

The logo for "Dear Ethics Lawyer" is written in a black, cursive script font. The word "Dear" is smaller and positioned to the left of "Ethics Lawyer". A small "TM" trademark symbol is located to the right of "Lawyer". The background of the logo is a light-colored, textured surface with some faint, illegible handwriting in the background. An orange diagonal banner is visible in the top right corner of the page, partially overlapping the logo area.

Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I represent a client in litigation during discovery. May I tell an unrepresented third party witness that they are not obligated to speak to opposing counsel about the matter? May I ask our client to reach out to third-party witnesses with which the client has an ongoing relationship to ask them not to speak to opposing counsel about the matter?

A: Model Rule 3.4(f) prohibits a lawyer from asking a third-party witness not to speak to opposing counsel about a matter. This situation poses a nuanced step back from that, to more simply let the witness know that they are not compelled to speak to opposing counsel, and may decline at their option, unless subpoenaed or ordered to do so. Rule 4.3 describes obligations relating to dealings with third parties: not projecting that the lawyer is disinterested, correcting any misunderstanding about the lawyer's role, and not giving legal advice, except advising them to secure counsel if the third-party's interests are possibly in conflict with those of the lawyer's client.

There are a few ethics opinions concerning the specific question, as potential discouragement of an unrepresented witness from speaking to opposing counsel. Most have deemed it not inappropriate to advise an unrepresented witness that they are not required to speak to counsel, at least in the absence of other inducements or requests. See, e.g., D.C. Ethics Op. 360 (2011). Check the jurisdiction in which you are litigating for any contrary authority.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation

in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.