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EXPERT ANALYSIS

'Queen for a Day' — Assessing the Risks and Rewards of a Proffer Agreement

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While being the target of a federal criminal investigation is certainly daunting, securing immunity, a declination of prosecution or a cooperation guilty plea agreement after a successful proffer session with the government may seem like your client has been given the keys to the castle. However, will the government actually treat you like royalty?

"Proffering" is a process in which an individual associated with a criminal investigation offers to disclose everything he knows relating to the investigation in the hope of obtaining an agreement for immunity, declination of prosecution or, in most cases, a cooperation guilty plea agreement.

A proffer can create immense benefits for individuals who are able to successfully navigate its murky waters. Yet the consequences of a failed bid to cooperate with the government's investigation under a proffer can be condemning, and devastate any potential trial defenses available to a client who ultimately becomes a defendant.

"In most instances, the answer to the critical question of whether an attorney should proffer a client should be 'don't.' Too many events in the process can go against the client," Peter F. Vaira, special counsel at Greenblatt Pierce Funt & Flores LLC in Philadelphia and former U.S. attorney for the Eastern District of Pennsylvania, said in an interview with the authors.

Needless to say, defense counsel's ability to assess and advise a client of the many risks and pitfalls of proffering and speaking freely to the prosecution about the client's involvement in a criminal scheme or act is an integral part of federal criminal practice.

Under Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6), statements made during plea negotiations are not admissible against the defendant at trial. These protections can be waived, however, as part of the proffering process.

In *United States v. Mezzanatto*, 513 U.S. 196 (1995), the U.S. Supreme Court held that Rule 410 and Rule 11(e)(6) waivers are proper where they are a prerequisite for proceeding with a proffer and are simply another step in the negotiation process.

These waivers are memorialized in the "proffer agreement," usually in the form of a letter between a federal prosecutor and the client. The prosecutor's expectation is that the client will truthfully answer all questions the government has, and in most instances, will inculpate other people in the criminal conduct at issue.

Think of this "proffer session" as an audition. The client's objective is to convince or persuade the government that he or she can further the investigation and be an effective witness at trial against other individuals. In order to accomplish this task, the client's factual statements must be material to the investigation.

Proffering is the process through which an individual associated with a criminal investigation offers to disclose everything he knows relating to the investigation in the hope of obtaining an agreement.

The real difficulty arises when a client seeks to use a proffer as a mechanism for asserting personal innocence under circumstances where the government already believes the evidence demonstrates his or her culpability.

Most prosecutors expect heading into a proffer that the client will be willing to truthfully admit to his or her participation in the crimes under investigation and provide details about the involvement of others.

"While the government will often decide your client's testimony is helpful, it will almost always require that your client plead to some charge," Vaira said.

Therefore, the proffer process may be a life preserver for a client who has made peace with his or her culpability and sees a need to mitigate the damage that will likely be sustained in a prolonged fight with the government.

Conversely, an ill-advised proffer can sink a client's viable defense theory in a manner that often cannot be salvaged by even the most skilled trial attorney. An ill-advised proffer can potentially subject a client to additional exposure for false statements and obstruction of justice charges or sentencing enhancements.

"The decision whether to participate in a proffer depends on the client's relative exposure and, in particular, on a weighing of the benefits (the client's chances of heading off an indictment by proffering) versus the risks (the chances an indictment will occur anyway, in which case the proffer may complicate the client's defense at trial)," Jason M. Weinstein, a partner at Steptoe & Johnson in Washington and a former assistant U.S. attorney in the Southern District of New York and District of Maryland, said in an interview with the authors.

So, why would the subject or target of a federal investigation subject him or herself to the risks associated with proffering and waive the Rule 410 and 11(e)(6) protections?

For starters, the client may not be the "true" target of the investigation, and the government may be seeking a more culpable associate of the client. In other cases where the client's culpability is clear and the evidence is compelling, the individual may need to consider a proffer as a first step toward avoiding substantial penalties or incarceration.

Before subjecting a client to a proffer session with the government, however, counsel should begin with an attorney proffer, Weinstein said.

An "attorney proffer" is an opportunity for counsel to speak with the government in a truly off the record capacity in an effort to gauge the prosecution's reaction to what information the client may be able to provide in a hypothetical situation.

"Pursuing an attorney proffer may give you valuable insight into the government's likely reaction to the client's version of the events and into the government's overall view of your client's status in the case," Weinstein said. "These can be valuable data points in weighing the benefits and risks of a proffer by the client."

Counsel may also seek a "reverse proffer" from the government. In a reverse proffer, the client merely listens to a presentation by the prosecutor concerning the nature and extent of the evidence against the client.

Attorney proffers and reverse proffers are important and often underused tools for controlling the flow of information in the grand jury and investigation process.

"Before you decide whether to cooperate a client, the simplest way to view the analysis is two-fold: first, am I sure my client is telling me the truth; and second, am I sure my client does not want to go to trial," Alex B. Spiro, a white-collar criminal defense attorney at Brafman & Associates PC in New York and a former Manhattan assistant district attorney, said in an interview with the authors.

In exchange for a client's statements, a proffer agreement typically includes a provision where the government agrees that it will not use the proffer statements against the client so long as the individual's defense at trial is consistent with the statements made during the proffer sessions.

If the defendant's trial defense is ultimately inconsistent with the statements made in any proffer, the defense risks triggering the waiver provision in the proffer agreement, which allows the government to use the proffer statements on cross-examination, in rebuttal and even during its case-in-chief.

The risk of triggering the waiver provision has long imposed severe limitations on the types of cross-examination strategies and arguments that counsel can employ without inadvertently causing the devastating admission of a client's proffer statement.

"The decision to cooperate is neither easy nor easily reversed," Spiro added.

What is "inconsistent" in the proffer versus trial defense context has been a heavily debated issue.

In determining whether an "inconsistency" has occurred and a proffer statement can be admitted, courts have recognized that a distinction exists between a defendant's assertion of fact and a defendant's challenge against the sufficiency of the government's evidence.[1]

Whether the defendant has asserted a fact contradictory to his proffer statement is a fact specific inquiry which depends on the "'unique insights' a district court gains from actually seeing and hearing these matters pursued in the dynamic context of a trial."[2]

The enforceability of proffer agreements and the government's ability to introduce proffer statements in the event of a breach have been repeatedly upheld where defense counsel makes factual assertions in its opening, closing or cross-examination that are flatly inconsistent with the defendant's proffer statements.[3]

There has been very little guidance from the courts, however, on whether the door to admit proffer statements opens when a defendant's trial strategy challenges the government's ability to prove its case and asserts facts implicitly, rather than directly, which arguably contradict the defendant's proffer statement.

The fact-specific nature of this paradox has left defense counsel in the precarious position of constantly assessing (or second guessing) whether it has triggered the proffer agreement's waiver provision.

In *United States v. Hardwick*, 544 F.3d 565 (3d Cir. 2008), the defendant entered into a proffer agreement during the government's investigation of murder and other criminal acts related to drug dealings in Camden, New Jersey.

During the proffer sessions, the defendant admitted to planning and participating in the killings of Hiram Rosa and Kenneth Allen.

During the trial, defense counsel cross-examined a cooperating witness, who had admitted to shooting Allen. Defense counsel repeatedly asked whether another gang member, Ricky Perez, ordered Allen's death, even though the cooperating witness had testified that he acted on the defendant's orders.

Defense counsel elicited additional testimony from Perez indicating that Allen had disrupted Perez's drug deals and affected his profits, in an attempt to show Perez had motive to kill Allen.

Even though the defendant did not testify at trial, the court found that defense counsel's cross-examination contradicted the client's proffer and triggered its waiver provision.

The court granted the government's motion to admit the defendant's proffer statements and rebut the cross-examination testimony.

The 3rd U.S. Circuit Court of Appeals agreed with the trial court and found the defendant's cross-examination was aimed at inferring that the government's witnesses, rather than defendant, were responsible for the Rosa and Allen murders, contrary to the statements made by the defendant in his proffer sessions.[4]

In addition to considering whether an inference derived from defense counsel's questions or arguments is inconsistent with a defendant's proffer statements, it is imperative that the defendant is aware of the specific wording of his proffer agreement.

"In most instances, the answer to the critical question of whether an attorney should proffer a client should be 'don't.' Too many events in the process can go against the client," former U.S. attorney Peter F. Vaira said.

An ill-advised proffer can sink a client's viable defense theory in a manner that often cannot be salvaged by even the most skilled trial attorney.

The interpretation of such an agreement and whether its waiver provision has been triggered is a question of law to be analyzed by the district court under contract law standards.[5] The specific terms of the proffer agreement will dictate the protections defendant is, or is not, afforded.

For instance, a proffer agreement does not provide a defendant with full immunity. In *United States v. Mathis*, 239 Fed. Appx. 513 (11th Cir. 2007), the defendant argued to the 11th U.S. Circuit Court of Appeals that his conviction should be vacated because the government obtained and used evidence uncovered directly from his proffer sessions.

The defendant's proffer agreement, however, included language stating that the government reserved the right to pursue any investigative leads derived from the defendant's proffer statements and use such derivative evidence in any criminal or civil proceeding against the defendant.

As such, the court upheld the defendant's conviction because the government used facts derived from his proffer statements and not the "statements and information which made up [defendant's] proffer."[6]

Moreover, a proffer agreement must be in writing to ensure that its protections are enforceable.

In *United States v. Clemons*, 721 F.3d 563 (8th Cir. 2013), the existence of a proffer agreement was undisputed, but neither the government nor defense counsel could produce a copy.

The 8th U.S. Circuit Court of Appeals held that any statements made during the proffer sessions were admissible at trial because there was no written agreement that the District Court could enforce which precluded or restricted the government's use of the proffer statements.

A proffer agreement, however, cannot be used to uproot a defendant's constitutional right to a defense and due process.

While proffer agreements are interpreted according to contract law principles, the 1st U.S. Circuit Court of Appeals has provided a clear directive that proffer agreements "must be governed by principles of due process above and over those of contract law."[7]

Unlike a normal commercial contract, due process mandates that the government adhere to the terms of any proffer agreement it makes. The court said a defendant's consent to appear at a proffer session should not become a lever that can be used to uproot his or her right to fundamental fairness under the due process clause.

A recent decision from the 2nd U.S. Circuit Court of Appeals, *United States v. Rosemond*, 841 F.3d 95 (2d Cir. 2016), held that a district court applied the waiver provision of a proffer agreement so broadly that it impinged on the defendant's right to counsel.

The 2nd Circuit's ruling provided some much needed guidance on when defense tactics, which assert implicit facts, directly contradict the defendant's proffer statements and trigger the agreement's waiver provision.

In *Rosemond* the defendant, a prominent music producer, was charged with murder-for-hire.

In response to drug-related charges in the U.S. District Court for the Eastern District of New York, the defendant entered into a proffer agreement where the government agreed not to use any of the defendant's statements against him, except that they could be used "as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of [defendant] at any stage of a criminal prosecution."[8]

During one of the proffer sessions, the defendant made statements to the government indicating that he understood that the murder victim was going to be killed. During the initial trial and on retrial, the government's main witness testified that he knew that there was going to be a shooting, but he did not think that the victim was going to be murdered.

According to the witness, the defendant never used the words "murder" or "kill" in connection with the victim. The defense counsel thoroughly examined this subject with the witness during cross-examination and emphasized that the witness only believed he was participating in a

shooting, not a murder. The witness admitted he never discussed "murdering" or "killing" the victim with the defendant.

The government objected, arguing that the defense counsel's line of questioning suggested the defendant did not intend to have the victim murdered, and was made to imply to the jury that defendant did not intend to participate in a murder.

The District Court agreed, holding that the questions focusing on the fact that defendant did not use the words "murder" or "kill" triggered the waiver provision of defendant's proffer agreement. The court said the questions implicitly asserted that the object of the conspiracy was something less than murder.

On closing, the court instructed that the defendant could attack the credibility of the witness on ground that he gave inconsistent statements, but he could not "argue that the government has failed to prove that the object of the conspiracy and the intent of [defendant] was to murder the victim, as opposed to simply shooting him, or assaulting him or doing violence to him."[9]The 2nd Circuit reversed and held that the District Court's decision unduly constrained the defense counsel's ability to cross-examine the government witness's repeated denials that the defendant ever requested, much less discussed, the victim's murder.

The appeals court also found that the lower court's decision precluded defense counsel from arguing in closing that the government failed to prove its case.

The 2nd Circuit acknowledged the existence of a fine line between challenging the sufficiency of the government's evidence and implicitly asserting new facts — "[p]articular caution is required when the purported fact is asserted by defense counsel rather than through witness testimony or exhibits."

The 2nd Circuit advised its district courts to carefully consider what fact, if any, the defense counsel has actually implied before determining whether the defendant's proffer statements fairly rebut it.

A cross-examination that attacks a witness' credibility and challenges his or her perception or recollection of an event does not necessarily imply that the event did not occur. It merely suggests that the witness may not have seen or remembered it accurately.

The court said defense counsel must be permitted to "draw the jury's attention to the lack of evidence" presented by the government on specific elements without triggering the waiver provision of a proffer agreement.

On the other hand, questions accusing a witness of fabricating an event can implicitly assert that the event did not take place and contradict a proffer statement.

To be sure which side of the line defense counsel is walking, the court noted that "implicit in questions and arguments regarding witness fabrication, perception or recollection will often be the claim that the event did not occur the way the government suggests."

So long as the defendant does not assert an affirmative fact which contradicts his proffer statements, such questions will likely be insufficient to trigger the proffer agreement's waiver provision.

In summary, the court listed the following six circumstances that are not factual assertions sufficient to trigger a waiver provision:

- Pleading not guilty.
- Arguing generally that the government has not met its burden of proof.
- Arguing specifically that the government has failed to prove particular elements of the crime, such as intent, knowledge, identity, etc.

- Cross-examining a witness in a manner to suggest that he was lying or mistaken or was not reporting an event accurately.
- Cross-examining a police officer about discrepancies between his testimony and his earlier written report.
- Arguing that the government failed to present corroborating evidence.

The *Rosemond* decision and its rationale is relevant to all federal criminal cases, including white collar matters.

First, it allows counsel to better advise their clients on the risks of proffering because it provides some clarity on specific circumstances upon which a waiver provision may be triggered.

Second, it provides much needed guidance for defense counsel to evaluate whether their trial defense strategy will assert affirmative or implicit facts which may contradict their client's proffer statements.

Lastly, it limits the government's ability to argue that a defendant's proffer statements should be admitted where defendant has merely questioned whether the government has proven its case.

While *Rosemond* provides some clarity on how to avoid potentially devastating pitfalls in the proffer agreement process, former U.S. attorney Viara offered the following advice: "Proffer only when the you believe the government truly needs your client's information, the prosecutor does not insist that any cooperating witness must plead guilty first, and you know that you cannot effectively defend the case at a trial."

Even in a post-*Rosemond* world, defense counsel must be extremely cautious in taking a case to trial after a client has proffered with the government.

A proffer or "queen for a day" letter may get your client a day or two of feeling like royalty within the walls of the government's castle; but in many instances, if you ever intend to proceed to a trial, that proffer process will become the fastest route your client can take to the dungeon.

Proffering a client is a complex strategic decision to be made only after careful contemplation of the facts and evidence available to counsel, along with a clear appreciation for the pitfalls that often lie ahead on that path to cooperation with the government.

NOTES

[1] *See United States v. Roberts,* 660 F.3d 149 (2d Cir. 2011).

[2] *Id.* at 158.

[3] *See, e.g., United States v. Barrow,* 400 F.3d 109, 125 (2d Cir. 2005); *United States v. Krilich,* 159 F.3d 1020, 1025 (7th Cir. 1998); *United States v. Rebbe,* 314 F.3d 402, 405 (9th Cir. 2002).

[4] *See United States v. Hardwick,* 544 F.3d 565, 569 (3d Cir. 2008).

[5] *Id.* at 570.

[6] *Mathis*, 239 Fed. Appx. at 516; *see also United States v. Hoffman,* No. 14-022, 2014 WL 5040721, (E.D. La. Oct. 8, 2014) (proffer agreement stating only that government would not use statements "in [its] case-in-chief ... should a trial be held" did not prohibit government from submitting false statements made by defendant during proffer statements to a grand jury); *In re Grand Jury Subpoena to Janan,* 325 Fed. Appx. 551 (9th Cir. 2009) (finding that the proffer agreement language precluding government from using defendant's statements against him in its case-in-chief only conferred "direct use immunity" as the term "case-in-chief" refers only to evidence presented at trial by a party between the time the party calls the first witness and the time the party rests, or the part of a trial in which a party presents evidence to support the claim or defense.)

[7] *See United States v. La Luz-Jimenez,* No. 14-719, 2017 WL 507279, at *7 (D.P.R. Jan. 18, 2017) (citing *United States v. Melvin,* 730 F.3d 29, 38-39 (1st Cir. 2013) ("Proffer agreements are sui generis, and the contract-law principles that courts use in construing them are glossed with a concern that the defendant's consent to appear at a proffer session should not become a lever that can be used to uproot his right to fundamental fairness under the due process clause. 'Unlike the normal commercial contract,'

it is 'due process [that] requires that the government adhere to the terms of any ... immunity agreement it makes.'") (internal citations omitted)).

[8] *Rosemond*, 841 F.3d at 103.

[9] *Id.* at 105. The first trial resulted in a mistrial and defendant was retried. The trial judge adhered to her earlier ruling, limiting defendant's cross-examination of the government's witness to his prior inconsistent statements, and prohibiting any defense arguments to the jury "that it was a mere shooting." As a result, defense counsel avoided these inquiries and, this time, the jury returned a guilty verdict against defendant.