Defending the President

By Michael McMenamin

A non-Nixonian strategy for avoiding that messy sexual harassment trial

IT'S A DIRTY JOB, BUT SOMEbody's got to do it. That's why more laboratories are using lawyers instead of white rats in their experiments: There are more of them; you don't get as attached to them; and there are some things rats won't do. So let's get on with mapping out a legal strategy—and the tactics to go with it—for Bill Clinton to beat the sexual harassment lawsuit filed against him by Paula Jones.

After securing an appropriately large retainer, we start by assuming that the gist of Jones's complaint is true—that Clinton used an Arkansas state trooper to solicit her to meet Clinton in his hotel room; that once she was in his room, Clinton attempted to kiss her neck and put his hand on her thigh underneath her culottes; that she then sat on a sofa and was joined by Clinton, who dropped his trousers and underwear as he sat down, thereby exposing "distinguishing characteristics in Clinton's genital area that were obvious" and asked her to perform oral sex; that she refused and left the room; and that, on the same day, she told three other women about the incident.

Why assume this? Shouldn't our client deny everything? Protest his innocence? Question the motives and credibility of his accuser? Of course he should. And his lawyer has done that for him, in a press conference the day the suit was filed.

But now we're behind closed doors, and we're talking strategy, not public relations. And our strategy is simple. It's to win. At the earliest possible time. And before the plaintiff has much opportunity to take sworn testimony from potentially embarrassing witnesses like state troopers, Gennifer Flowers, and other Clinton mistresses. So we need to take a page out of the legal playbook that helps the news media win 90 percent of all libel cases before trial on issues other than truth.

Truth is the last line of defense for the media, and so it should be for Clinton. As long as we win, public relations can take care of the rest. Why avoid the issue of truth? Because it's her word against his, and only a jury can decide who's telling the truth. If this case goes to a jury, we will have let our client down no matter what the jury decides. And they may well decide she's telling the truth. After all, she never came forward until after *The American Spectator* had branded her as one of Bill's bimbos, and all she wanted Clinton to do was confirm she had said no. But to avoid going to a jury and still win, we must concede, for the sake of argument, that Jones is telling the truth and persuade the judge that we should win anyway as a matter of law.

So much for strategy. Let's move on to the legal issues we're going to use to get our client off.

Legal issues come in two flavors—substantive and procedural. Both are important, but the substantive wins more ball games and the procedural can be boring for a lay person, so let's move right to the substance—sexual harassment, which Jones has labeled "intentional infliction of emotional distress" because she had only six months to file a federal civil-rights claim and didn't. Jones claims that the hotel oral-sex incident was one instance and the other was a job transfer and failure to receive merit pay increases in retaliation for having turned Clinton down.

The hotel oral-sex incident falls under what employment lawyers call the "hostile environment" category of sexual harassment. It is by far the most common complaint and the most misunderstood by the public. The retaliatory job transfer is called quid pro quo sexual harassment, which is Latin for "tit for tat," but you can't say that in court.

LET'S PAUSE BRIEFLY TO CONSIDER THE job transfer and merit pay claim before moving on to what you really want to know—how we're going to get Clinton off without going to trial. Most of what we will need should be found in Jones's personnel file with the Arkansas state government. If it contains a legitimate, non-discriminatory reason for her transfer, we are halfway home. Then all we need to do is find the state employee who made the decision to transfer her and the one who told her about the transfer and have them corroborate what's in the file and testify that no one from the governor's office ever talked to them about Jones.

As for the pay claim, there already have been news reports that Jones received at least one merit increase and three cost-of-living increases in less than two years. If we can prove all this, her

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quid pro quo claim is in deep trouble. She's got to cast serious doubt on our story, either by producing a witness who overheard or saw something from the governor's office about Jones before the transfer or by showing that other employees in jobs just like hers with work records just like hers were not transferred or got better pay increases. If she does, then we may well be facing a jury trial. If she doesn't, then her job transfer and merit pay claims are history, because the judge should throw them out.

HOSTILE ENVIRONMENT WILL BE A TAD trickier to defeat. And doing so won't endear us or the president to his legions of feminist admirers. But our obligation is to our client and, besides, most of those feminists are, in their heart of hearts, really Hillary admirers who quite justifiably think Clinton is scum for cheating on her. Our argument here is that what Clinton is claimed to have done is *not*, repeat *not*, illegal sexual harassment. And the same goes for Sen. Robert Packwood and Justice Clarence Thomas.

Boorish, bad taste, clumsy—but not illegal. Why? Because in 1986, the Supreme Court defined a hostile work environment due to sexual harassment as sexual conduct which "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."

That's a tougher standard than you think. Here are some examples of situations which courts have found did *not* constitute a hostile environment:

• In the alleged rape of a dispatcher by a sheriff, where a special prosecutor had decided to take no criminal action, the court ruled that a hostile environment was not present because the victim was able to work regular shifts for 10 days after the incident.

• In a case where, after calling her into his office and locking the door, the victim's supervisor twice pressed his body against her so that she felt his erect sexual organ, the harassment was not "sufficiently severe or pervasive."

• In a case where a co-worker made a "verbal sexual advance," touched the victim's breast, and grabbed her buttocks, the conduct was not "sufficiently severe or pervasive," since the victim continued working at the job for nine months.

Isolated incidents like a pubic hair on a Coke can or recounting a pornographic film, as Thomas was accused of doing, pale by comparison. Packwood's clumsy advances and awkward gropings are not much closer. Clinton's alleged conduct is obviously more egregious but still eminently defendable under existing law.

Our real ace in the hole is one fact: It only happened once. No federal court has ever found a single incident to be sufficiently severe to constitute a hostile environment.

We just argue that it wasn't "sufficiently severe or pervasive" to create an abusive working environment or unreasonably interfere with Jones's work performance. Jones worked for Arkansas for another year and a half after her hotel encounter with Bill.

BUT OUR REAL ACE IN THE HOLE, WHAT'S going to get us out of this case quickly, is one additional and critical fact: It only happened once. As one court has said, there is a "nearly universal consensus of federal authority holding that generally a single incident of sexual harassment will not create a hostile work environment." Actually, it *is* universal—not one federal court has ever found a single incident to be sufficiently severe to constitute a hostile environment, even though some federal courts have admitted that a single severe incident—for example, rape or violent sexual assault—*could* do so.

So what's the catch? How can our "no harm, no foul" defense go wrong? Easy. There's always a first time for anything, and the Supreme Court of Michigan has already held that a single incident created a hostile environment. More troubling for Clinton, however, is the single incident that the Michigan Supreme Court found to be sexual harassment. The plaintiff, a veterinary technician, had a five-minute encounter on a couch with the owner of the company, and she conceded he might have mistakenly believed she wanted to kiss him. The owner then grabbed her by the neck and forcibly attempted three times to kiss her, physically restraining her for about one-and-one-half minutes.

By contrast, the incident with Paula Jones lasted at least 15 minutes, but she admits no force was used—he asked (politely, if crudely), and she said no. End of story? Not quite. Jones also claimed that Clinton exposed himself, which is a sufficiently shocking act that you cannot predict in advance how the judge—Susan Weber Wright, a Republican Bush appointee—will react when Jones's lawyers ask her to follow the Michigan case.

What about presidential immunity? You know, "the king can do no wrong"—or, more accurately, the "elected politicians are above the law"—defense. The technical legal phrase is "the Nixon gambit." Should we use it? Well, we could. Some lawyers will do anything—which is why Clinton is not using white rats to defend him. After all, in a collective display of insanity, the U.S. Supreme Court (lawyers all) held in 1982 that Nixon had absolute immunity for official acts committed while in office. So yes, we could argue that our client can't be sued anywhere, anytime, for anything. But it would be wrong, that's for sure.

Here's why. Clinton wasn't in office when it happened, and arguing that soliciting oral sex was an official act would be a stretch, even for a lawyer. Plus, it's a delaying tactic, and it's bad public relations. If we raise immunity and we win, Jones can immediately appeal. If we lose, we can immediately appeal. All that guarantees is that this case is going to be around for the next two years, through the 1996 presidential election campaign. So keep in mind our strategy: It's win, stupid, as

soon as we can. We don't need delays.

On to the tactics. Clinton's lawyer, Bob Bennett, is in the Washington office of a huge New York law firm known for its hardball, take-no-prisoners litigation style. He might well take the same approach here and harass Jones and her lawyers by burying them in paper with motions, briefs, document requests, interrogatories, requests for admissions, and deposition notices—all the weapons in the modern litigator's arsenal. He might well do that, but it would be a mistake. Why? Keep in mind our strategy. We want a quick victory before Jones's lawyers have a chance to take their own depositions—testimony under oath—of Arkansas state troopers, Gennifer Flowers, and other assorted Clinton mistresses.

HERE'S HOW WE DO IT. WE DON'T FILE an immediate motion to dismiss claiming that Jones's complaint is legally insufficient. We could easily lose such a motion, and that wouldn't look good. Instead, we promptly take the depositions of Jones and the Arkansas state employees who ordered her transfer and granted her pay increases. We limit our questions to the oral-sex request, the transfer and merit pay, and whether the hotel incident affected the way she did her job.

We then go to the judge and ask her to dismiss the case on the two substantive legal issues we examined earlier—quid pro quo and hostile environment. We also ask the judge to prohibit Jones's lawyers from taking any potentially embarrassing depositions from troopers or bimbos pending her decision on our request. The judge ought to be receptive. We're conserving the court's resources, and if we lose, the game will go on, and Jones's lawyers will have a shot at taking their embarrassing depositions. But unless there's a smoking gun out there about the transfer or pay increases, or if Jones can prove she was so distraught over the incident she wasn't able to work without undergoing extensive therapy, then Clinton ought to walk—no *illegal* sexual harassment.

There you have it. Even if Clinton's guilty in the hotel oral-sex incident, we get him off the hook; his handlers proclaim his vindication and the lack of "legal" merit in his accuser's case; most people will think he really has been found innocent; a jury of their peers will never get to decide what actually happened between Bill and Paula in that hotel room; we avoid unseemly comparisons to Nixon and accusations about being above the law; the state troopers don't get to tell their pandering stories under oath; Bill's bimbos stay in the closet; and we head off with our fees to the bank. Is this a great country or what? R

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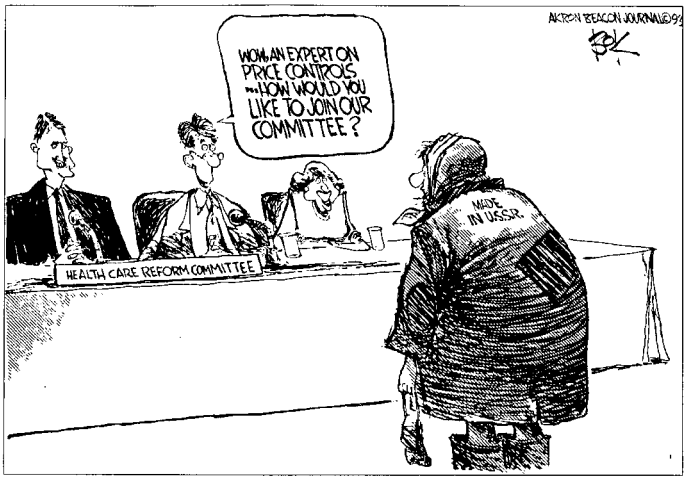
California Scheming

By Steven Hayward and Michael Lynch

A referendum on single-payer health care



WITH ALL EYES FIXED on the growing deadlock in Washington, D.C., the biggest health-care story of 1994 may be emerging a continent away. In California, a sweeping, Canadian-style "single payer" initiative that gathered more than 1 million signatures has qualified for the November ballot. More breathtaking than anything the Clintons dare propose, the California initiative will be a battleground to test both the "health-care crisis" mentality and the voters' eagerness to have a government takeover of health care.

The initiative's ballot qualification coincided with the launching of a national effort by single-payer advocates that features TV spots and full-page newspaper ads. If this long-shot initiative somehow passes in November, Congress and the president may well change their minds about the political feasibility of a federal takeover of the complete health-care system, without the patina of private insurance. The initiative would abolish private health insurance in California and replace it with a state-run "time tested single payer system" to be known as the "California Health Security System."

It is not necessary to reopen the arguments about the performance of Canada's single-payer system (waiting lists, rationing, fudged cost numbers, and so forth) to get at the defects of this initiative, because the most dramatic feature of the measure is not the single-payer system itself but the creation of an elected state health commissioner with immense, even ominous, powers. To label this prospective officer a "health czar" would be an understatement. The health commissioner would have complete authority, with little legislative oversight, to control the estimated $108-billion budget the system would set up (twice the size of California's present state budget). The health commissioner would be granted "any and all powers necessary to implement this Act."

"These broad powers include," the initiative continues, "the power to set rates and promulgate generally binding regulation on any and all matters relating to the implementation of this Act and its purposes." The commissioner will determine how many doctors there shall be, in what specialties, and where they are located. Section 25275 (b) sets as goals "achieving the number, geographic, discipline and specialty distribution of professional providers...needed by the state" and "adjusting, over a period of years to be determined by the Commissioner, the number, geographic and specialty distribution of professional providers to staff underserved areas and communities."

These and other coercive measures can be enforced through the global budgeting and price-fixing powers of the health commissioner, whose powers over the prospective $108-billion health-care budget would be far greater than the governor's powers over the regular $50-billion state budget. The global budgeting power extends not only to operating expenditures for each category of medical specialty but to capital budgets as well. No medical facility may make a capital improvement or establish a new procedure worth more than $500,000 without approval from the health commissioner. The commissioner would regulate the development and implementation of new technology through these capital controls.

THE HEALTH COMMISSIONER'S OFFICE would be complemented by a phalanx of regional administrators and regional consumer advocates, an expert Health Care Policy Advisory Board, and an ostensibly grass-roots Health Care Consumer Council that would really serve as the political base for the elected commissioner. The system would be funded through a new payroll tax, a personal income-tax surcharge, and a $1.00-a-pack levy on cigarettes. These new taxes would amount to about $48 billion; the balance of the health budget would come from consolidating existing federal and state health programs such as Medicare Part B and Medicaid. Global budgets, price controls, a constitutional declaration that health care is a "right," and a generous list of benefits, including mental-health and drug treatment, are all part of the package.

A consortium of left-leaning organizations, including labor, churches, seniors, nurses, a few doctors and pharmacists, Naderite consumer groups, and even the California Teachers Association, is backing the initiative. Out-of-state money has gone to support the California initiative, including $25,000 from a New York City

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