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OUTSIDE COUNSEL

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Proffer Agreements: To Execute or Not to Execute?

Typical scenario: you represent an individual in a federal criminal investigation and the prosecutor requests that the individual come in for an interview, otherwise known as a proffer session. You and your client decide that it is in the client's interest to accept the invitation.[1]

The question that inevitably arises next is whether to ask for a proffer agreement, also colloquially known as a "Queen for a Day" agreement.

These agreements often confer little benefit on potential defendants. Indeed, as discussed below, the real beneficiary of a proffer agreement is the government because it typically secures an explicit waiver of Federal Rule of Evidence 410 (Rule 410), which bars the admission of statements made to government attorneys in the course of plea discussions. By obtaining this waiver, the government may offer statements made by a defendant during a proffer session to the extent consistent with the terms of the proffer agreement, and precludes the defendant from later arguing that the statements were made as part of plea discussions and are thus inadmissible.

The question, therefore, is whether, in the absence of a proffer agreement, counsel can later prevent the government from offering the statements made during the session on the grounds that they are covered by Rule 410.

There is currently no uniformity among the circuits on the issue of whether proffer sessions always constitute "plea discussions"; it appears that one circuit has so concluded, others have ruled that it depends on the facts and circumstances, and still others have not addressed the issue.

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Therefore, the answer to whether to have your client execute a proffer agreement may depend largely on the jurisdiction; if the investigation emanates from a U.S. Attorney's Office in a circuit that recognizes all proffer sessions as "plea discussions," counsel should strongly consider avoiding having the client execute an agreement. In jurisdictions where the court of appeals has concluded otherwise, the safest course may be to execute an agreement, although depending on the facts of the particular case counsel may consider not executing an agreement and attempting to lay the seeds for an argument that the proffer session should be covered by Rule 410. The same analysis would appear to apply in those jurisdictions where the issue has not been resolved.

What Is a Proffer Agreement?

A proffer agreement is a limited immunity agreement that sets forth the uses that the government can make of the interviewee's statements. While the terms of proffer agreements vary among the U.S. Attorney's Offices, they typically preclude the government from offering the statements made during the interview directly against the individual in a future prosecution. That means that the government lawyers and investigators present during the interview cannot testify at trial against that individual about the statements made during the proffer session.

The primary exception is for prosecutions for false statements or obstruction of justice; that is, if the individual lies during the proffer session, the statements made by the individual can be offered against him or her. The prosecution involving Martha Stewart is the prototypical example of the government using statements made during a proffer session in this fashion.[2]

While the statements made during the session cannot be used directly against the individual in a subsequent, non-false-statements-based prosecution, the government is generally permitted to use leads obtained through the interview. The oft-repeated example is that if an individual admits to murdering John Doe and to burying Mr. Doe's body in his backyard, the government cannot call an investigator who heard the statement to testify that the individual admitted to committing the murder. However, the government can go to the individual's backyard, exhume Mr. Doe's body, and use the fact that the body was found there, as well as any additional fruits arising from the individual's admissions during the interview.

While proffer agreements ordinarily contain the provision discussed above prohibiting "direct" use of statements made, the agreements frequently contain a number of "door opening" provisions that substantially reduce the protections purportedly afforded. One typical provision is that if the individual is later charged and testifies in his or her defense, the statements made during the session can be used by the government during cross-examination to the extent that the trial testimony is in conflict with the prior statements. Another, even broader provision found in some proffer agreements permits the government to offer an individual's statements to the extent that the individual's attorney advances any argument, at any stage of the prosecution, that contradicts a state-

ment made by the individual during the session. This would include any arguments advanced or statements made during an opening statement or summation at trial, during the examination of any witness, or at sentencing.

Who Benefits From a Proffer Agreement?

Given that the prosecution can use leads from statements made by individuals during a proffer session, and that the "door opening" provisions of typical proffer agreements are broad, the natural question that arises is what real benefit there is to putative defendants in executing one. The conclusion that most practitioners have reached is that there is actually very little benefit. Courts routinely find that, in subsequent proceedings, attorney arguments have "opened the door," and usually do not require direct contradiction with the statements made by the client during the proffer session to permit the government to offer proffer session statements in rebuttal.[3] In the circumstance when an individual sits for a proffer session, is later charged, and his or her attorney is able to mount a defense entirely consistent with the statements made during the proffer session, the proffer agreement will have had some benefit. More likely, depending on how incriminating the statements made during the proffer session are, counsel will have to carefully tailor the defense to avoid "opening the door."

So who does benefit from a proffer agreement? The answer, although not an obvious one, is the government. Federal Rule of Criminal Procedure 11(f) provides that the admissibility of statements made during plea discussions is governed by Rule 410. This evidentiary rule proscribes, in relevant part, the admission of statements made "in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty…."[4] Typical proffer agreements contain a provision in which the individual who executes it explicitly waives the protection afforded by these rules. The Supreme Court has held that such waivers, so long as they are voluntary and knowing, are enforceable.[5] Thus, the government is able to later use the statements made by the individual (consistent with the terms of the agreement), and there can be no challenge by the defendant that the statements constitute inadmissible plea discussions.

Advising Your Client

Because your client will be afforded relatively little protection by the agreement, the logical question that arises is whether to counsel that one be signed. If the prosecutor fully understands that the agreement is actually designed for his or her benefit, he or she will likely insist upon it. But what if the prosecutor does not insist?

While the agreement confers scant protection to your client, depending upon the jurisdiction you are in, there may be a significant benefit to not executing a proffer agreement. For example, in the U.S. Court of Appeals for the Second Circuit, proffer sessions are generally considered plea discussions within the meaning of Rule 410.[6] In a relatively recent opinion, *United States v. Barrow,* the court, citing prior cases, stated succinctly: "Statements made by defendants in proffer sessions are covered by Rule 410."[7] Thus, if your client is interviewed by a government attorney and does not execute an agreement (or otherwise expressly waive the protections of Rule 410), the government should not be able to introduce your client's statements under any circumstances. Accordingly, in a jurisdiction such as the Second Circuit, in many cases counsel may well wish to avoid having their clients execute a proffer agreement.[8]

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In other circuits the answer may be different. In the First Circuit, for example, unless a plea is discussed explicitly, the protections of Rule 410 will likely not apply.[9] Other circuits, such as the Eighth Circuit, apply a "totality of the circumstances" test to determine whether the proffer session constituted a plea discussion for purposes of Rule 410.[10] There are also circuits that have not yet addressed the issue.[11]

It would appear that, in all of these jurisdictions, the analysis is similar. There is a risk that a court will not consider the proffer session to have been "plea discussions" and the government will be able to offer the statements made without limitation, including during its case-in-chief.

While there is admittedly minimal protection afforded to defendants by proffer agreements, on balance it may be preferable to require the government to demonstrate that the door has been opened, rather than allow the government unfettered use of the proffer statements.

On the other hand, if you advise your client not to execute a proffer agreement you have preserved the argument, which might carry the day, that the statements cannot be offered, period. Ultimately, the decision to be made in these jurisdictions will be case-specific and will likely turn on a number of factors, such as the nature of the statements you anticipate your client will make, including how incriminating they will ultimately prove, and the client's tolerance for risk.

1. This article does not address when it is advisable to counsel a client to attend a proffer session.
2. See *United States v. Stewart,* 433 F.3d 273 (2d Cir. 2006).
3. See *United States v. Barrow,* 400 F.3d 109, 120-21 (2d Cir. 2005); see also *United States v. Rebbe,* 314 F.3d 402, 407-08 (9th Cir. 2002); *United States v. Krilich,* 159 F.3d 1020, 1025-26 (7th Cir. 1998).
4. Fed. R. Evid. 410.
5. *United States v. Mezzanatto,* 513 U.S. 196 (1995).
6. See, e.g., *Barrow,* 400 F.3d at 116; *United States v. Velez,* 354 F.3d 190, 194 (2d Cir. 2004).
7. *Barrow,* 400 F.3d at 116.
8. Of course, Rule 410 does not prohibit the government from making derivative use of the statements made during the proffer session, see, e.g., *United States v. Millard,* 235 F.3d 1119, 1120 (8th Cir. 2000), but then again neither does the typical proffer agreement.
9. See *United States v. Penta,* 898 F.2d 815, 817-18 (1st Cir. 1990) (rejecting the position taken by the Second Circuit in *United States v. Serna,* 799 F.2d 842, 849 (2d Cir. 1986), abrogated on other grounds by *United States v. DiNapoli,* 8 F.3d 909 (2d Cir. 1993) (en banc), that "preliminary discussion must be considered as part of the overall plea bargaining process," and holding instead that "plea discussions means plea discussions").
10. See, e.g., *United States v. Edelmann,* 458 F.3d 791, 804-06 (8th Cir. 2006); *United States v. Morgan,* 91 F.3d 1193, 1195-96 (8th Cir. 1996).
11. See *United States v. Stein,* No. CR. 04-269-9, 2005 WL 1377851, at *11 (E.D. Pa. June 8, 2005) (noting that Third Circuit has not considered the issue of whether proffer sessions automatically fall within Rule 410); *United States v. Smith,* No. 00-40118-01, 2001 WL 523371, at *5 (D. Kan. April 26, 2001) (noting that the Tenth Circuit "has not yet established a general framework for determining whether a conversation is an inadmissible plea negotiation").