

LEGAL ETHICS OPINION 1864 MAY A CRIMINAL DEFENSE LAWYER AGREE THAT HE WILL NOT GIVE CERTAIN DISCOVERY MATERIALS TO HIS CLIENT DURING THE COURSE OF THE REPRESENTATION, AND THAT HE WILL REMOVE CERTAIN MATERIALS FROM HIS FILE PRIOR TO THE END OF THE REPRESENTATION?

In this hypothetical, a prosecutor wishes to provide broad discovery to defense lawyers in the course of criminal prosecutions, in order to make defendants aware of the weight of the evidence against them, to ensure that the defense lawyer has access to all potentially useful evidence, and to encourage reasonable resolutions of criminal cases in light of that evidence. Because of the nature of much of this evidence, including the identities and locations of cooperating witnesses and graphic photographs of the victims, the prosecutor does not want to permit defendants to physically possess this evidence. Accordingly, the prosecutor asks all defense lawyers who receive any discovery that is not legally required to sign an agreement that provides:

I, _____, counsel for the above referenced defendant, (or authorized agent of counsel for such defendant) hereby acknowledge receipt of [the discovery materials]. Although the Commonwealth is required to allow me to inspect exculpatory evidence, I agree that, with the exception of those materials described in Rule 3A:11(b)(1), the Commonwealth is not required to provide me with copies of any evidentiary materials or to allow me to copy any evidentiary materials.

In consideration of the Commonwealth providing me with copies of these evidentiary materials other than those described in Rule 3A:11(b)(1), I agree that, until this case is concluded, I will not allow these materials or any copy thereof to leave my possession or control. While I have the right to share and show the contents of these materials to my client, I agree to not give these materials, except the materials described in Rule 3A:11(b)(1), to my client until this case is concluded.

I understand that, although I may review my client's criminal and DMV records in the Commonwealth's Attorney's office, the Commonwealth Attorney is prohibited from giving me these records absent a specific court order.

I understand that [certain discovery materials] are particularly sensitive and that the Commonwealth is loaning me copies thereof for my convenience. In consideration of the Commonwealth providing me with such copies rather than merely allowing me to inspect them, I agree to return them to the Commonwealth's Attorney prior to the conclusion of my representation of the defendant.

QUESTION PRESENTED

Does a criminal defense lawyer violate Rule 1.4 and/or Rule 1.16(e) by agreeing that, to the extent the prosecutor provides any discovery in excess of that required by law, the defense lawyer will share the information with his client but will not give any discovery materials or copies to the client during the representation, and will return any copies of "sensitive" discovery materials to the Commonwealth's Attorney so that his client is not entitled to receive them upon termination of the representation?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.4¹ and Rule 1.16(e)², and relevant legal ethics opinions are 1789 and 1854.

ANALYSIS

A lawyer's obligation to share information with his client during the course of the representation is governed by Rule 1.4, which requires the lawyer to inform the client of "facts pertinent to the matter" and to comply with "reasonable requests for information." Unlike Rule 1.16(e), which applies upon termination of the representation, Rule 1.4 does not specify the means by which these obligations must be carried out. LEO 1789, addressing the issue of a client who has asked for a copy of his medical records that the lawyer obtained in the course of the representation, explains that any request for a copy of a particular document in the file "must be considered" in light of the duty to promptly comply with reasonable requests for information, but does not conclude that a lawyer must provide a document because the client has requested it.

In this case, the discovery agreement specifically authorizes the defense lawyer to show his client the contents of the discovery materials and to discuss those contents with the client; the defense lawyer is only barred from providing the document or a copy to the client. Under the

¹ Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(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.

² Rule 1.16 Declining or Terminating Representation

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.

circumstances, the lawyer does not violate Rule 1.4 by entering into and complying with this discovery agreement. The lawyer can explain all pertinent facts to his client and comply with a reasonable request for information by meeting with the client to view and discuss the discovery materials; accordingly, Rule 1.4 does not require that the lawyer provide copies of any of these materials, even upon request of the client.

This proposed discovery agreement differs from the arrangement prohibited by LEO 1854 because in this case, the lawyer is allowed and encouraged to share the information from the discovery materials with his client. Absent state or federal law, a rule of court, or court order to the contrary, an agreement that in any way limited the lawyer's ability to give information to his client would be prohibited according to the analysis in LEO 1854.

At the termination of the representation, Rule 1.16(e) requires that the lawyer provide the contents of his file to the client upon the client's request. Accordingly, unless the disclosure of certain materials is prohibited by law, any materials that are in the lawyer's file at the conclusion of the representation must be provided at that time. Except for the last paragraph of the discovery agreement, referring to "certain sensitive materials," the agreement does not raise any concern as to the defense lawyer's compliance with Rule 1.16(e), as it explicitly provides that the lawyer will make the discovery materials a part of his file and furnish those materials to his client upon termination of the representation.

However, the provision that requires the lawyer to return "certain sensitive materials" to the Commonwealth so that those materials are not in the lawyer's possession at the termination of the representation may lead to problems if the lawyer's representation is terminated unexpectedly and the lawyer does not have time to return the materials before the client is entitled to receive a copy of his file. In order to avoid a potential violation of Rule 1.16(e) after the lawyer's termination or for another reason, the defense lawyer should seek informed consent, preferably in writing, from his client before agreeing to this restriction on the client's access to information upon termination of the representation.³ Without client consent, the lawyer should not accept "sensitive materials" that would be subject to the last paragraph of the discovery agreement.

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

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³ The lawyer may wish to memorialize the client's consent to the agreement by having the client sign the agreement, along with the defense lawyer and the Commonwealth's Attorney.