

U.S. Department of Justice
United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400

West Palm Beach, FL 33401

Facsimile: [REDACTED]
November 25, 2008

VIA ELECTRONIC MAIL AND U.S. MAIL

[REDACTED]
Bar Counsel
Attorney Consumer Assistance Program
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: Stuart Samuel Mermelstein [REDACTED] Florida Bar File No. 2009-
50,532(15C)

Dear Ms. [REDACTED]

Thank you for permitting me to respond to the letters submitted to The Florida Bar by Attorney Stuart S. Mermelstein and thank you for extending my response deadline to November 30, 2008. From the documents that you provided to me, it appears that Mr. Mermelstein faxed letters to two individuals at the Fort Lauderdale Branch of The Florida Bar. The first letter is dated September 18, 2008, and the second is dated September 24, 2008. On September 29, 2008, you wrote to Mr. Mermelstein requiring that he swear to the facts contained in his letters of complaint. Although your letter required that he provide that sworn statement by October 6, 2008, it appears that Mr. Mermelstein signed and faxed that paperwork to you on October 7, 2008.

Mr. Mermelstein did not copy me on the correspondence that he sent to you, so I first learned of the Bar Complaint when I received your letter of November 6, 2008. I received that correspondence on November 10, 2008. On November 11, 2008, I provided a copy of your letter and all attachments to my [REDACTED] I, Northern Region, U.S. Attorney's Office, West Palm Beach, Florida, by leaving a copy in her internal mailbox. A certification to that effect is enclosed herewith. On November 12, 2008, I hand-delivered additional copies to the relevant attorneys in the Miami office of the U.S. Attorney.

Mr. Mermelstein's complaint relates to my written victim notifications of the resolution of a criminal investigation that I handled. On September 18, 2008, I sent, via electronic mail, a letter to Ethics Counsel for the Florida Bar seeking guidance on this matter because there were several victims whom had not yet been notified. I have enclosed herewith that correspondence, including the attachments and the response of [REDACTED] dated November 4, 2008.

In her letter, [REDACTED] reported that she could not provide an opinion letter because my inquiry was based, in part, on past conduct and that she could not provide legal advice regarding my obligations pursuant to statute or court order. Nonetheless, Ms. Ferguson did refer me to the relevant Rules Regulating the Florida Bar, specifically Rules 4-7.4(a), 4-4.2(a), and 4-3.4(c).

Rule 4-7.4

Mr. Mermelstein's complaint specifically refers to Rule 4-7.4, so I will address that rule first. As explained in my September 18th letter to Ethics Counsel, as part of my employment, I investigated and presented for prosecution a case involving the sexual abuse of several young women who were teenagers at the time of the abuse. There is a federal statute, 18 U.S.C. § 2255, that provides a civil cause of action for victims of the federal crimes that I investigated; that statute sets a mandatory minimum amount of damages with no upper limit on any damages award.

At the request of counsel for the putative defendant, Jeffrey Epstein ("Epstein"), the U.S. Attorney's Office entered into pre-indictment plea negotiations that resulted in the signing of a Non-Prosecution Agreement ("Agreement"). ^{F1} The Agreement called for Epstein to plead guilty to state criminal offenses that would result in his designation as a sex offender. The Agreement also sought to place the victims in the same position where they would have been if Epstein had been convicted of the federal offenses. ^{F2} Accordingly, the Agreement required Epstein to agree to waive challenges to liability and damages related to claims brought pursuant to 18 U.S.C. § 2255. In light of the large number of young, vulnerable, and unsophisticated victims, the U.S. Attorney's Office also included agreement terms requiring Epstein to pay for the services of an independent attorney-representative, whose services would be offered (without obligation) to the victims free of charge. The U.S. Attorney's Office asked the former Chief United States District Judge for the Southern District of Florida to serve *pro bono* as a Special Master for the selection of the attorney-representative. Out of concern for the best interests of the victims, a stringent set of criteria were given to the Special Master, a copy of which is attached hereto. The Special Master selected Robert Josefsberg and his firm, Podhurst Orseck, to serve as the attorney-representative. There is no business relationship between Mr. Josefsberg and either the U.S. Attorney's Office, the Special Master, or myself, and his selection has resulted and will result in no financial benefit to the U.S. Attorney's Office, the Special Master, or myself.

Under federal law, the Government has several obligations related to victims, including obligations to inform victims of resolution of their matters and the rights to restitution or other relief. See, e.g., 18 U.S.C. § 3771 and 42 U.S.C. § 10607(c)(1)(B). Accordingly, I prepared a letter informing the victims of how the matter was resolved, including the appointment of Mr. Josefsberg. The letter advised the victims that Mr. Josefsberg would be in contact with them shortly and invited the victims to contact Mr. Josefsberg directly if they so chose. It also informed them that they were "not obligated to use Mr. Josefsberg as [their civil] attorney," and makes several other references to the victims' ability to select other lawyers.

During the pendency of the investigation, some of the victims retained civil attorneys to represent them in civil suits against the defendant. For those victims whom I knew to be represented and whose attorneys had asked that correspondence be directed to them, I sent a modified version of the letter to the attorney, rather than to the victim, and asked the attorney to convey the substance of the letter to the victim. In that letter, the discussion of contact with Mr. Josefsberg made clear that Mr. Josefsberg's contact would be with the attorney only, not directly with the victim.

Attached to Mr. Mermelstein's correspondence are representative samples of letters sent to victims whom I knew were represented by counsel and whose counsel had asked that correspondence be directed to them and to those victims who were unrepresented (or who I

believed were unrepresented). Unbeknownst to me, one victim had hired Mr. Mermelstein as her attorney prior to receiving my letter. Another victim whom we believed was unrepresented was contacted by the FBI agent assigned to the case to obtain a correct mailing address. During that conversation, she informed the FBI agent that she had consulted with Mr. Mermelstein's firm regarding possible civil litigation, but she gave specific instructions that she wanted the notification letter to go directly to her. On September 15, 2008, I complied with her request and sent the original to her and a copy of the letter to Mr. Mermelstein's partner, Jeffrey Herman, with a note explaining why the letter was sent directly to his client.

Rule 4-7.4 relates to "Direct Contact with Prospective Clients." The victims that were the subject of the criminal investigation were not my clients and I was not seeking to solicit them to be my clients. I am employed exclusively by the U.S. Department of Justice and I am forbidden to represent anyone else in exchange for compensation. [E3](#)

Subsection (a) reads: "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." As explained above, the letter was sent pursuant to my legal obligations to inform the victims of the resolution of the matter, and I am ineligible for any pecuniary gain based upon any victim's decision on whether to engage the services of Mr. Josefsberg and/or to seek damages from Epstein. Accordingly, I do not believe that I violated Rule 4-7.4(a).

Rule 4-7.4(b) goes on to prescribe the appropriate language for written communications sent to "prospective clients for the purpose of obtaining professional employment." The victim notification letters were not sent to prospective clients, nor were they for the purpose of obtaining professional employment.

Rule 4-4.2

Ms. Ferguson next referred to Rule 4-4.2, "Communication with Person Represented by Counsel." As explained above, with two exceptions, letters to victims represented by civil attorneys were sent to the victims' attorneys with instructions that they provide the information contained therein to their clients.

As set forth in Mr. Mermelstein's complaint, there was one instance where I sent a letter to a victim who, unbeknownst to me, had retained Mr. Mermelstein's firm. Rule 4-4.2(a) only prohibits communication with "a person the lawyer knows to be represented by another lawyer . . ." In that instance, I did not know that the victim had hired Mr. Mermelstein's firm, and, therefore, there was no violation of Rule 4-4.2. This communication and the communication described above (where another victim specifically advised the FBI case agent that she wanted me to send the victim notification letter directly to her) could have been avoided if Mr. Mermelstein had advised me that he represented those two victims and wanted all correspondence to be directed to him. I had corresponded with his firm several times before then and his firm had contacted the FBI case agent as early as January 2008 informing her of their representation of one of the victims and asking that information regarding the criminal matter be provided directly to counsel.

With respect to the communication with the victim who specifically requested that the letter go directly to her, I note that Rule 4-4.2(a) does not bar that communication. Instead, Rule 4-4.2(a) states that "[i]n 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 . . .” My client is the United States of America and my representation of that client involved the federal grand jury investigation of criminal conduct by Epstein. The subject of my letter to the victim was the resolution of the criminal investigation, and, to my knowledge and based upon the information that I received from the FBI agent, Mr. Mermelstein did not represent the victim in connection with that criminal matter. Furthermore, even with regard to the civil suits that Mr. Mermelstein was prosecuting on behalf of some of the victims, Mr. Mermelstein was not pursuing the federal cause of action implicated by the criminal investigation (18 U.S.C. § 2255).

Thus, with respect to Rule 4-4.2(a), in those instances where I was aware of an attorney who purported to represent the victims in connection with both the criminal investigation and the civil suits, the notification letter went directly to counsel. There was one instance where I sent a letter to a victim where I was unaware that the victim had retained an attorney. And there was one instance where a victim communicated to an FBI agent that she was represented by Mr. Mermelstein's firm only in connection with civil litigation and who asked that the letter regarding the criminal resolution be sent directly to her. In that instance, the letter was sent to the victim with a copy to Mr. Mermelstein's firm.

Mr. Mermelstein writes that “several victims have received unsolicited telephone calls from Mr. Josefsberg, causing them great distress.” I conferred with Mr. Josefsberg’s firm. Mr. Josefsberg himself has not contacted any victim. His partner, Kathy Ezell, attempted to contact three victims before receiving Mr. Mermelstein’s notification of representation. Ms. Ezell spoke directly only to one victim, and as soon as the victim stated that she was represented, Ms. Ezell ended the conversation. Ms. Ezell left a message on the voicemail of another of Mr. Mermelstein’s clients and never received a response. In the third case, a man answered the telephone. When Ms. Ezell asked to speak to the victim and explained who she was, the man told Ms. Ezell that the victim was represented. Again, Ms. Ezell promptly ended the conversation. I would respectfully disagree with Mr. Mermelstein’s characterization of the contacts and note, again, that the problem could have been avoided if Mr. Mermelstein had notified me upon accepting representation of those victims.

Rule 4-3.4

Ms. Ferguson also referred me to Rule 4-3.4(c), which states that a lawyer shall not “knowingly disobey and obligation under the rules of a tribunal . . .” In connection with litigation filed by two victims against the U.S. Attorney’s Office, U.S. District Judge Kenneth A. Marra ordered the United States to make available to identified victims a copy of the Non-Prosecution Agreement subject to a Protective Order. During the hearing, Judge Marra made clear that he wanted the U.S. Attorney’s Office to communicate his order to all of the identified victims, not just the plaintiffs in the suit against the United States. Thus, my obligations to send the victim notification letters were both statutory and judicial.

Rule 4-4.1

Mr. Mermelstein also suggests that the letters are somehow misleading because:

(1) the letter fails to advise the victims that they will be waiving rights to proceed under other causes of action for damages, including punitive damages; and

(2) the letter fails to inform the victims that Epstein's agreement to pay Mr. Josefsberg's fees "is not a meaningful concession since 18 U.S.C. § 2255 provides that Mr. Epstein would be required to pay the plaintiff's attorney's fees in any event upon proof that the underlying statute was violated."

Rule 4-4.1 governs truthfulness in statements to others. Rule 4-4.1(a) provides that attorneys may not make false statements of material fact or law to a third person. The victim notification letters accurately represent how the criminal investigation was resolved, including the terms of the Non-Prosecution Agreement related to victim compensation. Rule 4-4.1(b) goes on to provide that attorneys also may not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client . . ." Mr. Mermelstein's accusation relates to a failure to disclose facts to the victims. As explained below, there was no misrepresentation or failure to disclose anything; however, even if there were a failure to disclose a material fact, disclosure of the "facts" that Mr. Mermelstein asserts were not "necessary to avoid assisting a criminal or fraudulent act by [my] client," the United States. Thus, Rule 4-4.1 has not been violated.

To explain more fully, the victim notification letters were drafted with the intention that they would be reviewed by the victims in consultation with counsel – either Mr. Josefsberg or other counsel selected by the victims. The letters were not meant to, and could not, convey the myriad of civil options available to the victims. Instead, under extremely litigious conditions with Epstein's counsel, the United States determined that it should simply paraphrase the terms of the Agreement – using the exact language of the Agreement as much as possible. Accordingly, the letter is not misleading.

As I stated in the victims' letters, the United States could not participate in civil litigation, and Epstein's attorney had already asserted that I was trying to influence such litigation. I did not and could not represent the victims, and, accordingly, could not provide them with legal advice. This was the reason for creating a procedure to provide the victims with independent counsel at no charge to them. That counsel could advise the victims regarding the advantages and disadvantages of pursuing and/or waiving certain claims.

With respect to the charge that the letters are misleading because they don't state that the provision of counsel at Epstein's expense "is not a meaningful concession," I respectfully disagree for two reasons. First, as explained above, the letter accurately conveys the terms of the Agreement with Epstein and I cannot provide legal advice regarding the interpretation of that Agreement or civil damages statutes. That is the role of the victims' personal attorneys. Second, the concession is extremely meaningful. The Agreement allowed for an independent third party, who was in the best position to make the selection (having served as Chief United States District Judge), acting *pro bono*, to select the most qualified attorney for the difficult task of litigating against Epstein's formidable defense team. It provided a group of unsophisticated victims of limited means with access to experienced, reputable counsel, who would advise them in the victims' best interests without issues of payment, press coverage, or otherwise clouding the picture. Furthermore, this system allowed the victims the opportunity to try to negotiate pre-litigation settlements without having a portion cut out for attorney's fees. While Mr. Mermelstein's clients apparently are willing to face the public scrutiny of civil litigation, most of the victims were intensely interested in maintaining their privacy. Lastly, this system allowed for the provision not only of top-tier legal services, but also psychiatric and counseling services at the defendant's expense. None of these victims could afford to pay those expenses out-of-pocket,

nor could most attorneys working on a contingency-fee basis. Those victims who are represented by Mr. Josefsberg's firm are receiving these services now (as opposed to several years from now, when civil litigation is likely to end) at no expense to them. Thus, the agreement to pay the fees and costs of the victim-representative is substantial consideration for the Non-Prosecution Agreement and I assume that Mr. Mermelstein has considered and explained the benefits of that provision to his clients.

Conclusion

For the foregoing reasons, I respectfully submit that there has been no violation of any ethical obligation of the Florida Bar. As the prosecutor on this case, I have strived to balance the sometimes competing interests of each victim, and have worked to fulfill my obligations to advise and protect them in accordance with the law and my duties as representative of the United States. I would add that the legal team from Mr. Josefsberg's firm has also acted in an exemplary fashion, focusing on the mental health of the victims and corraling resources to assist them in all aspects of their lives.

Please let me know if you need any additional information, and thank you for your kind assistance with this matter.

Sincerely,
R. Alexander Acosta
United States Attorney

By:



Enclosures

cc: Stuart S. Mermelstein (via Federal Express)



^{F1}The Agreement contains a confidentiality provision and is governed by a Protective Order entered by the U.S. District Court for the Southern District of Florida. If The Florida Bar believes that it needs a copy of the Agreement in order to resolve this complaint, I will take the appropriate steps to make it available to you.

^{F2}See 18 U.S.C. § 3771(a)(6) and 42 U.S.C. § 10607(c)(1)(B) regarding the right to restitution.

^{F3}In very limited circumstances that do not apply here, Assistant U.S. Attorneys are allowed to represent others *pro bono* .