U.S. Department of Justice

Office of Professional Responsibility

Washington, D.C. 20530

June 11, 2000

Mark J. Langer
Clerk of the Court
United States Court of Appeals
District of Columbia Circuit
Washington, D.C. 20001-2866

UNDER SEAL

In Re: Alphonso Michael (Mike) Espy,
Division No. 94-2

Dear Mr. Langer:

This is in response to your March 16, 2001 letter allowing me to submit comments for possible inclusion as an appendix to Independent Counsel Donald Smaltz' Final Report ("Report") to the Division of the Court in the above-referenced matter.

On April 3 and 4, 2001, I visited your offices and was permitted to review the following portions of the Report: pages 309-310 of the text, pages 19-20 of Appendix A, and pages 19-24 of Appendix C. Please accept the following comments in connection with this matter.

In a December 5, 1997 letter to Attorney General Janet Reno, Mr. Smaltz complained of several statements attributed to the Attorney General, her "top advisers," and unnamed Justice Department officials appearing in two *New York Times* articles in late November 1997. Noting that his office was conducting a criminal trial in the United States District Court for the District of Columbia at the time these statements appeared in the press, and citing Rule 3.6 of the A.B.A.'s Model Rules of Professional Responsibility ("Rule 3.6"), Mr. Smaltz' letter expressed concern about "the possible effect of [the quoted] statements on jurors in [the] trial." The trial in question was of Ronald Blackley. In a January 20, 1998 letter, the Attorney General informed Mr. Smaltz that his complaint had been referred

to the Office of Professional Responsibility ("OPR").[1]

In a July 15, 1998 letter, OPR informed Mr. Smaltz that it had concluded that Rule 3.6 did not apply to the quoted statements because (1) it was unlikely that the statements would have a substantial likelihood of materially prejudicing a case, a prerequisite for Rule 3.6 to apply; (2) Rule 3.6 applied only to lawyers participating in the case; and, (3) the statements pertained to matters then under active public debate. As such, Mr. Smaltz was told, OPR had decided not to pursue the matter any further.[2] I participated as an Assistant Counsel in OPR's handling of the matter.

On August 6, 1998, Mr. Smaltz wrote to the Attorney General criticizing OPR's decision not to pursue his complaint.[3] In a November 16, 1998 reply, the Attorney General, noting that OPR had decided not to investigate the matter because the quoted statements did not violate any ethical rule, stated that OPR's decision was "consistent with standard Department practice" inasmuch as "OPR's investigative authority is premised on the possible violation of specific rules of conduct." At the same time, the Attorney General informed Mr. Smaltz that she continued to find the reported statements "distressing" and that she had "taken steps to emphasize to senior staff [her] disapproval of the comments, the need to avoid such remarks, and [her] continuing commitment to ensuring that nothing [anyone in the Department says] impacts on the appropriate independence of independent counsel."

At page 310, the Report expresses dissatisfaction with OPR's decision not to pursue Mr. Smaltz' complaint. The remainder of this letter attempts to set forth the reasons for OPR's conclusion that the grounds Mr. Smaltz advanced for initiating such an investigation were insufficient. Before turning to that topic, however, another statement on page 310 of the Report requires brief comment. On that page, in summarizing the reported remarks about which Mr. Smaltz complained, the Report suggests that Justice Department officials were quoted in the media as having characterized the Judges of the Special Division as "derisively dismiss[ive]." This is inaccurate. The quote in question was as follows:

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[1] The Report reproduces the Attorney General's January 20, 1998 letter at page 19 of Appendix C.

[2] The Report reproduces OPR's July 15, 1998 letter at pages 20-21 of Appendix C.

[3] The Report reproduces Mr. Smaltz' August 6, 1998 letter at pages 22-24 of Appendix C.

"[S]ome Justice Department officials have derisively dismissed the suggestion that the outside prosecutors selected by Judge Sentelle's panel are in fact any more independent than Ms. Reno."[2]

As the quote makes clear, the only individuals described as being "derisively dismiss[ive]" were Justice Department officials. No judge of this or any other court was characterized as such. Furthermore, the person responsible for the characterization was the *New York Times* reporter who wrote the article, not a Department of Justice official as the Report suggests.

In accordance with longstanding practice, OPR does not investigate allegations of conduct that was at most unwise or regrettable, or that reflected mere errors in judgment. Rather, before initiating an investigation, OPR requires the predicate of either a direct allegation of misconduct supported by some credible evidence or a set of facts indicative of misconduct. *See* 28 C.F.R. §0.39a(a)(OPR shall review "any * * * allegation concerning conduct by a Department [of Justice] employee that may be in violation of law, regulations or orders, or of applicable standards of conduct"). In the instant case, OPR found no law, regulation, order or applicable standard of conduct violated by the reported comments of which Mr. Smaltz complained.

In particular, the comments did not reveal anything that was protected by grand jury secrecy rules or the Privacy Act, or that was classified, investigative in nature, or otherwise confidential. Nor was anything revealed in violation of 5 C.F.R. §2635.703, the provision applicable to Executive Branch employees governing the use of nonpublic information; 28 C.F.R. §50.2, which sets forth the Department of Justice's media guidelines; or any other Departmental or Executive Branch regulation of which OPR was aware.

As previously noted, in his December 5, 1997 letter, Mr. Smaltz drew the Attorney General's attention to Rule 3.6. For an extrajudicial statement by a lawyer to violate this ethical rule, the lawyer must know or reasonably know that the statement will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." As noted, the trial which Mr. Smaltz suggested would be prejudiced, *United States v. Blackley*, was being held in Washington, D.C. However, the two articles containing the allegedly prejudicial statements appeared in the *New York Times*, an out-of-town newspaper. More importantly, neither article mentioned the *Blackley* case, much less did it

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[2] *New York Times*, November 25, 1997.

disparage any witness, item of evidence, or prosecution theory in the case. As a consequence, OPR found no "substantial likelihood" of the kind of prejudice against Mr. Smaltz' case required by Rule 3.6, much less the requisite knowledge of the risk of prejudice on the part of the unnamed officials who allegedly made the statements.[5]

Furthermore, by its terms, Rule 3.6 applies only to lawyers "who [are] participating or ha[ve] participated in the investigation or litigation" at issue. Mr. Smaltz's office conducted the *Blackley* trial without the participation of any Department lawyer. In his August 6, 1998 letter to the Attorney General, Mr. Smaltz sought to counter this deficiency in his allegations by stating that the *Blackley* case was "originally investigated by the Department." OPR considered this point unavailing, however, because it did not appear -- and Mr. Smaltz did not claim -- that anyone making the reported comments participated in the original investigation. For each of these reasons, OPR concluded that no investigation could be initiated on the theory that Rule 3.6 was violated.

It is noteworthy that, in his December 5, 1997 letter calling for an investigation into the reported comments, Mr. Smaltz introduced his citation of Rule 3.6 with the signal "cf." Every lawyer knows that the signal "see" is used to introduce a citation to authority that is binding and applicable, whereas the signal "cf." is resorted to where the cited authority is at most only persuasive in nature. Thus, Smaltz' use of "cf." to introduce his citation to Rule 3.6 suggested that he did not consider it directly applicable to the conduct he was complaining about. Moreover, in his August 6, 1998 letter, Mr. Smaltz expressed dissatisfaction with the fact that OPR would consider the reported comments "unworthy of inquiry simply because they can be threaded through a technical reading of the ABA rules," a comment further conveying the impression that Mr. Smaltz believed Rule 3.6 to have been violated at most in spirit, not in its letter. This impression was strengthened by the fact that, after making this point about Rule 3.6, Mr. Smaltz' August 6, 1998 letter advanced a Department of Justice policy which, according to him, was allegedly violated by the reported comments "*both* [in] the letter and the spirit."[6]

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[5] At page 309, the Report observed that the jury ultimately convicted Blackley on all counts.

[6] Emphasis added. The Department of Justice policy in question appeared in a November 1995 Department circular entitled *Ethics and Professional Responsibility* issued by the Office of Legal Education in the Executive Office of United States Attorneys. OPR found nothing in the circular violated by the

Mr. Smaltz concluded his August 6, 1998 letter by denouncing OPR for declining to investigate the reported comments on the ground that the complained of conduct was "technically defensible under the ethical rules." However, in initiating an investigation into whether a Department of Justice employee violated a given rule, OPR cannot ignore factors making the rule inapplicable on the theory that they are only "technical" in nature. In sum, because Rule 3.6 did not apply to the reported comments, and because no other rule or standard of conduct appeared to prohibit them, OPR determined that no investigation was warranted.

The foregoing having been said, it is important to emphasize that, in finding an investigation of the reported remarks to be unwarranted, OPR did not intend to signal approval of them. Indeed, OPR viewed the quoted remarks as regrettable and told Smaltz as much.

Respectfully Submitted,

Paul L. Colby
Assistant Counsel

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reported comments.

See Report at page 21 of Appendix C (in July 15, 1998 letter, OPR cautioned Mr. Smaltz against interpreting OPR's conclusion that no inquiry was warranted as "mean[ing] that [OPR] found the comments to be appropriate").