

Confidential Informants and Cooperating Witnesses – Legal and Practical Issues

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Middlesex District Attorney's Office

Woburn, MA

Overview

- Definitions
- Who should you work with?
- Considerations when CWs and CIs are facing charges
- Agreements: sample contract, non-prosecution letter, and proffer letter
- Legal considerations/when disclosure of ID will be required/search warrants and controlled buys

Definitions

- Confidential Informant (CI)— Identity is not disclosed to the defendant.
- Cooperating Witness (CW)— Identity is disclosed to the defendant.

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Who should you work with?

- Note - If the CW or CI you seek to work with is not charged with a crime, then pre-approval not required from the District Attorney's office.
- If the CW or CI is facing charges and they seek to work off the charge through cooperating with the police, you should seek preapproval from the District Attorney's office before working with them.

Who should you work with?

- Considerations

- Check their Criminal History
 - Do they have convictions for violent crimes?
 - Do they have convictions for crimes against children?
 - Are they a registered sex offender?
- Do they have Open Cases?
 - Are they facing charges in a victim-related crime?
 - What about drugs-OUI or gun crimes?
- Are they on Probation?
 - Note that a term of probation may preclude their work as a CI/CW.

Who should you work with?

- Additional Considerations
- >Think about Credibility Issues
 - Do they have a drug or alcohol addiction?
 - Have they provided good information in the past?
- >Most informants do not work out
- >Check with neighboring departments to see if they have worked with this CI/CW and their experience with them.

Are they facing charges?

IF NOT, you do not need to inform the ADA that you are working with them. Be sure to keep records of money paid for gas, food, etc. and to associate these expenditures with a case number. This information must be disclosed under the discovery rules as a promise, reward, or inducement.

IF SO, you need approval of the District Attorney's office to work with the informant or cooperating witness.

Considerations when facing charges:

Bail and bail revocation issues

- They need to find their own way out of jail - they will say anything to get back on the street, but once they're out, the bail opportunity is lost.
- Consider circumstance of the arrest - are they blown?

Breakdown of the charges

Must discuss any breakdown with the District Attorney's office – consideration is contingent on their level of cooperation.

Agreements to work with CWs and CIs

- Sign a Contract

- The contract will define their role, e.g., execute a certain number of controlled buys, testify before the Grand Jury, testify at trial
- They must show progress within 45 days of signing the contract
- Timeline – periodic review of efforts to obtain information
- They must acknowledge they will go to jail if they are charged with a crime for which there is a minimum mandatory sentence. Do not give them false hope or thoughts of a free walk.
- If they are facing charges, they should have an attorney present – but the contract is not negotiable.

Example: Contract

Date

Defendant
c/o Attorney
Address

Dear Defendant,

You have indicated that you may have knowledge and information relating to the activities of certain individuals operating within Middlesex County and possibly elsewhere involving certain ongoing criminal activity. It is my understanding that you may be willing to (1) provide truthful and complete information to law enforcement officials regarding these activities; (2) provide ongoing cooperation and assistance, as required to those law enforcement officials during the course of any investigation into these activities; and/or (3) cooperate with the Middlesex County District Attorney's Office and/or other prosecuting agencies in the prosecution of the individuals participating in these activities.

Please be advised of the following:

1. No promises or agreements, express or implied, have been made or are being made at this time, regarding any criminal case pending or which may be brought against you in the future in Middlesex County.

2. Any promises or agreements regarding pending or future cases in Middlesex County must be made directly with the undersigned, or other authorized representative of this office. No other agent, employee, or officer of any local, state, or federal law enforcement agency has the authority to make any representations or enter into any agreements with you regarding the disposition of, or sentencing on, any case which is pending or may be brought against you in the future in Middlesex County.

3. If you enter into a cooperative relationship with law enforcement officials, the relationship may be terminated for any reason, at any time and without advance notice, by you or the law enforcement officials with whom you are cooperating.

4. You and the law enforcement officials with whom you are cooperating will determine the nature and extent of your cooperation on a case by case basis. If you disagree with a suggested course of action, you may refuse to provide the requested assistance.

5. Whenever your cooperative relationship with law enforcement ends, this office will engage in a results oriented review of the nature, extent and significance of your cooperation. In particular, this office will analyze the significance of arrests, seizures or prosecutions which result from your cooperation, as well as the nature and extent of the cooperation you provided.

Example: Contract

6. In exchange for your cooperation and assistance, this office will reflect the results of your cooperation and your role in bringing them about, in its charging and/or sentencing decisions. At your request this office will bring the nature and extent of your cooperation to the attention of the Court. **This office agrees to be reasonable in its exercise of discretion in charging and sentencing recommendations under this agreement. You agree that you are not permitted under this agreement to offer a sentence recommendation different than the sentence recommendation made by the Commonwealth.** Furthermore, once you request that a sentence recommendation be made, you will no longer be allowed to cooperate under this agreement.

7. This office will not give you any consideration in its charging and/or sentencing decisions if your cooperation fails to produce significant results.

8. Except as noted below, statements made or information provided by you to law enforcement officials during the course of your cooperation will not be used against you in any criminal proceeding. However, be advised of the following: (1) this office reserves the right to use your statements in cross-examination, to impeach you, or in rebuttal, if you provide testimony in any proceeding which is materially different from statements or information you provide during the course of your cooperation, or in a prosecution for perjury, obstruction of justice, or making a false statement or report; (2) the agreement not to use your statements against you applies only to statements pertaining to crimes involving the possession or distribution of controlled substances; and (3) the District Attorney may make derivative use of or may pursue any investigative leads suggested by any statements made or other information provided by you, and any evidence derived from statements made or other information provided by you may be used against you and others in any criminal case or other proceeding.

9. It is the policy of this office that persons arrested for, or charged with, a drug offense requiring a mandatory minimum period of incarceration must be incarcerated in a prison or house of correction for some period of time, regardless of the extent and nature of their cooperation. **In other words, if you are now or could be charged with a drug offense carrying a mandatory minimum period of incarceration, under no circumstances will this office agree to, or recommend, a sentence which does not provide for a term of incarceration.**¹ Also, the agreements set forth in this letter whereby this office may reflect the results of your cooperation in charging and sentencing decisions applies only to the complaints pending against you only with the XXXXX District Court. The agreements set forth in this letter do not apply to any other criminal or civil case, probation matter, civil forfeiture case or restraining order now pending against you or that may be brought against you in the future in this or any other jurisdiction.

¹ The mandatory-minimum offenses referred to in this section are trafficking offenses, subsequent distribution offenses, and distribution to minor offenses. School zone offenses may be dismissed in consideration of cooperation.

Example: Contract

10. During the course of your cooperation, the law enforcement agency to which you provide cooperation and assistance may advise you of certain rules of conduct. A violation of these rules may result in the termination of your cooperative relationship with law enforcement officials.

11. During the course of your cooperation, you are forbidden to obtain, possess or distribute controlled substances, or engage in any other criminal activity, unless explicitly authorized in advance by the law enforcement officials with whom you are cooperating. You will be prosecuted for any unauthorized criminal activity which comes to the attention of this office.

12. During the course of you cooperation, you may be directed by law enforcement officers to negotiate or arrange for the purchase or sale of controlled substances. You must advise the law enforcement officials with whom you are cooperating of the nature and extent of all your attempts to arrange for someone to obtain or distribute controlled substances, and you must not enter into any such discussions without the express approval of these law enforcement officers.

13. Failure to return this letter to the undersigned within fifteen days of the date set forth above shall render the offer to permit cooperation null and void in all respects. If executed by all the parties, this cooperation letter shall automatically expire forty-five days from date set forth above and may only be extended in writing by this office.

Sincerely,

Assistant District Attorney

I hereby state that I have read the foregoing letter; that I understand its contents; that I have discussed the contents of this letter with my attorney, and that I agree to the terms and conditions set forth in this letter. I also acknowledge that no other promises or agreements have been made other than those set forth in this letter.

DATED: _____
xxxxxxxx (Defendant)

I hereby give my consent, to the extent required under Rule 4.2 (Mass. R. Prof. C.) for law enforcement officers to communicate with my client for purposes of accomplishing the cooperation contemplated by this agreement.

DATED: _____
xxxxxxxx (Attorney)

Other types of agreements

Non-prosecution – CW/CI agrees to full cooperation in investigation; District Attorney's office agrees to not prosecute.

Proffer – CW/CI agrees to provide information regarding a specific incident; District Attorney's office agrees that statements made and information provided will not be used against CW/CI.

Example: Non-prosecution letter

NAME
ADDRESS

DATE

Re: JOHN DOE

Dear _____:

As you have discussed with Assistant District Attorney _____, the Middlesex District Attorney's Office (MDAO) is office is prosecuting _____ for _____ occurring in _____, MA, on _____. You have indicated through _____ that you have information concerning that incident. After consultation with your attorney, _____, you have represented to the MDAO (through _____) that _____ Based on that factual representation, and on the additional terms set forth in this letter, the MDAO and you agree as follow:

1. You agree to cooperate fully in the investigation into the allegations described above and any prosecutions that result from the investigation. You agree that your cooperation will include, but not be limited to providing full, complete and truthful information and, if requested, testimony at any proceeding, including but not limited to any proceeding in a grand jury, district court or superior court. You agree to answer completely and truthfully any and all questions put to you by law enforcement officers and representatives of this office, neither withholding any material information nor attempting to protect any person through false information or omission, nor falsely implicating anyone. You also agree to make yourself available for interviews by attorneys from this office, the State Police, and other law enforcement officers as determined to be required by this office, and to make available all records, documents, or physical evidence in your possession, custody or control which this office determines to be relevant to this matter.

2. You agree not to commit, attempt to commit, or to attempt to facilitate the commission of, any violation of any local, state or federal law in this or any other jurisdiction. You also agree not to violate any civil or criminal court order in this or any other jurisdiction.

3. In exchange for these agreements, and provided (1) that you have fully and completely cooperated and carried out the agreements outlined above in all material respects, and if requested, testified truthfully and completely before a grand jury and at all hearings, trials, and/or other proceedings related to the above matter, and (2) that the representations made by _____ and set forth in paragraph 1 above are true, the MDAO agrees not to prosecute you for your participation with _____ in _____ on _____ at _____, MA.

4. This agreement may be deemed null and void by the MDAO if it is determined by the MDAO in its sole discretion that (1) your cooperation and assistance, including any requested testimony, is being withheld, or has not been complete, candid and truthful, (2) you commit any criminal act (charged or uncharged) in this or any other jurisdiction, or (3) you otherwise violate this agreement.

Example: Non-prosecution letter

5. If this agreement is declared null and void by the MDAO per paragraph 4, you may be prosecuted for any offense that the evidence permits, and any statements made by you may be used against you for any and all purposes, including future prosecutions.

6. This agreement is only between you and the MDAO and does not bind any other federal, state or local prosecuting or law enforcement agencies.

7. No other promises, agreements or conditions have been entered into between the MDAO and you other than those set forth in writing in this letter, and none will be entered into unless they are in writing and signed by the MDAO and you.

8. You hereby acknowledge you are at least 18 years of age, of sound mind, and are not presently under the influence of any alcoholic beverage or controlled substance or are laboring under any other disability.

9. You acknowledge that no law enforcement official has (1) threatened you to cause you to provide information, (2) made any promise to you to cause you to provide information (other than the promise set forth in paragraph 4 above); and (3) told you what to say other than to tell the truth in any interview or testimony that he may give.

The foregoing is the complete agreement between the Middlesex District Attorney's Office and you. It may be modified only by a writing signed by this office and you. If this letter accurately reflects the agreement between this office and you, please confirm this by signing in the appropriate place below.

Very truly yours,

DISTRICT ATTORNEY

By:

Xxxxx Xxxxx
Assistant District Attorney

I, _____, hereby state that I have read and understand this letter and it fully sets forth my agreement with the Middlesex District Attorney's Office. I state that there have been no additional promises or representations made to me by any law enforcement officials, officers or agents. I also acknowledge that I am signing this letter voluntarily, without any threats or coercion, and have fully discussed this agreement with my attorney, _____.

Date: _____

Defendant's Name

Date: _____

Attorney's Name

Example: Proffer letter

Proffer letters are written agreements between prosecutors and individuals under criminal investigation which allow these individuals to tell the government about their knowledge of crimes, with the assurance that their words will not be used against them in any later proceedings.

ADDRESS

DATE

Re: _____

Dear Attorney _____:

This letter confirms that the Middlesex District Attorney's Office (MDAO) will consider a full, accurate and complete proffer from your client, _____ (date of birth ___/___/___), pertaining to his knowledge about, and/or involvement in _____ on _____, at _____, MA. The terms under which the contemplated proffer will be received are as follows:

1. Except as stated herein, no statements made or other information provided by _____ during this proffer will be used by the MDAO directly against him in any judicial proceeding, except for purposes of cross-examination, rebuttal and/or impeachment, should he offer testimony or evidence in any proceeding materially different from any statements made or information provided during the proffer, or in a prosecution based on false statements made or false information provided during the proffer.* Further, the agreement not to use your client's statements against him applies only to statements made during the course of this proffer and it does not apply to prior or subsequent statements given to any law enforcement officers or agents.

2. The MDAO may make derivative use of or may pursue any investigative leads suggested by any statements made or other information provided by your client in the course of the proffer. Any evidence derived from statements made or other information provided by him during the proffer, may be used against him and others in any criminal case or other proceeding. This provision is necessary in order to eliminate the possibility of a hearing at which the Commonwealth would have to prove that the evidence it would introduce is not tainted by any statements made or other information provided during the proffer. See Kastigar v. United States, 406 U.S. 441 (1972).

3. Your client acknowledges that the making of a proffer pursuant to this agreement does not necessarily constitute grounds for consideration of a reduced sentencing recommendation, the dismissal of charges in whole or in part by the Commonwealth, or an agreement not to charge your client.

4. This letter does not obligate the MDAO to enter into any further agreements with your client, nor does it prohibit the MDAO from prosecuting him for any offense. Moreover, the MDAO is not agreeing hereby that it will subsequently enter into a plea, non-prosecution or immunity agreement with your client. If any subsequent agreement is to be made, its terms will be negotiated separately and set forth in writing in a new document.

5. This agreement not to use your client's statements against him applies only to statements pertaining to his knowledge about and involvement in _____ on _____ at _____, MA. The agreement does not pertain to other any other crimes or conduct occurring at any other times or places. If your client wishes to provide a proffer about other matters, a separate agreement must be negotiated and signed by the MDAO and your client.

Example: Proffer letter

6. This agreement is only between you and this office and does not bind any other federal, state or local prosecuting or law enforcement agencies.

7. No other promises, agreements or conditions have been entered into between this office and your client other than those set forth in writing in this letter, and none will be entered into unless they are in writing and signed by this office and your client.

8. Your client hereby acknowledges that he is at least 18 years of age, of sound mind, and is not presently under the influence of any alcoholic beverage or controlled substance or is laboring under any other disability.

9. Your client acknowledges that no law enforcement official has (1) threatened him to cause him to provide information, (2) made any promise to him to cause him to provide information (other than the promise set forth in paragraph 1 above); and (3) told him what to say other than to tell the truth in any interview or testimony that he may give.

The foregoing is the complete agreement between the Middlesex District Attorney's Office and you. It may be modified only by a writing signed by this office and you. If this letter accurately reflects the agreement between this office and you, please confirm this by signing in the appropriate place below. Failure to complete, sign and return this letter to this office on or before the close of business on _____ shall render the terms of this letter null and void unless an extension is given to you in writing in advance.

Sincerely,

MARIAN T. RYAN
DISTRICT ATTORNEY

BY: _____
Assistant District Attorney
Middlesex County

I, _____, hereby state that I have read and understand this letter and it fully sets forth my agreement with the Middlesex District Attorney's Office. I state that there have been no additional promises or representations made to me by any law enforcement officials, officers or agents. I also acknowledge that I am signing this letter voluntarily, without any threats or coercion, and have fully discussed this agreement with my attorney, _____.

[Witness/Defendant's Name]

Date

[Attorney's Name]

Date

* Your client's statements will be not otherwise be disclosed beyond law enforcement for investigative purposes unless your client provides any information which the MDAO deems to be exculpatory as to any present or future defendant. In that event, or as is otherwise ordered by the court or by the automatic operation of discovery rules under M.R.C.P. 14, the MDAO will disclose that information and the circumstances of how such information was obtained to any such other defendant, his counsel and/or the court.

Legal considerations

Commonwealth's privilege not to disclose the identity of a confidential informant- the privilege exists to encourage individuals to communicate information regarding crimes to the government. Com. v. Bonnett, 472 Mass. 827 (2015).

- In determining whether to order disclosure of a CI's ID, the court considers (1) whether disclosure would endanger the CI or impede law enforcement efforts; and (2) whether the CI's ID and information are relevant and helpful to the defense. See Com. v. D.M., 480 Mass. 1004 (2018).

Note that disclosure of the CI's ID will be required under certain circumstances.

- > When the CI is a percipient witness to a crime.
 - If you want to keep the CI's ID confidential, do not charge the target where the CI is a percipient witness. If the CI is only a tipster and not an active participant in the crimes charged, disclosure of his ID will not be required.
- > When the identity of the CI is needed for a fair presentation of the evidence at trial, e.g. where the defense is that the defendant was "set up" by the CI and the police and that drugs were planted.

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Search warrants and CIs

- In an affidavit in support of a search warrant, you must include facts establishing a CI's "basis of knowledge" and "veracity."
- A properly conducted controlled buy can provide both. The District Attorney's office recommends that you observe three controlled buys to establish a nexus to the target location.
- "Veracity" for an unnamed CI may also be established if the CI provided information in the past which led to an arrest and a seizure of controlled substances, or led to an arrest and a pending Superior Court case following a determination of probable cause.

Using CIs to do controlled buys

- (1) Officer meets CI at location other than the location where suspected criminal activity is occurring.
- (2) Officer searches CI to ensure that he has no drugs on his person and (usually) gives him money to purchase drugs.
- (3) Officer escorts or follows CI to the premises where the alleged illegal activity is occurring and watches the CI enter and leave the premises.
- (4) CI gives officer the substance he purchased from the residents of the premises under surveillance.

Final word – beware of CIs.

Example – Terry H. was frequently arrested and offered to help police and conduct controlled buys to “work off” the charges. He was a sex offender, drug addict, thief, and had committed crimes against family members. In his initial work as a CI, he did fine. He eventually started using buy money to purchase drinks. After one arrest, he got a detective to write a letter to the court requesting leniency in light of the work he had done for the police. Terry made about 100 copies of the letter; whited out the date; gave it to his lawyer every time he was arrested; and his lawyer presented it to the judge, so it appeared that he was an active CI. After some time, local departments learned to not work with him. About 10 years have passed since this letter was drafted and he is still using it.

Questions?

Contact information:

ADA Chris Tarrant
Lowell Regional Office
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Lowell, MA 01852
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