



United States Attorney
Southern District of Florida

U.S. Department of Justice

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November 18, 2008

VIA FEDERAL EXPRESS

Ms. Heidi E. Brewer
Bar Counsel
Attorney Consumer Assistance Program
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: Florida Bar File No. 2009-50,532(15C)

Dear Ms. Brewer:

Thank you for permitting me to respond to the letters submitted to The Florida Bar by Attorney Stuart S. Mermelstein. 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 direct supervisor, Karen Atkinson, Chief of Criminal Section 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, additional copies were provided 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 Assistant Ethics Counsel Gail E. Ferguson, dated November 4, 2008.

In her letter, Ms. Ferguson 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).

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, which sets a statutory minimum amount of damages with no upper limit on any damages award.

At the request of counsel for the putative defendant, the U.S. Attorney's Office entered into pre-indictment plea negotiations that resulted in the signing of a Non-Prosecution Agreement ("Agreement").¹ The Agreement called for the putative defendant to plead guilty to state criminal offenses that would result in the defendant's designation as a sex offender. The Agreement also sought to place the victims in the same position where they would have been if the defendant had been convicted of the federal offenses.² Accordingly, the Agreement required the defendant 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 the defendant 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

¹The 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.

²See 18 U.S.C. § 3771(a)(6) and 42 U.S.C. § 10607(c)(1)(B) regarding the right to restitution.

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. 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 resulted 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* 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 will be in contact with them shortly and invites the victims to contact Mr. Josefsberg directly if they so choose.

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, 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 who I knew were represented by counsel 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 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 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 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.³

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 the putative defendant. 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.

Ms. Ferguson next referred to Rule 4-4.2 “Communication with Person Represented by Counsel.” As explained above, with one exception, letters to victims represented by civil attorneys were sent to the victim’s 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. In all of these instances, Rule 4-4.2 was not implicated.

There is a single instance where, as explained above, a victim specifically advised the FBI case agent that she wanted me to send the victim notification letter directly to her. Both of these instances could have been avoided if Mr. Mermelstein had advised me that he represented the 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. My correspondence also was directed to the resolution of the criminal investigation, not to the civil litigation in which Mr. Mermelstein represented the victims. Even with regard to those civil suits, Mr. Mermelstein was not pursuing the federal cause

³In very limited circumstances that do not apply here, Assistant U.S. Attorneys are allowed to represent others *pro bono*.

of action implicated by the criminal investigation.

I would like to address one apparent misstatement in Mr. Mermelstein's complaint. He writes that "we have recently been advised that several victims have received unsolicited telephone calls from Mr. Josefsberg, causing them great distress." Mr. Josefsberg did not make any unsolicited telephone calls and the other attorneys in his firm contacted only ___ person who was represented by Mr. Mermelstein.

I have received a letter from that attorney asserting that my contact with the victims violates Florida Bar Rule 4-7.4. I have reviewed the rule and do not understand how it would apply to me because: (1) I am not soliciting employment from a prospective client; (2) I am not seeking pecuniary gain; (3) none of the victims has expressed a desire not to receive communications from me; (4) the letter does not involve coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence; (5) the letter is not false, fraudulent, misleading, or deceptive; and (6) there is nothing about the mental or physical states of the victims that leads me to believe that they cannot review and understand the information that is included in the letter.

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

Sincerely,

[REDACTED]
United States Attorney

By: s/A. [REDACTED]
A. Marie Villafañá
Assistant United States Attorney

cc: [REDACTED], AUSA and Professional Responsibility Officer
[REDACTED] AUSA