

Whitewater, Two Decades Later: Lessons Learned as the Sole Investigative Accountant

By Steven Bankler, CPA, PFS, Cr.FA, CFF, CGMA

“[Lawyers for the Clintons] said the improper tax deductions were honest errors, made because there was confusion over who really owned a certain piece of Whitewater property and who was responsible for the loan taken out to buy it, Whitewater or the Clintons.”¹

These words, published in *The New York Times* March 8, 1992, blew the whistle for what we now call the Whitewater scandal. By 1994, the issue consumed the press and began raising enough eyebrows on Capitol Hill to warrant investigation.

At the time, I was already knee-deep in President Bill Clinton’s underwear. That is, I had already been asked by national media to review the Clintons’ previous Federal tax returns to look at various deductions including the charitable donations of used clothing (including underwear valued at \$2 each). Knowing that I’d already pored through the couple’s returns, *The Wall Street Journal* invited me to Washington, D.C. to participate in its own breakout article on the Whitewater subject, "Tax Experts Believe Clintons Took Improper Deductions," which was published February 7, 1994. Over the next few months, I was asked to also provide analysis for NBC Nightly News, *TIME Magazine* and others.

In the same week, representatives for both the U.S. House and Senate committees investigating Whitewater called, each asking me to testify. They had read my name numerous times in the press as the tax expert who had reviewed the Clintons’ returns. I explained that I had no firsthand knowledge of any facts in this matter. Further discussions were held with Senate representatives and they decided that they wanted to employ me as an expert witness. The Senate representative was confident in my knowledge of complex tax laws, asserting that I would be able to analyze the individual and corporate tax returns, assist in the financial analysis of Whitewater documents, and support the attorneys in developing questions for the witnesses. And so, in the end, I was hired per diem as the Senate’s investigative accountant for the Special Committee to Investigate Whitewater Development Corporation and Related Matters, administered by the Committee on Banking, Housing, and Urban Affairs.

The Special Committee was officially charged with conducting an extensive investigation and public hearings on the matters relating to the President’s and Mrs. Clinton’s investment in Whitewater Development Corporation and with James and Susan McDougal, Madison Guaranty Savings and Loan Association.² Back in Washington, D.C., it wasn’t until I entered one conference room, and then another, both filled to the brim with filing cabinets and very smart (albeit very young) attorneys, that I truly felt the gravity of my position as the sole investigative accountant for the Senate Whitewater Committee. I tapped into what I knew already, but I

learned quite a bit along the way as well. Here, from process to proof, are the lessons I learned serving as an expert witness in the Whitewater case.

Live and Die By Process

Over the course of the investigation, the Special Committee deposed 274 witnesses and held 60 days of public hearings, during which 136 witnesses testified. Approximately one million pages of documents were submitted for review.³ The filing cabinets I mentioned earlier contained many of those documents – tax materials and backup documentation to be reviewed. Most of the paperwork was irrelevant to my assignment, but thousands of other pages were critically important.

My first task was to distinguish the relevant from the irrelevant, in relation to my assigned tasks. In all, there were three areas in question: how the White House handled papers in Deputy White House Counsel Vincent Foster's office following his death on July 20, 1993 (known as the Foster Phase of the investigation); whether there was possible White House interference with any investigations or prosecutions by federal agencies relating to Whitewater, Madison Guaranty related entities, and Capital Management Services, Inc. (the Washington Phase); and the activities of Whitewater, Madison Guaranty, CMS, Lasater & Co., and the work and billing practices of the Rose Law Firm relating to Madison Guaranty (the Arkansas phase).⁴

Once the corroborating evidence was located, we needed to address the accounting issues at hand. What's more, it was my responsibility to prepare the team for the public hearings for my area of investigation. I researched how each court interpreted the tax statutes and explained these provisions, as well as relevant tax principles, to the non-tax investigative attorneys.

The pace was grueling at 18+ hour days but, with the right process in place, we were able to move ahead with relatively no stone unturned and little backtracking.

Understand Human Nature

Human nature is a powerful indicator of behavior. When it comes down to it – based on human nature – people tend to act and react similarly when investing money. It was this assumption that led me to an important discovery during the course of the investigation.

The Whitewater matter was well scrutinized. It was perhaps the most scrutinized case of potential “petty” tax fraud in U.S. history, serving as the subject of hundreds of articles, news investigations, a Resolution Trust Corporation investigation, U.S. House and Senate investigations and an investigation by Special Prosecutor Kenneth Starr.⁵

Yet, amidst this intense scrutiny, I was the first to discover a previous land deal with Jim McDougal prior to the Whitewater deal. What led me to this discovery? I had a hunch that Whitewater wasn't the Clintons' first land deal. What I knew about human nature dictated the

following: No one bets that much money (approximately [then Governor] Bill Clinton's annual salary at the time) on their first venture, particularly of this nature. I believed that most people would try a smaller investment with the promoter. If that proved successful, then he would make the larger investment. It turns out, that is exactly what Governor Clinton did. It comes down to the idea of loss aversion, or the tendency for risk-taking to be motivated more by an aversion to loss than a penchant for gain. And experience tends to lessen the aversion.

Take the Daubert Challenge

“Everyone is entitled to his own opinion, but not his own facts.”

I consider this quote, widely attributed to four-term U.S. Senator Daniel Patrick Moynihan, one of the most important pieces of advice to keep in mind when serving as an expert witness. As an expert witness, you are there to assist the fact finder(s), by providing your opinion. Usually opinions are based on known facts, assumptions, and other relevant information.

Let's take taxation, an area that I practice, as an example. In a dispute with the IRS, I would say that 80-90 percent of the time, the dispute centers on the facts. If the taxpayer is correct on the facts of the transaction, the IRS will most often readily concede that the taxpayer is applying the correct law. If, however, the IRS is correct on the facts, the taxpayer's camp will usually agree that the IRS is applying the correct law. Essentially, the law is usually fairly clear and developed. For the other 10-20 percent of cases, it's interpretation of the law that becomes the issue. In all instances, the expert witness's report must be built upon a solid foundation, clearly explaining the reasoning for his opinion. At the federal level, and in all states that rely upon the *Daubert* standard, this reasoning will be used by the fact finders.

The *Daubert* standard – designed to reduce courtroom “junk science” – was first defined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), shortly before the Whitewater proceedings took place. While its predecessor, the *Frye* standard, is based on the rules of “general acceptance,” the *Daubert* standard places strong emphasis on an expert's methodology and supporting data. While it was created to specifically address scientific testimony in federal trials, it is applied to all experts at the federal level. In fact, PricewaterhouseCoopers LLP's report “Daubert Challenges to Financial Experts: An 11-year study of trends and outcomes” points out that the Supreme Court decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) “clarified that the *Daubert* criteria were applicable to all types of expert testimony, not merely testimony relating to science.” The report also points out that, since the *Kumho Tire* opinion, the number of challenges to expert witnesses of all types has been increasing rapidly, rising from 253 in 2000 to a record 879 in 2010.⁶

One could say that the Whitewater investigation presented a “trial by fire” test of my *Daubert* prowess, since the standard was still in its infancy. These days, 20 years after the standard was first introduced, there is no excuse not to be prepared. I recommend challenging your own

methodology to the *Daubert* standard, even when no one else is. In a heated proceeding like Whitewater, every fact is scrutinized. Circling back to my first point on process: there's no better way to make sure your testimony can hold up to intense scrutiny.

- 1 Jeff Gerth, "THE 1992 CAMPAIGN: Personal Finances; Clintons Joined S. & L. Operator In an Ozark Real-Estate Venture," *The New York Times*, March 8, 1992.
- 2 S. Rep. No. 104-280, *Investigation of Whitewater Development Corporation and Related Matters, Final Report of the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, June 17, 1996.
- 3 Ibid.
- 4 Ibid.
- 5 Lee A. Sheppard, "News Analysis: Whitewater Committee Reports On Clinton Tax Returns," *Tax Notes Today*, July 8, 1996.
- 6 "Daubert Challenges to Financial Experts: An 11-year study of trends and outcomes," PricewaterhouseCoopers LLP, February 2011.

Steven Bankler has more than 35 years of experience in the accounting industry. Since establishing his San Antonio, Texas, CPA firm in 1977, Bankler has been intricately involved in high-profile legal proceedings that called for a forensic accountant, including the U. S. Senate's Whitewater investigation. During his appointment as sole tax accountant for Whitewater, Bankler assisted attorneys for the Senate Whitewater Committee and for the Special Prosecutor's Office, which required him to examine thousands of pages of documents and depositions.