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Washington, D.C. 20530

July 15, 1998

Mr. Donald C. Smaltz  
Independent Counsel  
P.O. Box 26356  
103 Clonoco Street, Suite 200  
Alexandria, VA 22313

Dear Mr. Smaltz:

In a December 5, 1997 letter to the Attorney General, you expressed concern about alleged comments attributed by the media to senior Department of Justice officials which were critical of yourself and other independent counsels. The Attorney General responded in a January 20, 1998 letter deploring such comments if they were in fact made and advising that your letter had been referred to this Office for review.

Your letter suggested that publication of the alleged comments could influence jurors hearing a case then pending or members of a future venire. The letter also noted the possible application of Rule 3.6 of the A.B.A.'s Model Rules of Professional Responsibility which bars attorneys from making extrajudicial statements having "a substantial likelihood of materially prejudicing" a pending case.

Based on our review of the excerpts you cited, we concluded that the alleged comments did not in these circumstances violate Rule 3.6 because their general nature made it unlikely that they would have "a substantial likelihood of materially prejudicing" any case. In particular, none of them disparaged any specific witness, item of evidence or prosecution theory. Rather, they pertained to matters then under active public debate.

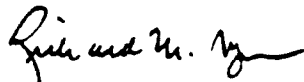
In addition, Rule 3.6 applies only to lawyers "who [are] participating or ha[ve] participated in the investigation" at issue, a requirement no Department official meets. And while, by its terms, the rule's prohibitions extend as well to any "lawyer associated in a \* \* \* government agency with [such] a lawyer," the rule still does not apply to Department officials since independent counsels are not part of the Department.

Because Rule 3.6 is inapplicable in this case and no other ethical rule appears to prohibit the reported comments, we must

conclude that no further inquiry into them by this Office is justified. This conclusion does not, however, mean that we found the comments to be appropriate.

If you have any questions, please contact me or Assistant Counsel Paul Colby on (202) 514-3365.

Sincerely,



Richard M. Rogers  
Deputy Counsel