Proffer Agreements

What Is Your Client Waiving and Is It Worth the Risk?

BY JOHN MCCAFFREY & JON OEBKER

Your client is the target of a federal investigation. He is offered the opportunity to speak with prosecutors and investigators so that they have "his side" of the story before determining whether charges will be pursued. You may ask yourself, "What do I have to lose?" Well, the answer is a great deal. By agreeing to have your client interviewed, also referred to as a proffer, you could give the government new leads, severely limit the ability to defend your client at trial, and waive the attorney-client privilege in subsequent civil litigation.

Proffer sessions are meetings between prosecutors and individuals who are the focus of an ongoing investigation. They are commonplace in criminal investigations. While a proffer session carries the potential to reduce or resolve a client's criminal exposure, it also presents a great deal of risk. Before participating in a proffer, prosecutors will typically require you and your client to sign a proffer agreement. These agreements can vary in the terms governing the arrangement. In analyzing whether to proffer a client, defense counsel must be acutely aware of the rights waived in a particular agreement and the negative consequences these agreements may have on a client if the case proceeds to trial. To proffer or not to proffer — that is the question!

While these agreements are commonly referred to as "proffer agreements," a more apt description would be to characterize them as "waiver agreements" as they typically exact a waiver of the protections provided by Fed. R. Crim. P. 11 and Fed. R. Evid. 410. Together these rules provide that "evidence of 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for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible against the defendant. It is well-settled that the protections afforded under these rules can be waived in proffer agreements, thus opening the door for a client's statements to be used against him at trial. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

Most proffer agreements allow the government to make indirect or "derivative" use of information revealed in a proffer session. Thus, the government will be free to pursue further investigative leads based on disclosures made during a proffer session. In addition to derivative use, standard proffer agreements allow the government to use a client's statements to impeach him if he testifies "inconsistently" at trial. What constitutes an inconsistency and who decides is where it gets interesting. A standard term in the agreement used by the United States Attorney's Office for the Northern District of Ohio which contains the following provision:

> [I]n the event that your client is a witness in any judicial proceeding, including but not limited to testimony before the grand jury or a trial, and offers testimony materially different from any statement made or other information provided during the proffer, the government attorneys may cross-examine [him or her] with, and introduce rebuttal evidence concerning, any statements made or other information provided during the proffer.

Some proffer agreements effectively gut a client's ability to mount a defense at trial. In some jurisdictions, prosecutors have used agreements to admit proffer statements not only to rebut inconsistent trial testimony, but also to rebut essentially *any* evidence or argument offered by the defense at trial. For example, a proffer agreement from the United States Attorney's office for the Eastern District of New York provides:

> [T]he Office may use any statements made by Client: (A) to obtain leads to other evidence, which evidence may be used by the Office in any stage of a criminal prosecution (including but not limited to detention hearing, trial or sentencing), civil or administrative proceeding, (B) as substantive evidence to cross-examine Client, should Client testify, and (C) as *substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of Client at any stage of a criminal prosecution (including but not limited to detention hearing, trial or sentencing).*(Emphasis added.)

In practice, the particular language of these agreements determines what triggering events open the door to the admission of a client's proffer statements at trial. For example, in *United States v. Gonzalez*, 309 F.3d 882 (5th Cir. 2002) the agreement provided: "[n]o statements that either you or Mr. Gonzalez make during these discussions can be used as evidence against him in any civil or criminal proceedings except the Government may use such statements for the purpose of cross-examination, impeachment and rebuttal *should your client testify at any proceeding contrary to this proffer*." *Id.* at 884 (emphasis added). There, the waiver provision of the proffer agreement was not triggered because the defendant did not testify. *Id*. at 886.

In contrast, the agreement in *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005) broadly permitted the government to use the proffer statements "to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [defendant] at any stage of a criminal prosecution." In *Barrow*, the defense counsel's opening statement and questions during cross-examination opened the door to the introduction of the defendant's incriminating proffer statements. *Barrow* noted that the mere fact of pleading not guilty or challenging a witness's perception or recollection of an event would be insufficient to trigger the waiver provision of the agreement. However, the court held that a cross-examination "accusing a witness of fabricating an event" or an opening statement suggesting that an event did not occur would open the door to the admission of the proffer statements against the defendant — during the government's case-in-chief. *Id.* at 118 – 119.

A proffer agreement may also severely restrict the evidence to be introduced at trial. The defendant in *United States v. Roberts*, 660 F.3d 149 (2d Cir. 2011) was accused of smuggling cocaine while working at JFK Airport. During the proffer, the defendant admitted his involvement in the drug conspiracy. The proffer agreement allowed the government to use any statements made during the proffer session "as substantive evidence to 'rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of [Roberts] at any stage of a criminal prosecution.'" This waiver provision was triggered when defense counsel simply offered two exhibits in an effort to prove that the defendant was not at JFK Airport on the date in question.

A proffer agreement may also waive your client's Fifth Amendment right to remain silent. In *United States v. Vella*, 414 Fed. Appx. 400, 2011 WL 652752 (3rd Cir. 2011), defense counsel's cross-examination of a government witness opened the door to *omissions* from the defendant's proffer statement. There, the defendant was accused of being a part of a bid-rigging scheme involving grants from the Department of Housing and Urban Development. In his proffer, the defendant was asked to disclose any contacts with another target of the investigation. In response, the defendant failed to mention a meeting that occurred at a Home Depot. At trial, when defense counsel mentioned the Home Depot meeting in opening statement and cross-examination of a government witness, the government sought to introduce the defendant's failure to mention the meeting during the proffer session. *Vella* held the failure to mention the meeting at the proffer and the subsequent reliance on the meeting at trial opened the door to the government's introduction of the failure to mention the meeting during the proffer statement. Because the defendant voluntarily agreed to speak to the government during the proffer, any omissions from the proffer statements enjoyed no Fifth Amendment protection. *Id.* at *4.

The restrictions resulting from a proffer agreement can continue to sentencing. In *United States v. Ozmon*, 713 F.3d 474 (8th Cir. 2013), the government was allowed to admit defendant's proffer statements at sentencing. The agreement in that case prohibited the government from using "any self-incriminating information provided by [Ozmon]" at the proffer interview unless Ozmon "denie[d] the same or present[ed] evidence to the contrary *at any hearing subsequent* to the signing of [the cooperation agreement]." *Id.* at 476 (emphasis added). Ultimately, defense counsel triggered the admission of defendant's proffer statements when his formal objections to the defendant's presentence report were inconsistent with the proffer statements. *Id.*

And, by participating in the proffer session, you and your client may be waiving the protection of the attorney-client privilege in subsequent litigation. In *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation,* 293 F.3d 289 (6th Cir. 2002), the Sixth Circuit rejected the concept of "selective waiver" and held that the disclosure of privileged information to the Department of Justice in an effort to settle a Medicare and Medicaid fraud investigation acted as a waiver of the attorney-client privilege in a subsequent civil lawsuit. Following this precedent, the court in *Mainstay High Yield Corporate Bond Fund v. Heartland Industrial Partners, L.P.*, 263 F.R.D. 478, at fn. 4 (E.D. Mich. 2009) noted that statements given during proffer sessions were discoverable in a subsequent civil case.

The decision whether to proffer a client is one of the most difficult choices facing any defense counsel. Depending on the proffer agreement, the ramifications of an unsuccessful proffer could be devastating to the trial of the matter. Thus, when faced with the decision to proffer or not to proffer, defense counsel and the client need to thoroughly evaluate whether the proffer is worth the price. Make certain you read carefully the agreement presented to you and your client.

John McCaffrey is a former FBI Special Agent and Prosecutor. He is a Partner at Tucker Ellis LLP where his practice focuses on white collar criminal defense and business litigation. He is a Fellow of the American College of Trial Lawyers. He can be reached at john.mccaffrey@tuckerellis.com.

Jon Oebker is a former Cuyahoga County Prosecutor and Assistant Attorney General for the State of Ohio. He is Counsel at Tucker Ellis where he also practices in the areas of white collar criminal defense and business litigation. He can be reached at jon.oebker@tuckerellis.com.