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A Survey of Federal Proffer Agreements:

The Shortcomings and Pitfalls in the Government's Promised Protections

One of the most difficult questions a defense attorney faces pre-indictment is deciding whether to allow the government to interview her client. Since the government rarely is willing to provide a witness immunity from prosecution, these pre-indictment interviews are commonly carried out pursuant to a so-called "proffer agreement." At first blush, these agreements appear to offer the defense some assurance that statements made during a proffer will not be used against the potential defendant in the future. However, a closer examination of federal proffer agreements from across the country reveals that the shelter they provide is far less than it might seem, and that allowing the government to interview a client could command a heavy price to be paid at a future trial. There still may be good reasons to allow the government to speak with a client, but it is important to approach such interviews with caution, preparation, and full knowledge of the risks.

We have conducted a survey of proffer agreements from U.S. Attorneys' Offices across the country to analyze the extent of the protections they offer.[1] This review exposed the tightrope defendants must walk when agreeing to a proffer session, with their fate as potential criminal defendants and their ability to effectively defend themselves at trial in the balance. A proffer session can lead to significant benefits; it could sway the government's view of the client, perhaps successfully moving the client off the indictment list, or it could lead to reduced charges and an opportunity to earn cooperation credit in connection with sentencing. However, the proffer agreements uniformly make clear that if a client's proffer session does not lead to a resolution of the government's investigation, a proffer statement can become a significant roadblock at a subsequent trial. Many agreements not only limit what the defendant can say if he takes the stand, but they also go much further and potentially hamstring defense strategies and important lines of cross-examination.

This article seeks to help practitioners advise clients about the risks of proffers in three parts. First, we examine the key language in the proffer agreements we reviewed that significantly limit how much protection they offer to a person who chooses to participate in an interview. Second, we explore how these limitations can have significant impacts on a defendant's trial strategy, ranging from impacting the defendant's ability to testify to what evidence and theories the defense may present on the defendant's behalf. We also discuss judicial decisions that analyzed the language of proffer agreements to determine the scope of the government's ability to use statements and information from proffer sessions at trial. Finally, informed by both the benefits and limitations of proffer agreements, we offer practi-

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cal advice on proffers from how to approach discussions with the government to how to advise the client on handling proffer session questioning.

Before delving into this discussion, it bears noting that the problem of whether to allow the government to interview a client is especially common in white collar cases. White collar investigations often run for many years and often are not covert, so potential targets can become aware of the investigation well before indictments issue. This means that lawyers representing the subjects and targets of white collar investigations often have an extended opportunity to try to engage in discussions with the government lawyers and agents conducting the investigations before charging decisions are finalized. Moreover, it is not uncommon in a white collar investigation that key facts are not in dispute. Instead, white collar practitioners often find that they must advocate for their clients regarding the interpretation of the facts and whether they amount to criminal exposure. This can increase the desire to bring the client in for an interview to show the government that the client's acts were well-intentioned and not motivated by criminal intent. However, government agents are not easily swayed and, as outlined below, the downside risks of proffers are real.

A. Key Elements of Proffer Agreement

Proffer agreements are designed to help entice an individual who might have some criminal exposure to come in for an interview with the government. The central promise of the proffer agreement is that in exchange for providing truthful information, any statement made during the proffer will not be used against the interviewee in the government's case-in-chief at any future trial, bail hearing, or sentencing. A typical formulation of this promise found in a proffer agreement from the District of South Dakota states:

> No statements made by your client or other information provided by him during proffer will be used directly against him in any criminal proceeding.

Similarly, a proffer agreement from the Eastern District of Pennsylvania reads:

> First, no statements made by you or your client, or other information provided by you or your client during the "off-the-record" proffer, will be used directly against your client in any criminal case.

All proffer agreements begin with some version of this basic promise.

However, this core promise comes with substantial limits that defense counsel must grapple with in deciding whether to advise the client to go forward with an interview. All the agreements we reviewed contained explicit reference to the first three types of limitations, and many also included the fourth, and perhaps most insidious, limitation.

1. Derivative Use

While the government promises it will not use any statements made during the proffer directly against the client, the proffer agreements reviewed uniformly make clear that the government may make derivative use of any such statement by pursuing investigative leads to other information and evidence. A proffer agreement from the Northern District of Illinois puts the interviewee and counsel on notice as follows:

> The government is completely free to pursue any and all investigative leads derived in any way from the proffer, which could result in the acquisition of evidence admissible against your client.

A more aggressive proffer agreement from the Central District of California provides the government may:

> Use all information derived directly or indirectly from the meeting for the purpose of obtaining and pursuing leads to other evidence (including any information or data obtained from digital devices upon your client's disclosure of any passwords of PINs during the meeting), which evidence may be used for any purpose, including any prosecution of your client.

The government's ability to make "derivative use" of the defendant's statements means that if the client admits to where relevant information can be found or tells the government what witnesses have relevant information, the government may use that information to build its case against the defendant.[2]

2. Use of Statement as Impeachment on Cross-Examination of Defendant at Trial

The proffer agreements surveyed also consistently provide that if a client chooses to testify at trial, the proffer statement can be used to impeach the client's trial testimony. As provided in a proffer agreement from the Eastern District of Missouri:

> [I]f your client is a witness at any future trials and offers testimony materially different from any statements made or other information provided during the proffer or discussion, the attorney for the government may cross-examine your client concerning any statements made or other information provided during the proffer or discussion.

This standard limit on proffers is not surprising. It seems to be a fair measure given that the client is promising to make a truthful statement in the proffer and taking an oath to tell the truth on the witness stand at trial. Any inconsistent statements between the proffer and the trial testimony can be exposed by the government.

3. Use of Statements Contrary to Evidence Offered by Defendant at Trial

Where the language between the proffer agreements begins to vary is the extent to which they leave the door open for the government to use the defendants' statements at trial beyond just using them for impeachment of the defendant. All the proffer agreements included at least some leeway for the government to use the client's proffer statement as rebuttal evidence in response to evidence or witnesses offered by the defense at trial. A sample proffer agreement from the Eastern District of North Carolina states that the government may use the statements made by the defendant "to rebut any evidence offered" by the defense at trial. Similarly, a proffer agreement from the District of Columbia states that if the defense "presents evidence through other witnesses" and that evidence "contradicts statements made in your client's debriefing," the prosecution may cross-examine those "other witnesses concerning any statements made or other information provided by your client during the proffer." Numerous other jurisdictions contain similar language. The prof-

fer session therefore may not just constrain what testimony the defense can solicit from the defendant, it can also limit what can be elicited from other trial witnesses.

4. Use of Statements Contrary to Position Taken at Trial

As will be analyzed in greater depth in the next section, the most ambiguous and potentially far-reaching limitation included in a number of the proffer agreements allows the government to introduce statements made during a proffer session as rebuttal evidence to a position taken or argument made by counsel or the client at trial. Here are some representative examples:

> **Southern District of Florida:**
> Additionally, this office may use [interviewee's] statements to rebut any evidence, cross-examination, or *representations* offered by or on behalf of [interviewee] at any stage of any proceeding or criminal prosecution, regardless of whether or not [interviewee] testifies. (Emphasis added.)

> **Middle District of Tennessee:**
> The United States may also use the witness's statements as substantive evidence to rebut any evidence, factual assertions*, or arguments offered by on behalf of the witness* that are inconsistent with the statements made during this proffer. (Emphasis added.)

> **District of Minnesota:**
> [T]he government may use … statements made by you at the meeting and all evidence obtained directly or indirectly from those statements … *to rebut any evidence, argument, or representations offered by or on behalf of yourself* in connection with the trial and/or at sentencing, should any prosecution of yourself be undertaken. (Emphasis added.)

> **Southern District of New York:**
> [T]he government may also use statements made by Client at the meeting *to rebut any evidence or arguments offered by or on behalf of Client* (including arguments made or issues raised sua sponte by the district court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client. (Emphasis added.)

> **Southern District of Ohio:**
> The United States may also use your client's statements as substantive evidence to rebut any *evidence, factual assertions, or arguments* offered by or on behalf of your client at any phase of trial or sentencing. (Emphasis added.)

In each of these five examples, the prosecution is reserving the right to use statements made by the interviewee at trial in ways that go significantly beyond the cross-examination of witnesses and presentation of evidence. To some degree, each of these agreements contemplates the use of proffer statements to challenge the defense's positions, theories, and arguments at trial. While it is not clear from the face of the agreement precisely when these more expansive provisions will be triggered, they all threaten to hamper the defense at trial in significant ways.

B. Proffer Agreements — Impact on Trial Strategy

The limitations on the non-admissibility of a defendant's proffer statement as set forth in the agreement can create major challenges that a proffer statement can place on the defense at subsequent trial.

1. Impacts on Trial Testimony

The first and most straightforward impact of a proffer is that it may harm and even preclude the defendant from testifying at trial. Since all witnesses struggle to recall events and testify precisely the same way each time they are asked about something, it is very likely that if a defendant opts to testify, there will be at least a few discrepancies between the proffer statement and the client's trial testimony that the prosecution can then seize on to attack the client's credibility. In evaluating the size of this risk, it may be critical whether the client's testimony was recorded. Often interviews are not recorded, giving the defense the room to argue that the agent who took notes and generated the interview report made an error. If there were multiple agents present during the interview, each of whom took notes, it is important to seek to get *all* of the interview notes so that inconsistencies and omissions can be identified and the jury can be educated that interview reports are not always perfect reflections of what a defendant said during a proffer session. In some cases, it may even become necessary for the attorney who attended the proffer session to relinquish his or her role as the client's advocate and become a witness at trial if what is in the government's report differs in significant ways from the attorney's notes and memory.

If there is evidence at trial that significantly contradicts what the client recounted during the proffer session, the risk of a damaging cross-examination may be so great that it may no longer be possible to credibly put the client on the stand. For this reason, it is important to try to avoid bringing a client in for a proffer without a sense of what the government's evidence may show because the client may make statements that are readily refutable. It also demonstrates that it may be necessary to demand boundaries on what a client is going to be asked about during a proffer session to limit the possibility that a client will answer questions about topics that have not been vetted and investigated ahead of time.

In addition to inconsistencies, there is also the risk that the client may have made significant admissions that will constrain his ability to testify at trial. Often potential defendants will agree to a proffer session in hopes of demonstrating that in exchange for leniency, the potential defendant will become a useful government witness. However, if a client has admitted to extensive knowledge and participation in the acts underlying the criminal charges, then the client will not be able to get on the stand and deny that knowledge and participation if the deal-making efforts with the government fail.

Finally, the proffer session will have previewed for the government how the defendant comes across when testifying and may have shown them how the client can be provoked. The prosecution can use this knowledge to craft a more potent and targeted cross-examination at trial. Therefore, if the client is going to take the stand after having done a proffer, it is important to revisit questions that he or she may have fumbled during the proffer session and to shore up any weaknesses in

testifying that may have been revealed.

In addition to limiting or destroying a defendant's ability to testify, proffer statements can also constrain the testimony that defense counsel can safely elicit from other witnesses. The proffer agreements reviewed show that in most jurisdictions if defense counsel offers any evidence or the testimony of any witnesses that is materially different from any proffer statements, the prosecution may use the defendant's proffer statements in cross-examination or rebuttal. Accordingly, it is important to keep a copy of the client's proffer statement nearby when preparing to question any witness so that the defense does not inadvertently open the door to the admission of unhelpful statements by the defendant.

It is critical to fully understand the government's investigation, vet the client's narrative, and grapple with the potential issues a proffer session could have on trial strategy.

2. Impacts on the Theory of Defense

The most aggressive proffer agreements try to constrain defense counsel's arguments and positions at trial. As cited above, many of the proffer agreements reviewed assert that the government can use the proffer statements to rebut the defense's position if any argument or representation made by defense counsel is materially inconsistent with the client's proffer statements. For instance, if the lawyer offers a certain position in her opening statement that in some way contradicts or is inconsistent with what the client said in the proffer session, the government may argue that it can now seek to admit the proffer statement to rebut that position.

Depending on how aggressively these kinds of proffer provisions are asserted by the government at trial, a proffer could create significant hurdles to the defense throughout the trial. For example, a defendant might be on trial for participation in a conspiracy to submit false claims for medical treatment to Medicare. At the proffer, the client may have stated that it was her responsibility as chief billing person to review all Medicare claims before they were submitted for payment. At trial, defense counsel may wish to show that responsibility for claim submission rested with someone else in the company. The defense may want to question the government's lead investigator about another person in the company who held that responsibility. Under the proffer agreement, the prosecution could then try to elicit the defendant's proffer statements from the lead investigator or use the defendant's proffer statements in rebuttal.

While all proffer agreements begin with the promise that truthful statements will not be used in the government's case-in-chief against the defendant, that promise is potentially a narrow one. Statements that a defendant makes during a proffer session may become part of the evidence at trial if the defense is not careful to avoid taking any contrary positions through its arguments and questioning of witnesses. The proffer may seriously limit a defense's options as to present and argue its case to the jury. As a result, when read aggressively, the language of many of the agreements reviewed impacts a client's Sixth Amendment right to meaningful defense and effective counsel.

Court Decisions Analyzing Government's Aggressive Use of Proffers

Courts have made clear that they will hold both the government and the defense to the terms of the deal that the parties struck under the proffer agreement. A case that offers a particularly detailed analysis of the contours of a proffer agreement's ability to constrain the defense at trial is *United States v. Rosemond*.[3] In *Rosemond*, the defendant was tried for participating in a conspiracy to commit murder for hire. Before the trial, Rosemond participated in proffer sessions in hopes of reaching a cooperation agreement.[4] Under the terms of the proffer, the government was allowed to use his statements to rebut factual assertions made on his behalf at trial.[5] During one of the proffer sessions, Rosemond stated that he knew that his associates' actions would lead to the victim's death. Before the trial, the district court ruled that any argument by defense counsel that the government had failed to prove that Rosemond had intended to murder the victim would open the door to admitting his proffer statement.[6] On appeal, the circuit court found that the trial court had unduly restricted the defense's argument and questioning of witnesses.[7]

In overturning the district court's ruling, the Second Circuit made several notable holdings. First, it found that the protections of Rule 410 of the Rules of Evidence, which prohibit use of a statement during plea discussions at trial, could be waived through a proffer agreement as long as the waiver was knowing and voluntary.[8] It also found that proffer agreements "are contracts to be interpreted according to ordinary principles of contract law" and must be interpreted "to give effect to the intent of the parties."[9] It then went on to analyze whether the defense had made any "factual assertion" at trial that could be "fairly" rebutted by the proffer statement.[10] The mere fact that Rosemond had pled not guilty, the court found, was not a factual assertion that opened the door to the admission of the proffer agreement.[11] It also found that defense counsel may seek to demonstrate why the facts put in evidence by the prosecution were insufficient to meet any of the elements of the offense without triggering the admission of the proffer statement.[12]

Acknowledging that the line between challenging the sufficiency of the evidence and implicitly asserting facts is a "fine one,"[13] the court identified several examples of when a defendant "opens the door" for his proffer statements to be used at trial where the defendant had made contrary admissions during a proffer:

- Asserting in an opening statement that someone other than the defendant was the real perpetrator of the crime.
- Accusing a government agent, through cross-examination, that he had fabricated facts.
- Arguing that a shooting was "an intended kidnapping gone wrong" when the defendant admitted in a proffer session that the shooting was "an intentional murder."
- Proffering documentary evidence that implied that a cooperating wit-

> ness was not present as alleged by the government, where the evidence was offered not just to impugn the witness's credibility, but to prove a fact that contradicted the defendant's proffer statement.[14]

The lesson from *Rosemond* is that after a proffer during which the defendant has admitted to one or more elements of a crime, the defense must be very careful in tailoring its attack on that element of the government's case. The defense must restrain itself to attacking the sufficiency of the government's evidence on that element or risk opening the door to the admission made during the proffer.[15]

Although *Rosemond* shows that courts carefully police the terms of proffer agreements, they do at times find that the government properly admitted the defendant's proffer statements at trial. Recently, in *United States v. Lyle*,[16] the Second Circuit revisited *Rosemond*, this time finding that in a multidefendant case, one of the defense attorneys had opened the door to the admission of his client's statements during a prior proffer session. During openings, defense counsel stated that "we dispute [] the idea that [Lyle] was a dealer."[17] The Second Circuit held that because the proffer agreement allowed the government to introduce the defendant's statements "to rebut any evidence or arguments offered on behalf" of the defendant, the attorney's assertion was sufficient to allow in the defendant's statements during his proffer that (1) he had repeatedly distributed packages of methamphetamine, (2) he had accompanied another person to obtain and to deliver methamphetamine, and (3) he knew the location of the methamphetamine supplier.[18] These were all damning statements that the prosecution was able to present to the jury to rebut defense counsel's opening statements. Painfully, the Second Circuit points out that if defense counsel had instead stuck to only challenging the sufficiency of the government's evidence, this consequence would have been avoided.[19] Presumably had counsel instead stated that "the government does not have sufficient evidence to show that Lyle is a dealer," the proffer would not have been admissible. Additionally, although the judge instructed the jury that the evidence of Lyle's statements to the government were not to be considered in deciding the guilt of his co-defendant, it does not come as much of a surprise that both were ultimately convicted on all counts.[20]

Another example of how a defense attorney can unwittingly permit the admission of the client's proffer statements at trial is found in *United States v. Shannon*,[21] which found that the defense's cross-examination led to the admission of the defendant's proffer statements. At trial, the government sought to prove that the defendant, Shannon, was a "recruiter" for two health care agencies who paid money to Medicare patients in exchange for their information and signatures on falsified medical forms. The owner of the two health care agencies pled guilty to his part in the scheme and testified for the government at trial. During the defense's cross-examination of the owner, the defense pressed whether Shannon's payment of patients was merely a "rumor":

Q: That wasn't a rumor?

A: It was not a rumor if patient is calling and asking that Shannon had me sign the paperwork and did not give me the money he promised.

Q: Okay. *Well, if he didn't pay him the money that he promised, that means he didn't pay them, correct*?

A: That's why patient was calling, to get the money.

Q: Okay. I understand that's why they were calling, but they weren't paid, correct?

A: At that time, yes.

Q: Okay. And you have no firsthand knowledge of them actually paying the patient, correct? We've already established that, right?

A: Right, I did not see him because I was in the office.[22]

The Sixth Circuit found that this questioning amounted to "offering evidence" that the defendant had not, in fact, paid patients for assisting with the medical forms, which, under the terms of the proffer agreement, the government could rebut with the admission of the defendant's admission during a proffer session that he had made such payments.[23]

The importance of the precise language of the proffer agreement to define the scope of what can be admitted at trial is echoed in the First Circuit's decision in *United States v. Jiminez-Benecevi*.[24] In that case, a crucial issue at trial was whether the defendant was the individual in a surveillance video that showed a shooting taking place. The defense retained an expert to analyze the video, and the expert was expected to testify that the individual in the video was several inches taller than the defendant.[25] The government pushed back and argued that to counter this expert testimony, it should be permitted to admit the defendant's proffer statement that he was, in fact, the shooter shown in the video.[26] The court sided with the prosecution and told the defense that if it wanted to offer the expert's testimony, it had to inform the expert of the statements the defendant had made during the proffer session.[27] The First Circuit reversed, finding that under the terms of the particular proffer agreement the defendant has signed, his statements could only be used if the defendant himself testified "in a manner inconsistent with any information provided".[28] It contrasted this language with other proffer agreements that explicitly permitted the use of the defendant's statements "to rebut any evidence, argument or representation" made by the defense at trial.[29] The language of the proffer agreement therefore is critical and must be carefully evaluated.

Another case worth a brief mention and that again shows that appeals courts are prepared to do a close reading of the terms of a proffer agreement is *United States v. Melvin*.[30] In *Melvin*, the defendant was accused of participating in a drug conspiracy. As part of the investigation, the FBI had recorded a phone call between a cooperating witness and an unknown individual to arrange for a drug transaction.[31] After defendant Melvin was later arrested, he participated in a proffer session. A government agent who participated in the proffer session testified at Melvin's trial that he had familiarized himself with Melvin's voice during the proffer and could therefore identify him as the unknown individual on the call with the cooperating witness.[32] The First Circuit held that the agent's voice identification testimony violated the proffer agreement.[33] Like the Second Circuit, it found that proffer agreements must be interpreted based on principles of contract law, and that because the agreement forbade the government from using the defendant's statements "or other information provided" by the defendant "directly against him," the use of his voice was impermissible.[34] In reaching this conclusion, it also used the doctrine of "contra proferentem," under which an ambiguous term in a contract is construed against the drafter.[35] The central lesson of these cases is that courts will treat proffer agreements like any other contract and will hold both sides to the terms to which they have knowingly agreed.

Finally, it is important to remember that the limitations on the admissibility of proffer agreements also apply to sentencing proceedings. For example, in *United States v. Elshinawy*,[36] the district court found that the defendant had rendered his proffer statements admissible against him at sentencing because the defense had made contentions in their sentencing memoranda that were inconsistent with the defendant's proffer statement. Interestingly, in accepting the accuracy of the FBI report summarizing what the defendant stated during his proffer session, the court noted that "two defense attorneys were present during the proffer on August 2, 2017, and they do not contest the accuracy of the content of the Form 302."[37] This is a reminder that not only does defense counsel have an obligation to take good notes of the interview, but defense counsel may become a witness at a subsequent proceeding if it becomes necessary to dispute the government's summary of the client's statements.

General Considerations for Allowing the Client to Be Interviewed

Even with a full understanding of the risks, it is possible to decide that it is worth bringing the client in to the government for an interview pursuant to a proffer agreement. There may be genuine hope that a client's truthful statements will sway the government's view of the client and his role in the matters under investigation. It may also be possible to garner cooperation credit or to obtain more favorable plea terms. Informed by the risks described above, here are steps that should be undertaken when considering a proffer session.

1. Establish a Dialogue with Government Lawyers

Before agreeing to bring a client in for a proffer, it is imperative to establish a clear and productive dialogue with the government lawyers. Defense counsel rarely knows the strength of the evidence the government has gathered against his client or what witnesses have told the government or said during testimony before the grand jury. Conversations with the government attorneys create opportunities to gather facts as well as to test some of the factual or legal explanations the client might have for his conduct. Gauging the government's response to how defense counsel frames the issues and the client's conduct and knowledge is essential to determining whether a proffer session is a viable option. The tenor of these conversations and the level of information exchange they begin to generate can be an important first step towards a useful proffer session.

2. Obtaining Information from the Government Lawyers

White collar practitioners must engage in due diligence with government lawyers to determine whether a proffer session might be in a client's best interest. At the outset, it is critical to ask thoughtful questions to gather as much information as possible about the investigation, the government's view of the client, and the potential criminal exposure. This includes asking the government whether it views the client as a subject, target or witness, and what crimes the government believes may have been committed. Rather than simply advocating for the client's inno-

cence when communicating with the prosecution, it is often more important to ask questions, listen to the prosecutors' responses, and understand the government's investigation.

Another way to learn about the investigation is to try to understand what documents the government may have gathered. In white collar cases, the government commonly gathers voluminous records through subpoenas and warrants. Defense counsel can try to ask the government lawyers what documents they have reviewed and from whom they have gathered those documents. Government lawyers are not always willing to divulge this information or to share documents in advance of a proffer session, but at times a defense attorney can convince the government that the proffer session will be more productive if certain key documents are shared in advance.

Often the most effective way to learn about the investigation is for defense counsel to ask for a meeting with the government lawyers. Government lawyers often are willing to meet with criminal defense attorneys at any stage of a criminal case if they sense that the defense attorney may be willing to share information or insight that will be of assistance. What occurs at a pre-indictment meeting can vary broadly.

Offering to conduct an attorney proffer — explaining the client's position to the government — is a good way to test run the client's position without exposing the client to questioning by the government. Engaging the government in meaningful discussions requires some give and take. A good way to engage the government at the meeting is to establish a set of "discussion topics" in advance of the meeting. Raising a topic acknowledges information is of interest related to a person, document, or event, and can be an effective way to embark on substantive discussions. Organizing the meeting through a series of topics also assists in preparing the client for the proffer session.

If the government attorney is willing, it is generally helpful to engage in a reverse-proffer session at which the government lawyers describe the investigation to the criminal defense attorneys. The meetings are intended to illuminate the strength of the investigation and the potential usefulness of the client's proffer session with the government. These meetings are not a "give and take" but more of the government "putting its cards on the table." As a result, the government is generally willing to engage in a reverse proffer if it feels it will help the client and the defense attorney understand why a plea agreement and an agreement to cooperate with the government are in the client's best interest.

3. Evaluate the Client's Narrative

A client may have a compelling narrative to tell the government. This is a double-edge sword. Indeed, it could help the client avoid prosecution. Alternatively, the government may not accept the client's version of events, in which case the government will charge the client and will have had an opportunity to hear him out and question him. As a result, defense counsel has lost the element of surprise and the opportunity to present compelling testimony the government has not previously heard or questioned. Of course, if the client's narrative cannot first pass muster from defense counsel, the decision whether to advise the client to proffer is a simple one. Evaluating the client's narrative requires asking difficult questions and really pushing the client to determine how he or she would do in a proffer session.

4. Setting the Ground Rules

It can be helpful to try to establish ground rules with the prosecution about what topics the proffer session will cover. Some prosecutors take the position that they will not meet with a witness if there are constraints on the questions. However, often prosecutors are interested enough in what a potential defendant has to say that they will agree that the individual only has to answer questions about certain, predetermined topics. If the government strays from that agreed upon universe of topics, it is important for the defense attorney to be prepared to instruct the client not to answer and to potentially end the interview if the government's questions continue to go beyond the agreed upon scope.

5. Seek Input from Joint Defense Group

Seeking the input of lawyers in a joint defense group helps shape the decision whether to advise a client to engage in a proffer session. A good joint defense group has strong collective knowledge, experience, and wisdom in assessing a government investigation and the areas of potential criminal exposure. Shared information can also help evaluate the client's areas of exposure and likelihood of being criminally charged.

6. Prepare the Client for the Proffer Session

Regardless of a client's background, level of sophistication, and experience with the criminal justice system, there are 10 basic rules that every client must follow to have any sort of successful interaction with the government:

1. *Tell the truth.* While it may seem obvious, the starting point with any interaction with the government is to tell the truth. Lying during a proffer session will destroy all the benefits that might have been reaped and could open the door to additional criminal charges.[38]

2. *Listen to the question.* Many clients are anxious to "tell their side of the story" with the expectation of persuading the government of his or her innocence. Unfortunately, a client's eagerness to speak can cloud the first objective, which is to simply listen to the question asked and to answer it. Failing to answer the question also may make the client seem evasive and lead to frustration on the part of the questioner.

3. *Make sure you understood the question and ask for clarification or point out assumptions if needed.* Offering an effective response to an investigator's question requires a basic understanding of the question and a level of self-confidence to point out assumptions in it. To the extent that the client is unable to articulate a point of confusion or to seek clarification, defense counsel should be prepared to interject on behalf of the client.

4. *Wait. Think to yourself, not out loud.* Most clients are accustomed to speaking in a conversational style with others. In proffer sessions, clients must slow down, think, and articulate a response to the question asked. Thinking out loud can lead to the client providing extra information and opening new lines of inquiry unnecessarily. Thinking to oneself requires self-discipline and often takes practice. It is important that defense counsel do some mock questioning of the client to help the client develop these skills.

5. *Answer the question and stop.* Being loquacious will not score any points in a proffer session. An effective

response answers the question asked and does no more. If a simple "yes" or "no" fully answers the question, there is no need to embellish.

6. *Do not use "always" or "never" unless you are certain they apply.* Given the reality of everyday life, there is rarely a scenario where "always" or "never" applies. It is critical to err on the side of caution and not use these terms unless 100 percent confident they apply. Inevitably, when a client says that they have "never" done something, the prosecutor produces a document that shows the one instance when the client engaged in that precise behavior. Claiming that something never or always occurred also invites the government to discredit the client's proffer statement in its post-proffer investigation where it will seek evidence that verifies or discredits the client's statement. It is therefore better to train the client to say "I usually" or "it's my general practice to" rather than use absolutes.

7. *Say "I don't know" or "I don't remember" if that is a truthful answer.* Clients must understand that "I don't know" or "I don't remember" are fine responses to a question if truthful. Under the stress of a government interview, it is common for clients to suddenly have difficulty remembering facts or events they feel they should be able to recall. Government agents also often seem to expect clients to have perfect recall of events that may be months or even years in the past. If the client cannot recall what happened or perhaps was not even involved in certain events, it is important that he or she feel comfortable saying that to the agent rather than guessing or making up an answer.

8. *Do not guess unless you are told to do so and you make clear that it is just a guess.* If a client guesses at something without qualifying it as a guess, he is locked into that answer as it was given. This could work to the client's detriment at a trial or any subsequent proceeding where his proffer statement might be used.

9. *Do not turn the questioning into a conversation.* Clients struggle to stay focused and careful if they let the questioning devolve into a conversation. It is important that the client maintain the discipline to wait for a question, answer it, stop, and wait for the next question, even if this means that there are periods of silence.

10. *Ask to speak with your lawyer if you have any worries about an answer you have given or are being asked to give.* If a client is concerned about truthfully answering a question, she should consult with her attorney before giving the answer. Similarly, if the client is starting to lose focus worrying about a past answer, she should also ask to take a break and speak to her attorney to resolve the issue and return her focus to the present questioning. Prior to concluding a proffer session, it is also important to confer outside the government's presence to go over any areas of concern so that "the record" can be clarified before officially concluding the session.

Conclusion

While there is wisdom to the saying "no risk, no reward," that norm deserves careful consideration in the context of proffer agreements. As

reflected in the survey of various proffer agreements and recent case law, a client's decision to make a proffer could have profound effects on the defense's ability to effectively advocate at trial. The proffer may impact everything from counsel's oral arguments to witness examinations and the ability of the defendant to testify on his or her own behalf. As a result, it is critical to fully understand the government's investigation, vet the client's narrative, and grapple with the potential issues a proffer session could have on trial strategy. When a client is straddling the line between a target and witness in a white collar investigation, defense attorneys must not only evaluate the client's ability to handle the proffer, but also must think ahead about how a trial might unfold if the prosecution is unmoved by the proffer and an indictment follows. An attorney must try to envision how the opening statement, evidence, and theories of the defense at trial could be affected by the client's statement to the government. The stakes at a proffer session are high, and proffer agreements only offer a narrow barrier to the use of the client's statements at a subsequent trial.

Notes

1. We reviewed proffer agreements from the following jusrisdictions: Central District of California, District of Columbia, Southern District of Florida (2 versions), Northern District of Illinois, Southern District of Indiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, Southern District of New York, Eastern District of North Carolina, Eastern District of Pennsylvania, Southern District of Ohio, South Dakota, Middle District of Tennessee, the Northern District of Texas, the Department of Justice's Fraud Division, and the Securities and Exchange Commission. The authors thank the members of the Women's White Collar Criminal Defense Association whose members provided copies of proffer agreements in response to the authors' request.

2. A case examining what it means to make "derivative" use of a proffer statement is *United States v. Scott*, 12 F. Supp. 3d 298, 303-04 (D. Mass. 2014) in which the district court rejected the government's use of information obtained from the defendant's proffer to support a search warrant. The court held that the government's use of the data from a computer server that the defendant had provided to obtain a warrant to seize the exact same data was not "derivative use" of the information provided at the proffer. It held that the promises in the proffer agreement cannot be "overcome by simply making a copy of the thing proffered."

3. *United States v. Rosemond*, 841 F.3d 95 (2d Cir. 2016).

4. *Id.* at 103.

5. *Id.* at 110.

6. *Id.*

7. *Id.*

8. *Id.* at 107.

9. *Id.*

10. *Id.*

11. *Id.* at 110-11.

12. *Id.*

13. *Id.* at 108.

14. *Id.* at 109-110.

15. *Rosemond* also teaches that a defense attorney must take care to adequately explain the potential risks outlined in this article to her client before allowing the client to provide a proffer statement. After remand, the defendant in *Rosemond* later made an ineffective assistance of counsel argument asserting that his attorney had not provided adequate advice prior to the nine proffer sessions to which the defendant submitted prior to trial *See Rosemond v. United States*, 378 F. Supp. 3d 169, 182 (E.D.N.Y. 2019). Although the court rejected this claim, it highlights that clients often do not understand the language in a proffer agreement and may believe the agreements offer more protections than they actually do.

16. *United States v. Lyle*, 919 F.3d 716 (2d Cir. 2019).

17. *Id.* at 732.

18. *Id.* at 733.

19. *Id.* at 732.

20. *Id.* at 726.

21. *United States v. Shannon*, 803 F.3d 778 (6th Cir. 2015).

22. *Id.*at 781-82 (emphasis in original).

23. *Id.* at 786.

24. *United States v. Jiminez-Benecevi*, 788 F.3d 7 (1st Cir. 2015).

25. *Id.* at 13.

26. *Id.*

27. *Id.*

28. *Id.* at 16.

29. *Id.*

30. *United States v. Melvin* 730 F.3d 29 (1st Cir. 2013).

31. *Id.* at 32-33.

32. *Id.* at 33.

33. *Id.* at 38.

34. *Id.* at 36-37.

35. *Id.* at 37.

36. *United States v. Elshinawy*, Crim. No. ELH-16-009 (D. M.D. March 28, 2018), 2018 WL 1521876.

37. *Id.* at n.1.

38. This played out in *United States v. Moses*, No. 19-CR-6074EAW (W.D.N.Y. August 21, 2019), where a defendant was prosecuted for alleged false statements made during the proffer session. The defense tried to argue that the proffer agreement prohibited the charges as false statements could only serve as a basis for cross-examination at trial, and not for criminal charges. The magistrate judge reviewing the issue, however, disagreed and found that the plain language of the proffer agreement permitted the government to bring the charges. ■

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