

Kentucky Bar Association
Ethics Opinion KBA E-372
Issued: November 1994

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Pursuant to 42 USC Sec. 200e-5(f) the EEOC has filed an action against lawyer's client, the employer, and the affected employee has not intervened. Lawyer asks if he or she may contact employee without the consent of the EEOC counsel, or over the objection of the EEOC counsel.

Answer: Qualified yes.

References: Kentucky Rules of Professional Conduct 4.2 and 4.3

OPINION

The question presented consists of two parts: (1) the relationship the enforcement agency, in this case the EEOC, has to the employee/complaining witness and (2) the risks inherent in allowing counsel for the employer to contact the employee/complaining witness on matters related by subject matter but not forum, statute or regulation to an existing enforcement action. To avoid the prohibitions of Rule 4.2 & 4.3, it is counsel's responsibility to determine the nature of the relationship between the enforcement agency and the employee/complaining witness. Where the enforcement agency responds in the affirmative to counsel's inquiry, the employee/complaining witness should be considered to be represented and Rule 4.2 applies. Where the enforcement agency refuses to state a position concerning individual representation of the employee/complaining witness or responds in the negative then Rule 4.3 applies and counsel may proceed accordingly.

COMMENT

[We suggest that the Comment following Rule 4.3 be expanded with the addition of a second paragraph as follows:]

(2) A complaining witness in an action which by its nature gives rise to the possibility of additional claims by the person in other forums may be considered to be unrepresented in such other claims where the original enforcement agency fails or refuses to accept representation of the person individually. It is counsel's obligation to determine whether the person is represented individually by the agency. Counsel may take no action in contacting the unrepresented person and attempting to resolve such other claims when such

activity would have the effect, directly or indirectly, or compromising or obviating either the nature or the purpose of the original action.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.