

Caveat Profferor*

Defense lawyers usually try to suppress their clients' statements, not surrender them. But sometimes, bringing one's client in to the prosecutor's den may be the best strategy. It can lead to no charges, reduced charges, or a cooperation agreement. It can, however, also solidify a prosecutor's resolve to indict, provide fodder for additional investigation and damaging trial rebuttal evidence, or, as Martha Stewart painfully learned, lead to charges of false statements and obstruction.

Whether a client should talk to a prosecutor in what is commonly known as a "proffer," is, of course, a fact-specific decision, and so the first step is to bone up rigorously on all available facts from all available sources. It is also a decision that must be made in light of the case-law interpreting proffer agreements – the written contracts prosecutors require clients and their lawyers to sign before a proffer may proceed – and the somewhat ambiguous legal framework that governs the permissible uses of proffer statements in the absence of any proffer agreement. An ill-prepared or ill-advised proffer can have devastating consequences. Sometimes, it is better to go to war by holding one's peace.¹

What are proffers?

Defense lawyers are constantly presenting or "proffering" their clients' versions of events to prosecutors – in telephone conversations, e-mails, and fleeting conversations in courthouse corridors. A "proffer," however, generally means a formal interview of the client under the terms of a written "proffer agreement," held at the prosecutor's office, and attended by the prosecutor, the case agent(s), and the defense lawyer. Since it often occurs early in the representation, before the lawyer fully knows the client or the facts, it is a risky endeavor. The prosecutor may bombard the client with all sorts of questions the defense lawyer didn't even know to ask, much less prepare the client to answer. The obvious fear is that the client will be charged not with the alleged crime, but with the cover-up (as illustrated in the Martha Stewart case) or both (as we saw recently in the much publicized prosecution of Frederic Bourke for violations of the Foreign Corrupt Practices Act²). But there are other perils too, stemming from less obvious but often equally damaging uses of the proffer statements that are permitted under the proffer agreement.

What is a "Queen for a Day" agreement?

A proffer or "Queen for a Day" agreement is the contract a prosecutor usually requires the client and defense lawyer to sign at the beginning of a proffer. Beginning by protesting (perhaps too much) that it is NOT a cooperation agreement, its main purpose is to lay out the permissible uses of the client's proffer statements. Typically, it provides that a client's statements cannot be used against her as direct evidence at trial, but they can be used in three other situations – as leads to other evidence, to cross-examine her if she testifies or to rebut any evidence or arguments offered on her behalf at any stage in a

¹ Since proffers occur most commonly at the federal level, this article focuses on federal law.

² See *United States v. Kozeny*, 2009 WL 1940897, *5-6 (S.D.N.Y. July 6, 2009).

criminal prosecution, or as evidence in a prosecution for perjury, false statements or obstruction. If the client has alerted the prosecutor in advance that she is making an innocence proffer, she may be required to sign an agreement stating that there are no limitations on the uses of her statements, or she may be offered no agreement at all.³

How enforceable is it?

A proffer agreement is a contract, and, as such, it is interpreted under general principles of contract construction.⁴ Criminal defense lawyers do not often have occasion to dust off their contract law treatises, but these principles include such nuggets as: give a contract its plain meaning, interpret it as a whole, avoid an interpretation that would render any provision superfluous, only go outside the four corners of the agreement in cases of ambiguity, and – a key one in the proffer context – interpret ambiguities against the drafter.⁵ A court will only set aside a proffer agreement where it is clear that it was entered into unknowingly or involuntarily, which is to say, hardly ever.⁶ The Second Circuit has expressly rejected the argument that a client’s assent to the provisions in a proffer agreement is necessarily involuntary in light of the government’s superior bargaining power.⁷

How does a proffer agreement hurt the client?

One of the purposes of a proffer agreement is to secure a waiver of the client’s rights under Federal Rule of Evidence 410. Designed to ensure robust plea negotiations, this rule provides that except for some limited exceptions, “plea discussions” with a prosecutor may not be used against the client at a later stage in the criminal prosecution.⁸

³ See *United States v. Shyne*, 2007 WL 1075035, *5 (S.D.N.Y. April 5, 2007) (quoting the terms of an innocence proffer agreement).

⁴ See *United States v. Barrow*, 400 F.3d 109, 117-18 (2d Cir. 2005).

⁵ See *United States v. Torres*, 2008 WL 2977884 (S.D.N.Y. August 4, 2008) (“because proffer agreements are unique contracts in which special due process concerns for fairness and adequacy of procedural safeguards obtain, the Court resolves any ambiguities in the agreement against the Government”) (citations and internal quotation marks omitted).

⁶ See *United States v. Velez*, 354 F.3d 190, 196 (2d Cir.2004) (before deeming provisions in proffer agreement unenforceable, “the trial judge must find ‘some affirmative indication that the agreement was entered into unknowingly or involuntarily’”) (quoting *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)).

⁷ See *Velez*, 400 F.3d at 196 (“to the extent there is a disparity between the parties’ bargaining positions, it is likely attributable to the Government’s evidence of the defendant’s guilt”).

⁸ Federal Rule of Evidence 410 provides that “evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: . . . (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” Rule 410 contains the following two exceptions: “such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same . . . plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.” See also Federal Rule of Criminal Procedure 11(f) (“[t]he admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410”).

By supplanting this rule, the proffer agreement allows the prosecutor to use proffer statements in ways that can hobble the client's defense at trial. In fact, in *United States v. Barrow*, the Second Circuit held that under the broad waiver provision outlined above (which permits the prosecutor to rebut not just facts presented but arguments made on behalf of a client at trial), the prosecutor may introduce at trial *omissions* from proffer statements and proffer statements that *implicitly* contradict the defense lawyer's arguments to the jury.⁹ In *Barrow*, for example, where the defendant did not testify, the Court upheld the admission of the defendant's proffer statement that he routinely sold drugs at the address charged in the indictment for the purpose of "rebutting" a defense of mistaken identity and police fabrication. In short, statements made at a proffer can cripple what might have been a viable trial strategy.

When does a proffer agreement help the client?

Surprisingly, despite the waivers contained in a proffer agreement, there may be times when you really want one. Rule 410 applies to "plea discussions." Several circuits have interpreted that phrase to require "an actual subjective expectation to negotiate a plea at the time of the discussion," which was "reasonable given the totality of the objective circumstances."¹⁰ This definition potentially excludes a range of proffers from Rule 410 protection, including proffers where the client is being interviewed simply as a witness to a crime, where the client is seeking to persuade the prosecutor not to indict, or where the client maintains actual innocence.¹¹ While the Second Circuit has not directly addressed this issue, it has held that "plea bargaining implies an offer to plead guilty upon condition," which "must, in some way, express the hope that a concession to reduce the punishment will come to pass."¹²

Much academic ink could be spilled on the propriety of the distinction between protestations of innocence and plea bargaining (the one is often a prelude to the other, as the Second Circuit has acknowledged¹³), but the bottom line is that if you know your client is making a mere witness proffer or an innocence proffer, you should not assume that the statements are protected under Rule 410. One savvy defense attorney took this issue by the horns by explicitly invoking the protections of Rule 410 at the outset of a proffer where no proffer agreement was forthcoming. The prosecutor present said nothing in response, and a district judge later held that his silence essentially estopped the government from arguing that the proffer did not come within the ambit of Rule 410.¹⁴ But prosecutors may not always be so acquiescent. Moreover, at least one court has held

⁹ See *Barrow*, 400 F.3d at 121-22.

¹⁰ *United States v. Guerrero*, 847 F.2d 1363, 1367-68 (9th Cir.1988) (quoting *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir.1978) (*en banc*)).

¹¹ See, e.g., *United States v. Edlmann*, 458 F.3d 791 (8th Cir.2006) (there were no plea discussions where, *inter alia*, defendant sought to avoid indictment altogether, rather than to plead); see also Strassberg and Cristovici, *To Proffer or Not to Proffer? That is the Question*, New York Law Journal (June 2009).

¹² *United States v. Levy*, 578 F.2d 896, 901 (2d Cir.1978) (addressing the scope of a previous version of Fed.R.Crim.P. 11, which governed the admissibility of "statements made in connection with, and relevant to," an offer to plead guilty).

¹³ See *United States v. Valencia*, 826 F.2d 169, 173 (2d Cir. 1987).

¹⁴ See *United States v. Galestro*, 2008 WL 2783360, *20-22 (E.D.N.Y. July 15, 2008).

that Rule 410 does not protect false proffers,¹⁵ so even if you get past the hurdle of arguing that the proffer in question should get Rule 410 protection, you may not be able to surmount the claim that the client lost it by lying.

Is it better to proceed by attorney proffer?

Given all the downsides of client proffers, the question arises whether it is best for the client to present her version of events through her lawyer in an “attorney proffer,” which is similar to the client proffer, but without either the client or a proffer agreement. Attorney proffers can, however, open their own cans of worms. For one thing, mediating the client’s words through a professional saps them of their raw power. But more importantly, the lawyer’s words may be treated as the client’s own statements.¹⁶ Bernard Kerik learned this to his chagrin, when his lawyer’s proffer on his behalf to state prosecutors and investigators – that Kerik’s apartment renovations only cost \$50,000 and not \$255,000, and were paid for by Kerik himself, not individuals doing business with the City of New York – became one of the bases of federal public corruption charges.

To add insult to injury, the prosecutors in the federal case then successfully moved to have another of Kerik’s lawyers (his counsel of record on the federal case) disqualified based on the fact that he too had been authorized to convey the allegedly misleading statements to state prosecutors and investigators, although he had not in fact personally conveyed any. Disqualification was appropriate, the court held, because this lawyer may be called as a government witness at the trial, or, through his advocacy as trial counsel, may be an unsworn witness before the jury on Mr. Kerik’s behalf.¹⁷ To Kerik’s argument that the statements he made to his lawyers were privileged and therefore inadmissible at trial, the court held that they lost their privileged status when communicated to third parties, and, in any event, even if they were privileged, they would be admissible under the crime-fraud exception.¹⁸

Yes, attorney proffers can lead to criminal charges, loss of one’s counsel of choice, and loss of the protections of the attorney-client privilege.

¹⁵ See *United States v. Kerik*, 531 F.Supp.2d 610, 618 (S.D.N.Y. 2008). An alternative view is that Rule 410 protects false proffers except those that come within its limited exception (i.e. statements that are the basis of perjury or false statement charges and were made under oath, on the record, and in the presence of counsel).

¹⁶ See *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981).

¹⁷ See *Kerik*, 531 F.Supp.2d at 614-16.

¹⁸ *Id.* at 617; see also *United States v. Doe*, 82 Fed.Appx. 250 (2d Cir. 2003); Murray, *Proffer at Your Peril*, White Collar Crime Reporter, August 2005.

So why proffer at all?

While there are many reasons to be wary of proffering, let's not lose sight of the fact that it's often a risk worth taking. Of the cases referred to them for prosecution, federal prosecutors decline one in three, and far more in white collar cases.¹⁹ Of the cases they do prosecute, 95% end in a guilty plea²⁰ – indicative of the government's "awesome" bargaining power.²¹ Against these statistics, the opportunity to frame or influence the investigation, to engender doubt or sympathy, to secure an early cooperation deal, or to intimidate with the specter of dismissal or an acquittal, is not to be rejected lightly. Each case is unique, not just as to the facts, but also the personalities involved and the moment in time. Only hindsight can accurately answer the question of whether or not to proffer. But if there's one truism to be gleaned from reading the cases where proffers came back to bite, it's that one can never underestimate the importance of knowledge. Of the law, to be sure, but especially of all the available facts – and not just the ones your client shares with you.

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¹⁹ See *Federal Prosecutors: Wide Variation Found in Handling of Criminal Referrals for Prosecution*, A TRAC Special Report, January 24, 2003 (available at http://trac.syr.edu/tracreports/pros/ausa_pctdecG.html).

²⁰ See Report of United States Sentencing Commission, *Overview of Federal Criminal Cases – Fiscal Year 2007*, available at http://www.ussc.gov/general/20081222_Data_Overview.pdf.

²¹ *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996).