OFFICE OF INDEPENDENT COUNSEL

DONALD C. SMALTZ
In re Secretary of Agriculture Espy

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August 6, 1998

The Honorable Janet Reno
Attorney General of the United States
United States Department of Justice
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear General Reno:

On December 5, 1997, I wrote to you concerning a series of statements to the press, apparently emanating from the Department of Justice, that disparaged certain independent counsel offices, the independent counsels as individuals, and the Special Division of the U.S. Court of Appeals for the D.C. Circuit that appoints independent counsels. A copy of my letter is attached. You responded by letter on January 20, 1998, deploring the alleged comments. You further stated that the matter had been referred to the Department's Office of Professional Responsibility for "whatever action it deems appropriate." A copy of your letter is attached.

I have now received a letter dated July 15, 1998, from Richard Rogers of your Office of Professional Responsibility, reporting the results of his investigation. A copy of this letter is also attached. I must say that I find this letter to be deeply disturbing, first in what it says, but even more so in what it does not say.

Mr. Rogers' legalistic response reads more as a brief defending departmental action on narrow legal grounds than as a serious attempt to look at the problem. He concludes that, technically, the press statements attributed to departmental officials did not violate Rule 3.6 of the ABA's Model Rules of Professional Responsibility because, in his view, they were too general to influence a pending case and, under his interpretation, the rule governs only the behavior of attorneys who have directly participated in the investigation.

These distinctions are, at best, dubious. While the statements might not have disparaged any specific witness, item of evidence, or prosecution theory, they did directly disparage the prosecutor in high-profile pending cases (at least one before the jury as the remarks became public), and thus could easily have had an impact on the outcome. Moreover, while it is questionable that Rule 3.6 would condone one lawyer for the United States disparaging the work of another lawyer also appearing on behalf of the United States, the fact is that the Blackley matter, which was in trial when these remarks surfaced, was originally investigated by the Department.

My December 5 letter also pointed out that some of the statements attributed to departmental officials, that disparaged Judge Sentelle and the Special Division, might be in violation of ABA Model Rule 8.2, forbidding false statements concerning the qualifications or integrity of a judge. Mr. Rogers does not even bother to comment on this point.

However, the truly disturbing aspect of Mr. Rogers' letter is what he does not say. He does not pretend to have even considered the issues raised in my letter beyond searching for technical grounds that would take them outside of the ABA Model Rules. Rather, he eschews all further consideration of the problem: "Because Rule 3.6 is inapplicable in this case and no other applicable rule appears to prohibit the reported comments, we must conclude that no further inquiry into them by this Office is justified."

Your letter of January 20 stated that "[i]f these alleged comments were made to the press, I, like you, deplore them and find them wholly inappropriate." Either Mr. Rogers did not read your letter, or he is getting conflicting orders from elsewhere. Mr. Rogers takes the position that he need make no inquiry at all regarding the numerous press statements that we brought to your attention so long as he can construct a defense for them under the ethical rules. If the comments were, as both you and I have concluded, deplorable and inappropriate, then the Department should not consider them unworthy of inquiry simply because they can be threaded through a technical reading of the ABA Rules

Apart from the ABA rules, these comments, in my view, violate both the letter and the spirit of Departmental policies and regulations dealing with the media, as contained in Chapter 20, "Publicity and Media Regulations," *Ethics and Professional Responsibility*, Department of Justice, November 1995. The issue of the impropriety of the regulations is a question that should not be ignored by the Office of Professional Responsibility and needs, I respectfully suggest, to be addressed.

Because I still do not have a response, I must ask again, as I did in my December 5 letter, that you direct the officials who work for you to temper their public remarks, and to present any concerns or criticisms to the independent counsel offices so that problems can be addressed directly. The clear message of Mr. Rogers' letter is that "deplorable" and "inappropriate" statements by departmental officers and employees are condoned, if not encouraged, so long as they are technically defensible under the ethical rules. I hope that this message is not an accurate one but, if it is, I would appreciate being so informed. I also request whether, in the Department's view, the referenced statements fall within or without the proscriptions of Chapter 20, referenced above.

Sincerely,

Donald C. Smaltz
Independent Counsel

Enclosures
Copies: Richard M. Rogers, Deputy Counsel (w/encl.)
The Honorable Kenneth W. Starr (w/encl.)
The Honorable David M. Barrett (w/encl.)
The Honorable Carol Elder Bruce (w/encl.)
The Honorable Ralph I. Lancaster, Jr. (w/encl.)

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