

**Villafana, Ann Marie C. (USAFLS)**

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**From:** MAIL <MAIL@flabar.org>  
**Sent:** Tuesday, November 04, 2008 12:22 PM  
**To:** [REDACTED]  
**Subject:** Re: FW: Request for Written Staff Opinion ATTN Elizabeth Clark Tarbert; Logbook # 28386  
**Attachments:** graycol.gif; 28386gef denial.doc; Florida Bar Ltr re Ethics Opinion.pdf; Final Victim Notification -- Sample.pdf; Final Victim Notification Represented Sample.pdf

Dear [REDACTED]

My letter in response to your inquiry is attached below. This letter will be faxed and mailed to you later today.

If you have questions, please do not hesitate to call me at [REDACTED]

Sincerely,

Gail E. Ferguson  
Assistant Ethics Counsel

*(See attached file: 28386gef denial.doc)*

[REDACTED] on 09/29/2008 12:05:05 PM

To: "Ethics Opinions" <etopinion@flabar.org>  
cc:  
Subject: FW: Request for Written Staff Opinion ATTN Elizabeth Clark Tarbert; Logbook # 28386

Staff: Gail Ferguson/The Florida Bar

Dear Ms. Tarbert – Here is my earlier e-mail.

Thank you.

[REDACTED]  
Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

08-80736-CV-MARRA

17

P-015234

EFTA00189078

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**From:** [REDACTED]  
**Sent:** Thursday, September 18, 2008 7:21 PM  
**To:** eto@flabar.org  
**Cc:** [REDACTED]  
**Subject:** Request for Written Staff Opinion

Dear Sir or Madam: Please see the attached correspondence. Thank you for your assistance.

<<Florida Bar Ltr re Ethics Opinion.pdf>>

<<Final Victim Notification -- Sample.pdf>>

<<Final Victim Notification Represented Sample.pdf>>

[REDACTED]  
Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

[REDACTED] *(See attached file: Florida Bar Ltr re Ethics Opinion.pdf)(See attached file: Final Victim Notification -- Sample.pdf)(See attached file: Final Victim Notification Represented Sample.pdf)*

November 4, 2008

**VIA FACSIMILE (561) 820-8777**  
**& U.S. MAIL**

██████████  
Assistant United States Attorney  
Southern District of Florida  
500 South Australian Avenue, Suite 400  
West Palm Beach, Florida 33401

Re: Ethics Inquiry 28386

Dear ██████████

I received your request for an advisory ethics opinion dated September 18, 2008. You ask whether you violated Rule 4-7.4, Rules Regulating The Florida Bar, by complying with your statutory obligation to contact victims to inform them of the resolution of their matters and by complying with a court order to advise them that the services of an independent attorney-representative would be offered to them free of charge.

Unfortunately, I cannot provide the opinion you requested, because you are asking about your past conduct and legal questions that relate to your obligations under federal statutes and a court order. Florida Bar ethics attorneys are only authorized to provide opinions regarding an attorney's own future conduct. We are not authorized to render opinions concerning an attorney's past conduct or legal questions. See Procedures 2 (a)(1)(B) and 2(a)(1)(D), Florida Bar Procedures for Ruling on Questions of Ethics ([www.floridabar.org](http://www.floridabar.org)).

Although I cannot provide an opinion, I can discuss the relevant rules. Generally speaking, Rule 4-7.4 (a), prohibits an attorney from soliciting clients in person or through an agent, or in writing without complying with the attorney advertising rules, if the lawyer's primary motive is pecuniary gain, and states:

**(a) Solicitation.** Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, *when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.* A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. *The term "solicit"*

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*includes* contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) **any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule**, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6.

Emphasis added. If your contact with victims is neither motivated by pecuniary gain nor to assist another lawyer whose significant motive is pecuniary gain, then it is unlikely that your contact with victims could be characterized as improper solicitation in violation of Rule 4-7.4 (a).

Although your letter does not reference Rule 4-4.2 ("Communication with Person Represented by Counsel"), this rule prohibits a lawyer from communicating directly with a person the lawyer knows is represented in a particular matter, and states:

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. **Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract** requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

Emphasis added. It would be prudent for you to comply with this rule by limiting your contact to the lawyers of represented victims. Whether or not you were required to comply with this rule in the past, or whether you would be required to comply with it in the future, given your obligations under the federal statutes and the relevant court order involves legal questions beyond the scope of an ethics opinion.

Finally, Rule 4-3.4, prohibits a lawyer from deliberately violating a court's order, and states:

*A lawyer shall not:*

....  
(c) **knowingly disobey an obligation under the rules of a tribunal** except for an open refusal based on an assertion that no valid obligation exists;

Emphasis added.

Ms. A. Marie Villafana  
November 4, 2008  
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Thus, Rule 4-3.4 (c), requires you to comply with any orders issued by the court. Again, I can provide no opinion on how to accomplish compliance, because interpretation of the court order requires legal advice beyond the scope of an ethics opinion.

If you disagree with my denial of your request for an advisory ethics opinion, you have thirty (30) days to request that the Professional Ethics Committee review the denial. A request for review must be addressed to Elizabeth Clark Tarbert, Ethics Counsel, at 651 E. Jefferson Street, Tallahassee, Florida 32399. The request must be postmarked no later than thirty (30) days from the date of this letter, not the date of receipt. The request must contain the original inquiry number and clearly state the issues for review. You may include a written argument explaining why you believe you should be issued an advisory ethics opinion. Procedures governing your request for review and committee procedures may be found in Procedures 3(d), 4 and 6, Florida Bar Procedures for Ruling on Questions of Ethics (available on The Florida Bar's website at [www.floridabar.org](http://www.floridabar.org)). The Professional Ethics Committee meets approximately four times per year. You will be notified of the committee's decision promptly.

If you have any questions, please call me at [REDACTED]

Sincerely,

Gail E. Ferguson  
Assistant Ethics Counsel

GEF/gef

28386gef denial