profit by doing so, for the loan was nonrecourse. Second, legally speaking, Ward's "financial ability to assume that obligation on his own" is not a defense where the transaction is structured to conceal a violation of a regulation limiting the ability of the financial institution to make the loan.

An Arkansas case decided a few years before the Castle Grande transaction, *United States v. Parsons*,³⁶⁸ illustrates the second point. Parsons was the treasurer of a school's credit union. He needed more money than the credit union could lawfully loan to him. Therefore, he convinced several teachers to take out loans in their own names and deliver most of the proceeds to him.³⁶⁹ On appeal from his conviction for misapplication of credit-union funds and false entries, he argued that the jury should have received an instruction that he could be convicted only if the prosecution proved that he knew the other teachers lacked the ability and intent to repay their respective loans. The court rejected this argument, holding that where the straw is used

366 Latham Deposition at 27.

367 A financial statement for Seth Ward as of 1985 has been located. It shows ample net worth.

368 646 F.2d 1275 (8th Cir. 1981).

369 *Id.* at 1276-77.

to conceal violation of a legal limitation on lending, the financial condition of the putative borrower is irrelevant.³⁷⁰

The analysis in this section to this point parallels that in the *Rose Report*. Having reached this point, however, it must be conceded that the argument that Ward was a straw is weaker than it seemed on December 28, 1995. Notwithstanding the *Parsons* case, one must grant that Ward's recent testimony about his desire to buy the IDC property himself, and his ability to do so, might well influence a trier of fact to find that Ward was not a straw. Certainly a man who was ready, willing and able to buy a property, but did not do so because he recognized that he owed a duty of loyalty to his principal,³⁷¹ seems much less like a straw than someone who never had the slightest interest in a property but simply was doing the bidding of another.

Even so, the evidence suggests that the RTC could reasonably state a claim against McDougal for fraud and for breach of his fiduciary duties. Greg Young recently described the transaction as a "straw transaction," adding that Madison had "made him [Seth Ward] the loan to park that land" until Madison had the ability to buy it.³⁷² Ward himself summed it up in his recent deposition when he said to the young attorney examining him:

Q. But you were offered a transaction that was basically risk free to you by Mr. McDougal?

A. Yeah, and I took that. And you would have too.³⁷³

Perhaps McDougal could defend himself by arguing that he had a good-faith belief that the structure was lawful; at this point it is hard to determine how persuasive such a defense might be. In any event, such a claim, if brought against McDougal alone, would not be cost-effective.³⁷⁴

The evidence as to Ward is much less compelling than the evidence as to McDougal. There is no clear evidence of an intent to conceal. Ward says

370 *Id.* at 1279-80.

371 Ward Deposition, Feb. 12, 1996, at 13.

372 Young Interview, Feb. 20, 1996, at 3.

373 Ward Deposition, Feb. 12, 1996, at 111-12.

374 McDougal filed for bankruptcy in September 1991 and obtained an order of discharge on January 17, 1992 (PMS0532, PMS0552), well before the enactment of the RTC Completion Act of 1993. The order of discharge could be set aside only if the RTC could prove a fraud on the bankruptcy court; proof that McDougal defrauded someone other than the bankruptcy court would be of no avail.

he had no idea that the transaction might violate Rule V(C).³⁷⁵ One might argue, however, that the nonrecourse financing coupled with the other terms looked too good to be true. Thus, based on *Brown*, perhaps a rather weak claim might be stated for aiding and abetting in a fraud or for an intentional violation of the Arkansas regulation. The strength or weakness of such a claim need not be considered further. Such a claim cannot properly be brought against Ward because he has been released.³⁷⁶

For purposes of this report, the ultimate question is not whether McDougal or Ward could profitably be sued, but whether the Rose Law Firm aided and abetted them in what looks like fraudulent or intentional misconduct.

c. The role of the Rose Law Firm.

Despite the new billing records, the extent of the Rose Law Firm's involvement in the IDC acquisition is not well documented, and it has been further obscured by faulty memories. Seth Ward, who negotiated the acquisition for Madison Financial, denied that the Rose Law Firm had any involvement in the purchase of Castle Grande either on behalf of Madison Financial or himself—a statement that is demonstrably incorrect.³⁷⁷

I have been specifically asked whether I had any discussions with anyone from Rose concerning the Industrial Development Commission (IDC) property acquisition while I was at Madison. I would think that we used some lawyers, but I do not recall who it may have been, and do not believe it to have been Rose. I do not recall speaking to any lawyers concerning water issues in that project, and certainly had no discussions with anyone concerning delivering water services off-site. I have no knowledge of ever discussing at all any issues concerning a

375 Ward Deposition, Feb. 12, 1996, at 14-15.

376 Ward received a general release from the RTC when he settled *Ward v. Madison*, a settlement in which the RTC recovered \$325,000.

377 Seth Ward Interview, Apr. 29, 1994, at 1. Ward told the IG that he does not remember the Rose Law Firm doing any legal work for Madison Guaranty on the Castle Grande transaction, or on anything else. IG Ex. III-35, at 2. Ward was not alone in denying the Rose Law Firm's role in the transaction. When asked about Castle Grande, other Madison Guaranty directors and officers did not mention the Rose Law Firm as having any involvement in the sale. E.g., Steven Cuffman Interview, Apr. 26, 1994, tape 1, at 34-35; Sarah Hawkins Interview, Apr. 11-14, 1994, at 71-72; Don Denton Interview, Apr. 28, 1994, at 7-8. Jim and Susan McDougal were deposed but each invoked the Fifth Amendment and declined to answer all questions.

brewery, liquor licenses or a question of whether a particular jurisdiction was wet or dry.³⁷⁸

He is not the only one who seems to have forgotten things; the Rose Law Firm lawyers who handled the transaction also have little or no recollection of it.³⁷⁹

The documents that Darrell Dover and the Rose Law Firm have produced do not deal at all directly with the arrangements between Ward and Madison Financial.³⁸⁰ As discussed above, the disappearance of the Rose Law Firm lawyers during the drafting phase of the IDC acquisition is peculiar, but nothing convincingly demonstrates that the lawyers knew Ward was a straw and with such knowledge substantially assisted with improper aspects of the deal. The agreement, in any of its various drafts, is an innocent-looking document that would place nobody on notice of a Rule V(C) violation. Even the change in the language from "affiliate" to "entity or individual" is not the sort of thing that would have suggested incipient wrongdoing. To the sellers, this was an all-cash deal. IDC and the banks really could care less to whom Madison Financial might assign part or all of the property.

One can assume that Ward told Thrash and Thomas that he was the assignee and therefore needed to have the language encompass him, an individual but not an affiliate.³⁸¹ Even so, this would not have put the lawyers on notice that Ward would have no equity in the deal, would give Madison Financial a 270-day option to buy all his land back at cost and would receive commissions on everything that was sold. Thrash and Thomas both say they knew none of these things; circumstances support their testimony.³⁸² Furthermore, even if they had known these things, it does not follow that they knew of Madison Guaranty's Rule V(C) problem; both men deny knowing anything about the rule or Madison Guaranty's problem with it.³⁸³ There is no

378 Signed statement of Seth Ward, Sept. 29, 1994, IG Ex. III-35, at 2-3.

379 Thrash Interview, Dec. 1, 1995, at 8:17-9:3, 10:22-11:18. Thomas Interview, Dec. 19, 1995, at 6:23-7:4, 8:13-17. Hubbell recalls the transaction but not having any role in it himself. Senate Hearing Transcript, Dec. 1, 1995, at 102:15-103:11; Hubbell Interview, Dec. 27, 1995, at 4:5-9:8.

380 The one exception is RIC 109218 through RIC 109219, the copy of the September 24, 1985 letter produced by the Rose Law Firm. How it got into the Rose Law Firm's files is unclear; Hubbell is the most likely source.

381 Thrash Senate Testimony, Jan. 31, 1996, at 107-08.

382 See letter from Alden L. Atkins to Bruce A. Ericson, Feb. 2, 1996, at 1-2.

383 Thrash Interview, Dec. 1, 1995, at 24-25; Thomas Interview, Dec. 19, 1995, at 18-19.

evidence that any Rose Law Firm lawyers (other than Hubbell) knew of these terms.

Hubbell, however, stands in a different situation. While he says he did not work on this matter, he also says that he knew of the arrangements between Ward and Madison Financial, at least in broad outline, and he knew them shortly after the transaction closed. Hubbell knew of these matters because Ward discussed the transaction with Hubbell with some frequency. For example, Ward acquainted Hubbell with the terms of the September 3, 1985 memorandum:

Q. Let's turn to the next page, which says "Defendant's Exhibit 31" and also says "SW1-004." It's a memorandum dated September 3, 1985. Again, let me ask you if this is a document you saw in 1985 or 1986.

A. I may have seen it after the closing. Seth may have brought a copy home. So I can't say that I haven't seen it. Okay?

Q. Okay.

Do you have any recollection of discussing the terms of this document with Mr. Ward?

A. He discussed everything. So I mean -- I mean this specific document, no. But his deal with Madison, he talked about it all the time.

Q. Approximately how often would you see your father-in-law in this time period?

A. Fairly regularly. Not as often as after his accident. But fairly regularly.

.....

Q. Again, focusing on '85, '86, could you be any more specific as to "fairly regularly"? Do you mean once a week?

A. At least once a week.³⁸⁴

384 Hubbell Interview, Dec. 27, 1995, at 16:25-17:22.

Through these conversations, Hubbell came to know the terms of the arrangements between Ward and Madison Financial:

Q. You mentioned that you learned that Madison was going to lend him [Ward] the money to buy a part. Did you know anything beyond that, about the terms in which the money would be loaned to your father-in-law?

A. I learned that later on.

Q. But in 1985, you did not know those terms?

A. I probably did after it closed; but, you know, exactly when, I couldn't tell you.

Q. When you say you probably did after it closed, why is that? Is there a particular event that brought it to your attention?

A. Well, I mean the deals changed, you know; and so he would have told me that he was borrowing the money, you know, as opposed to Madison just buying it all and him getting a commission.

Q. At the point at which you learned he was borrowing the money and was buying part of the property, did you have any understanding as to whether he was borrowing 100 percent of the money needed to buy his part of the property or some lesser amount?

A. My understanding was it was always 100 percent.

Q. Did you have any understanding as to whether it was recourse versus nonrecourse?

A. I believe -- you could tell me, but I believe it was nonrecourse. I believe that's been an issue. I can't tell you when I learned.

Q. What was your understanding as to the arrangement with respect to commissions on the sale of the property?

A. If I remember right -- but I may have learned this later on -- there was a written agreement between McDougal and my father-in-law. And I think in general it was 10 percent on

anything he sold, 10 percent on any commercial real estate; and then a lesser percentage on residential real estate.

Q. When do you think you learned those facts?

A. It had to be sometime after the closing. My impression was that initially he was going to get paid when the deal closed, you know, like most real estate people. At some point, that changed.³⁸⁵

MR. BEN-VENISTE: Now, what was your understanding about how it was that he came to take a portion of the IDC property in his name?

MR. HUBBELL: In my understanding, and that's again based on conversations, was that when it came close to closing that there was some concern about Madison taking all of the property in its name and that Mr. Ward offered to take a portion in his name until it was sold, if Madison would lend him the money to do so.

MR. BEN-VENISTE: And was that the extent of your knowledge?

MR. HUBBELL: It was all kind of after the fact.

MR. BEN-VENISTE: Right. And do you recall discussing that knowledge with anyone at the Rose Law Firm?

MR. HUBBELL: I might have, but I don't have any recollection of it.³⁸⁶

Hubbell also understood that Madison Financial could not buy all of the property in its own name:

Q. At this time, September 1985, what was your understanding, if any, with respect to the reasons why Madison was not going to buy the entire property itself?

A. My understanding was based on what Mr. Ward told me, that maybe whoever closed the loan was -- was that Madison

385 Hubbell Interview, Dec. 27, 1995, at 15:1-16:15.

386 Hubbell Senate Testimony, Feb. 7, 1996, at 13-14.

had limits on what it could own in its own name, and so Mr. Ward was going to own part of it until it could be sold.³⁸⁷

The foregoing is fairly consistent with what Hubbell told the RTC's Inspector General, as summarized by an investigator:

HUBBELL said that WARD told him that he was negotiating on behalf of MADISON to buy the IDC property, which would then be split up between MADISON and WARD. HUBBELL said that Ward may have told him that MADISON could only buy a portion of the money [sic], and that the limitation may have been regulatory. HUBBELL recalled that Ward was negotiating the purchase as if he was the sole purchaser because the purchase price would have been higher if the sellers thought that McDOUGAL was the actual purchaser. WARD also had told HUBBELL that his part of the purchase would be financed with money borrowed from MADISON GUARANTY.³⁸⁸

Exactly when Hubbell acquired all this information is unclear. He says he gained most of it after closing (October 4, 1985), but that might be incorrect. As shown by the passage quoted above, on at least one occasion Hubbell said he had such information in September 1985. In addition, Hubbell, in the conversation with Schaufele after McDougal's birthday party in August 1985, declined to assist Ward with the transaction, citing conflicts. That statement provides a basis to infer that Hubbell knew something of the terms of the transaction at this time.

It is much harder to prove what other Rose Law Firm lawyers knew (if anything) about these matters. Other than Hubbell, all of them have denied knowing the salient terms that arguably make Ward a straw.

d. The elements of aiding and abetting.

To be liable for aiding and abetting, one must be generally aware of his role as part of an overall illegal or tortious activity, and one must knowingly and

387 Hubbell Interview, Dec. 27, 1995, at 21:25-22:6.

388 IG Ex. III-69, at 6-7. Regarding his role in the acquisition, Hubbell wrote a letter to the FDIC in June 1989 stating that he had "not represented Mr. Seth Ward in connection with any issue or matter relating to his disputes with Madison Guaranty." RTCKC42271; Hubbell Interview, Dec. 27, 1995, at 36:10-19.

substantially assist the principal violation.³⁸⁹ There may have been a principal violation here, but there is no substantial evidence that the Rose Law Firm knowingly and substantially assisted in its commission.

Knowledge: Mrs. Clinton, Thrash and Thomas, all of whom recall very little about the transaction, say they had no savings and loan experience, did not know of the Arkansas investment limitation regulation, did not know of the 1984 FHLBB Report of Examination or Supervisory Agreement, and did not know the terms on which Seth Ward purchased his portion of Castle Grande.³⁹⁰ No substantial evidence to the contrary has been found except possibly as to Hubbell.³⁹¹ Hubbell knew in 1985 the essential terms of the transaction, including the aspects that arguably make it a straw-man arrangement, but he says he did not learn these things until after the transaction closed.

If Hubbell had knowledge at a relevant time, it is possible that this knowledge might be imputed to the Rose Law Firm. As a matter of partnership law, that may happen if the partner who knows something but is not acting in the particular matter "reasonably could and should have communicated it to the acting partner."³⁹² Even so, it is unclear that the imputation of Hubbell's knowledge to the firm would mean that otherwise-innocent acts performed by other lawyers in the firm, who lacked actual knowledge of these matters, would somehow become "fraud" or "intentional misconduct" within the meaning of the statute of limitations extender. There is no relevant case law under the extender statute, nor much by way of analogy in cases construing the Uniform Partnership Act.

389 *Restatement (Second) of Torts* § 876 (1979). See generally *Rose Report* at 46-48. It should be noted that somebody has given a copy of the *Rose Report* to the Rose Law Firm and to somebody associated with President and Mrs. Clinton. Rose Law Firm Chief Operating Officer Ronald Clark has read the *Rose Report*. Clark Senate Testimony, Jan. 18, 1996, at 16, 23. Mrs. Clinton had it described to her, but not in any detail. Clinton Interview, Feb. 14, 1996, at 106. Were the FDIC to institute litigation against the Rose Law Firm, it would not help to have the *Rose Report* in the hands of the other side.

390 Thrash Interview, Dec. 1, 1995, at 4:20-5:12, 7:23-26, 23:25-24:25, 24:26-25:20, 31:13-22, 32:1-12. Thomas Interview, Dec. 19, 1995, at 5:4-12, 17:13-19:10, 23:3-7, 28:15-29:12. Letter from Alden L. Atkins to Bruce A. Ericson, Feb. 2, 1996, at 1-2.

391 Mrs. Clinton might well have seen references to Rule V(C) in Massey's correspondence with Beverly Bassett and Charles Handley, but even assuming she cast her eye over this letter, there is no reason to think it so much of an impression on her that it would have come to mind months later in a different context. Also, Massey's letter demonstrated, apparently to Handley's satisfaction, that Madison Guaranty was not close to being in violation of Rule V(C) at the time.

392 1 Alan R. Bromberg and Larry E. Ribstein, *Bromberg and Ribstein on Partnership* § 4.06, at 4:73 (1994), quoting Uniform Partnership Act § 12 (1914).

Substantial assistance: The argument here also is weak at best, although the reasons for this weakness differ as between the two principal documents.

The September 24, 1985 letter: Hubbell says that he did not draft the September 24, 1985 letter,³⁹³ and he told the Senate that he "wasn't party to the representation of Madison and my father-in-law in that acquisition, but I was aware of it generally."³⁹⁴ The evidence summarized above is not entirely consistent with Hubbell's declaration that he "wasn't party to the representation of Madison and my father-in-law in that acquisition," but it suggests at most that Hubbell may have cast a fairly casual eye over the September 24, 1985 letter.

Mrs. Clinton also says that she did not draft the September 24, 1985 letter. To disbelieve her, one must adopt a whole series of fairly implausible assumptions about when the letter really was drafted and what Mrs. Clinton was working on in November 1985. As already stated, a trier of fact is highly unlikely to find that these assumptions are supported by the weight of the evidence.

The May 1, 1986 option: This option has less immediate significance than the September 24, 1985 letter. The option did not assist in the closing of the acquisition. It, unlike the letter, was created many months after the transaction closed. The option, unlike the letter, does not prove any awareness on the part of its author of Ward's arrangements with Madison Financial. Such awareness could be inferred only if one credits the Latham/Young "complex theory" that the option was an attempt to obtain capital-gains treatment for Ward's commissions. If, instead, one credits Ward's view that the option had nothing to do with the commissions (as the jury in *Ward v. Madison* obviously did), then the author of the option need not have known anything about Ward's commissions, let alone his 100 percent financing or the other terms embodied in the September 24, 1985 letter. For these reasons, the option seems, at most, tangentially related to the acquisition itself.

Of the two theories, the simple theory probably is the more believable; the jury accepted it and it has the virtue of being simple and consistent with the September 24, 1985 letter. Nevertheless, the complex theory has its attractions, too: in some respects it looks like just the sort of thing that McDougal would attempt. Be that as it may, there is no evidence that Mrs. Clinton had any information that would have put her on notice of the facts underlying the complex theory. She has denied having such knowledge, and the circumstances support her. It is highly unlikely that, even if she had been

393 IG Ex. III-69, at 6-7.

394 Senate Hearing Transcript, Dec. 1, 1995, at 102:22-103:2.

so inclined, she would have drafted a document having a complex (and highly dubious) tax purpose in two hours.³⁹⁵ It also is unlikely that, had she known that purpose, she would have described the wrong property. For these reasons, a trier of fact is highly unlikely to conclude that Mrs. Clinton either knew of any wrongful purpose connected with the option (if there was one), or had the intent to aid in the commission of that hypothetical wrong.

A third theory might be suggested. The option might be related to an effort to document Ward's rights. Ward and others have testified to such an effort, noting the need to have some written evidence for the FHLBB examiners to see of Ward's entitlement to the commissions.³⁹⁶ In addition, a lawyer (such as Mrs. Clinton) working on FSLIC matters might have gained familiarity with the *D'Oench Duhme* doctrine and thereby developed a concern that an oral or inadequately documented arrangement might not prove enforceable should Madison Guaranty fail.³⁹⁷ Hubbell says that Ward was anxious about whether he would be paid.³⁹⁸ In such circumstances, it would not be unusual to ask a lawyer to help reduce one's rights to writing.

On analysis, however, this theory is really only a variant of the "complex theory." The theory that Mrs. Clinton might have been helping Ward to avoid a *D'Oench Duhme* problem makes sense as applied to the option only if one credits the view that the option bore some relationship to Ward's commissions. If this view is accepted, then the option might be deemed a rather opaque and perhaps misleading means of documenting Ward's entitlement to commissions. But, as noted, this is a theory the jury in *Ward v. Madison* rejected, and it suffers from a number of problems, starting with its inconsistency with the September 24, 1985 letter and going on to its dependence on Latham and Young, witnesses whom it would be easy to impeach.³⁹⁹

In any event, Mrs. Clinton does not recall being asked for such advice or rendering such services:

395 DKRT11 000922. The timesheet entry does not suggest that Mrs. Clinton spoke to anyone else at the firm, e.g., a tax lawyer, and Mrs. Clinton usually was meticulous about recording such intra-office conferences.

396 *Ward v. Madison* R.T. 27-29, 49-54, 101-02, 114-15.

397 *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). As used in this report, references to the doctrine also include the related statute, 12 U.S.C. § 1823(e).

398 As noted above, Seth Ward told Webster Hubbell in the spring of 1986 that he "had some sense Madison was having trouble" and was "very anxious" about whether he was going to be paid the commissions he was owed. Hubbell Interview, Dec. 27, 1995, at 43:21-44:12.

399 Latham pled guilty to bank fraud. Young's problems as a witness are much less serious but there are a number of inconsistencies in his testimony.

Q . . . At the beginning of this, I asked you a little bit about the D'Oench Duhme Doctrine and you described your understanding for me. Let me ask you this.

With respect to the option you prepared, the May 1, 1986 option, is it possible that was prepared because -- I'm just asking -- I'm not suggesting this as evidence -- I'm just asking the question. Because you had advised Mr. Ward that he needed to document his compensation arrangements with Madison Guaranty, that he was undertaking certain work for Madison, evidence which you indicate you don't recall and perhaps never knew about that he was to be paid some commissions. Is it possible that he had come to you and said "look, I don't know if I'm going to get paid or not. It's been six months. I haven't been paid, and the examination is underway. I'm a little concerned about whether or not I'm going to get paid."

Is it possible you advised him you ought to reduce this to writing? If you don't have it in writing, you may not get paid and if the institution is ever taken over, you could be out of luck because there's no written record? Is it possible you gave him such advice?

A I don't recall giving him such advice. I don't recall knowing enough about Mr. Ward's personal dealings with Madison to have had any basis to give him such advice. I don't recall Mr. Ward ever seeking my advice about his personal financial arrangements with anyone, including Madison.

Q Do you recall him indicating any -- let me put it this way.

Mr. Hubbell has said to me at least that Mr. Ward expressed to him, starting in the spring of 1986 what Mr. Hubbell described as a state of anxiety about affairs at Madison and how -- I think he goes into more detail -- but expressing anxiety worrying about whether or not he's going to be paid.

I take it what you're saying, is that didn't come to your attention that Mr. Ward had

anxiety of that sort?

A Mr. Ericson, I don't recall Mr. Ward ever expressing anxiety about anything to me. Mr. Ward's demeanor and dealings with me were always filled with confidence, not anxiety, to the best of my recollection, in the years that I had any dealings with him.⁴⁰⁰

Several other facts support Mrs. Clinton's recollections:

First, she may not have known much about the *D'Oench Duhme* doctrine. When asked a blind question about it, she answered by describing an unrelated legal issue.⁴⁰¹

Second, the theory that Ward or McDougal wanted to have the Rose Law Firm document the terms that (arguably) make Ward a straw man is hard to reconcile with the fact that in other respects McDougal and Ward seem to have resorted to self-help rather than advice of counsel. Certainly the series of loans that they entered into in the spring of 1986 (\$400,000 from Madison Guaranty to Ward; \$300,000 from Ward to Madison Financial; and approximately \$70,000 running in both directions) reflect an unusual approach to documenting Ward's entitlement to commissions. There is no evidence that the Rose Law Firm had a hand in these loans. It is hard to imagine that any competent lawyer could have recommended this course of action.

Finally, even if a trier of fact did find liability, it is doubtful that the option caused any harm. It was never exercised. It did not cover up anything, nor did it prevent the FHLBB examiners from roundly criticizing the IDC/Castle Grande project in their 1986 Report of Examination. While it became an issue in *Ward v. Madison*, neither Ward's counsel nor Madison Guaranty's counsel thinks it was very important to the result, and a review of the trial transcript leads to the same conclusion. For all these reasons, the May 1, 1986 provides no basis for any sort of claim against the Rose Law Firm.

The money received by the Rose Law Firm: The amount of money paid to the Rose Law Firm for its matter 5/IDC/Castle Grande work is not substantial. Work was performed for the money, at least with respect to the liquor and sewage issues, and the initial review of the purchase agreement.

400 Clinton Interview, Feb. 14, 1996, at 103-05.

401 Clinton Interview, Feb. 14, 1996, at 22, 102-05, 107.

As noted, for a time the Rose Law Firm received a \$2,000 a month retainer from Madison Guaranty. The press has suggested that then-Governor Clinton personally solicited this retainer from McDougal and picked up the money monthly.⁴⁰² The suggestion is made that the retainer was paid because the Clintons wanted the money, rather than for services rendered.

This suggestion seems wrong for at least three reasons:

First, the retainer was treated as an advance fee payment for services to be rendered rather than a "true" retainer (a fee paid regardless of whether services are rendered, in effect, a fee for remaining available).⁴⁰³ Consistent with this interpretation, the Rose Law Firm deposited the retainer into a trust account, at least starting in February 1986.⁴⁰⁴ A "true" retainer need not be deposited into a trust account, because it is a payment for being available rather than an advance on services.

Second, services were rendered and, when the representation was nearing an end, the unused portion of the retainer was returned to Madison Guaranty (indeed, perhaps while Madison Guaranty still owed the Rose Law Firm some money for the Babcock and Tulsa Econolodge matters). Thus, the suggestion that the retainer was some sort of gratuity, or was handled improperly, lacks foundation.

Third, as described above, McDougal's Madison Bank had refused to pay the Rose Law Firm in full for litigation services rendered in 1981 and 1982. Given this prior experience with McDougal, the Rose Law Firm could hardly be blamed for seeking advance payment before agreeing to represent a McDougal entity once again.

Missing documents: The Rose Law Firm did not have a centralized system of opening or maintaining files; instead, matters were left to the

402 *Los Angeles Times*, Nov. 14, 1983. Cf. Strayhorn Interview at 45; Davidson Notes of Raglin Interview, May 11, 1994. The President states that he did not pick up the money. Interrogatory Responses of William Jefferson Clinton, May 24, 1995, answer to Interrogatory No. 17(f), at 32.

403 Interrogatory Responses of Hillary Rodham Clinton, May 24, 1995, answer to Interrogatory No. 17(d), at 34-35 ("I don't recall who negotiated the 'retainer arrangement' (this was in fact simply a prepayment of fees and expenses, with any excess to be refunded to the client)."). This distinction is explained in Charles W. Wolfram, *Modern Legal Ethics* § 9.2.2, at 505-06 (1986).

404 RLF2 02995-96.

discretion of individual lawyers.⁴⁰⁵ The "bright line" approach taken to the statute of limitations in Arkansas has made long-term document retention by law firms less customary than might be true elsewhere. In Arkansas, as in some other states, the courts have been reluctant to develop exceptions to the statutes of limitations. While in some states (e.g., California), various tolling doctrines make it exceedingly difficult to render advice on how long one must keep documents, in Arkansas this is not true. As recently as 1991, the Arkansas Supreme Court, in a legal malpractice case, refused to adopt a variety of tolling doctrines, stating as follows:

There is yet another significant reason we do not retroactively adopt the "discovery rule," "date of injury rule," or "termination of employment rule." Many abstractors, accountants, architects, attorneys, and other similar professionals surely have relied on our traditional and long-standing rule. In doing so, they had no reason to keep records for longer than three (3) years. As a consequence, if we retroactively changed the rule, they might easily have no materials to use in their defense.⁴⁰⁶

The new evidence shows that the Castle Grande files were discarded in 1988, long before Whitewater in any form became an issue. The discarding occurred in a seemingly innocent context, as part of a general effort to discard unneeded files.⁴⁰⁷ There is no evidence that Mrs. Clinton knew anyone might need the files. The *Ward* case was then going to trial and she had a file labeled "Ward Option" but she says she does not recall being aware of the case, much less knowing that the option was at issue.⁴⁰⁸

405 Thomas Interview, Dec. 19, 1995, at 30-31; Hubbell Interview, Dec. 27, 1995, at 41:16-43:20.

406 *Chapman v. Alexander*, 307 Ark. 87, 817 S.W.2d 425, 427 (1991). Of course, nothing in this opinion, or elsewhere, would justify spoliation of evidence, should that be proved. The only point being made here is that discarding files before investigations began and subpoenas were issued might be justifiable. Therefore, without more, the non-existence of certain files today is not proof of actionable wrongdoing.

407 Supplemental Interrogatory Responses of Hillary Rodham Clinton, Jan. 20, 1996, answer to Interrogatory No. 68, at 14-15, and tab A thereto. Compare RIC 000007G through RIC 000007I, produced under cover of a letter from Alden L. Atkins to Bruce A. Ericson dated Feb. 9, 1996. The handwriting on RIC 000007G, indicating that files should be discarded, is not the same as the handwriting on the document behind tab A, which is otherwise identical. Mrs. Clinton thinks a staff person must have copied her directions onto another copy of the original memorandum. Clinton Interview, Feb. 14, 1996, at 99-101.

408 Clinton Interview, Feb. 14, 1996, at 101.

The worse that might be said is that Mrs. Clinton should have checked with her client before discarding files that belonged to it.⁴⁰⁹ If she did not do so, that arguably was an error on her part, but it is one thing to deem it an error and quite another thing to deem it spoliation. Besides, in Arkansas there is no general duty, in the absence of ongoing proceedings, to preserve evidence.⁴¹⁰

Conspiracy theories: Of course, one might reject all this and argue that the documents were destroyed in 1988 for a nefarious reason and that all the witnesses have testified untruthfully. Such an argument, however, would be highly unlikely to persuade any trier of fact.

It simply would not be persuasive to argue that, for \$21,000, McDougal corrupted the Rose Law Firm and convinced half a dozen lawyers, most of whom he did not know, to join him in a scheme to violate the law. Odd as he might seem, McDougal did not involve large groups of strangers in his schemes. Instead, McDougal typically involved a close group of long-time friends and trusted associates in his plans, and nobody else. And typically it was the same people, over and over, friends and vassals who dated back to McDougal's youth.

Rather than find a conspiracy here, a trier of fact presented with all the evidence is far more likely to end up thinking something like this:

The Clintons (like Senator Fulbright) were not old cronies, like R.D. Randolph; instead, they fell into a different group. They were not confidantes but people who McDougal wanted to claim as friends. Sitting on the periphery of politics, McDougal wanted to be known as someone who had friends in high places. In the Clintons' case, he wanted to say something like this: 'They are friends of mine. We go way back. They have invested with me. I worked for the Governor. His wife is my lawyer.'

In all probability, after Massey sought to obtain legal work from Latham, Latham raised the issue with McDougal, and McDougal thought something like this: 'What a good idea. I already have Jim Guy Tucker in my stable of lawyers. Why not add the First Lady as well? I will send her some fairly prosaic assignments and see how she does. Meanwhile, it certainly won't hurt to let people know the Governor's wife represents me.'

In contrast to this, the conspiracy theory is hopelessly flawed. The Independent Counsel already has alleged a different conspiracy--the conspiracy

409 See Clinton Interview, Feb. 14, 1996, at 97-102.

410 *Wilson v. Beloit Corp.*, 921 F.2d 765 (8th Cir. 1990), *affirming*, 725 F. Supp. 1056 (W.D. Ark. 1989).

with Tucker—involving the same property, IDC/Castle Grande. Without prejudging the results of that forthcoming trial, let us grant that the conspiracy alleged in the indictment does not violate common sense. The principals were cut in on the deals, and relatively large amounts of money changed hands (six figures, it is alleged). Whatever one thinks of that, however, it strains common sense to place a second set of conspirators on the same property—a set that included half a dozen lawyers who had never met McDougal before, a set that was not cut in on the deals, a set whose senior members stood to gain something on the order of \$20 a month.

Summary: The only solid evidence tying the Rose Law Firm to the IDC/Castle Grande acquisition is evidence of the innocent activity of participating in the drafting of the purchase agreement. While some evidence suggests that Hubbell could have had a role in the drafting of the September 24, 1985 letter, Hubbell denies it, as does Ward, and nothing proves Hubbell drafted the letter, much less that he did so knowing it to be wrong. Similarly, while Mrs. Clinton drafted the May 1, 1986 option, nothing proves she did so knowing it to be wrong, the circumstances of the work point strongly toward innocent explanations, and the theories that tie this option to wrongdoing or to the straw-man arrangements are strained at best.

IV. CONCLUSION.

The evidence taken as a whole does not amount to convincing proof that the Rose Law Firm knowingly aided and abetted a fraud, or a scheme to circumvent the Arkansas investment limitation regulation. This conclusion does not necessarily mean that the evidence exonerates anyone; it simply means, given the applicable legal standards and the statutory mandate under which the FDIC operates, that no reasonable basis has been found to recommend the filing of a claim relating to IDC/Castle Grande against the Rose Law Firm.

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