

This hypothetical considers a criminal case in which the Commonwealth's Attorney (CA) and the defense counsel seek to negotiate a plea agreement. Generally, the CA has no legal or ethical obligation to a particular witness in this case; however, the CA wishes to "protect" Witness X by restricting dissemination of the witness' identity and involvement. The CA communicates a settlement offer to the defense counsel, advising the defense counsel of material witnesses in the case, including the name and involvement of Witness X whom the CA wishes to "protect." A condition of the proffered plea agreement requires that the defense counsel neither reveal to the client the identity of Witness X nor the scope of Witness X's involvement in the case. The CA makes it clear to the defense counsel that if the defendant is made aware of Witness X's identity and involvement, then the plea offer will be withdrawn.

QUESTIONS PRESENTED

- 1) May a CA make a settlement offer to the defense counsel in a criminal case, requiring the defense counsel to refrain from providing relevant information to his or her client as a condition of the settlement offer?
- 2) May the defense counsel in a criminal case withhold from the client relevant information if withholding such information results in a desirable plea agreement for the client?

APPLICABLE RULES AND ANALYSIS

The appropriate and controlling rules relative to this hypothetical are Rules 1.4(c) and 3.4(h), which deal with communication and fairness to the opposing party and counsel. These issues and questions have not been addressed by this Committee in past legal ethics opinions.

The first question is whether it is ethical, as part of the proffered plea agreement, to require the defense counsel to keep Witness X's identity and involvement secret from his or her client, the defendant. The CA is attempting to protect Witness X from possible retribution, but Rule 3.4(h)¹ directly prohibits the CA from requesting a person (the defense counsel) to refrain from voluntarily giving relevant information to another party (the defendant). The exceptions noted in Rule 3.4(h) are specifically limited to civil cases²; therefore, the primary rule prohibits a lawyer from requesting that a person refrain from giving relevant information to another party. In this hypothetical, the CA cannot offer a plea agreement detailing the identity and involvement of

¹ Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
- (1) the information is relevant in a pending civil matter;
 - (2) the person in a civil matter is a relative or a current or former employee or other agent of a client;
- and
- (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

² Rule 3.4, Comment [4], "Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See also* Rule 4.2."

Witness X and then ask the defense counsel to refrain from sharing Witness X's identity with the client, because the identity and involvement of Witness X is considered to be relevant information.

Alternatively, because the CA is neither obligated to offer a plea agreement nor to provide all inculpatory evidence or witness testimony to the defense, the CA would be permitted to offer a plea based upon a *nameless* confidential informant for the defense counsel to present to his client. The defense counsel and his or her client would then have to assess the plea offer based upon the limited information available to them.

The second question concerns the defense counsel's communication duties when presented with the CA's plea agreement that requires the defense counsel not to reveal Witness X's identity. In response to the first question, the Committee opines that Rule 3.4(h) prohibits the CA from imposing such a requirement after having disclosed material facts to the defense counsel. The Committee also finds it unethical for the defense counsel to sequester certain facts from his or her client, as Rule 1.4(c)³ requires the defense counsel to inform the client of all of the matter's pertinent facts that will affect the determination of the defendant's plea.⁴ Rule 1.4(c) would permit the defense counsel to withhold such information from the defendant if the defense counsel believes that the defendant has enough relevant information about the pertinent facts to make an informed decision; however, whether Witness X's identity and involvement is additional information that must be disclosed to the client in order for the client to make an informed decision about accepting or rejecting the plea offer is fact specific and must be determined on a case-by-case basis. Fundamentally, the defense counsel cannot withhold from the defendant salient facts or information that would be pertinent to the defendant's decision to accept a settlement or plea agreement in his or her matter.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion
October 5, 2010

³ Rule 1.4 Communication
 (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

⁴ Rule 1.4, Comment [5] explains: "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. *See* Rule 1.2(a)...."