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Expert Analysis

To Proffer or Not to Proffer? That Is the Question

Lawyers familiar with white collar criminal investigations know well the dangers of engaging in client “proffers.” A client proffer occurs when a client is interviewed directly by the prosecutor during the course of the investigation, even as the prosecutor is trying to build a case, perhaps against that very client. From the defense lawyer’s perspective, such sessions are fraught with peril; a statement by the client made innocently, but inaccurately, may provide the spark that sets the investigation on fire. Nonetheless, counsel are often confronted with the practical reality of clients who want to speak to the government, perhaps to be cooperative or to avoid regulatory or employment sanctions, and who want to understand the proffer process.

Typically, a proffer takes place pursuant to a proffer agreement, which is colloquially known as a “Queen for a Day” agreement. As the name suggests, the agreement was originally designed to provide protection to the client witness to encourage the client to come forward and be candid with the government, even though the government was investigating and might seek to prosecute the client in the future. Although initially most proffer agreements limited the ability of the government to use the statements by the client in any case brought against her, over time, the protections afforded by the proffer agreement have been largely eviscerated.

In both the Eastern and Southern districts of New York, the language in standard proffer agreements has been expanded greatly to permit the government to use proffer statements against the client in many ways, including to rebut any inconsistent



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evidence or arguments offered or elicited by the defense, even on cross examination of government witnesses, and, in the Southern District, to rebut arguments or issues raised sua sponte by the court.¹ And, in *United States v. Barrow*, the Second Circuit held that the scope of such rebuttal testimony includes not only proffer statements that directly contradict factual assertions

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advanced by the defense, but any evidence that fairly counters and casts doubt on the truthfulness of such assertions, whether they are made directly or implicitly.²

As a result, today, a typical proffer agreement may well offer less protection to a client than an interview undertaken without any agreement at all. This peculiar result occurs because the typical proffer agreement now requires the client to waive her rights under Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence. To the extent an interview with the government is part of a plea negotiation, the Rules may offer substantially more protection to a client than a proffer agreement.

Rule 11(f) of the Federal Rules of Criminal Procedure provides that the “admissibility

or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.” Rule 410 prohibits the admission into 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.”

The underlying purpose of Rule 410 is the same as the initial purpose behind the proffer agreement—to promote plea negotiations and facilitate the investigative process by permitting defendants to talk openly to prosecutors without sacrificing their ability to defend themselves at trial if no disposition is reached. But although Rule 410 and the proffer agreement may have sprung from the same well, the various waiver clauses added to proffer agreements by the government have limited the protection offered by the proffer process far more than that offered by the Rules.

The protection offered by the Rules, however, is limited to the circumstances where the Rules apply. And here, the case law suggests a causal connection must exist between the statements and an attempt to negotiate a plea to a particular charge.

As noted by one court, “even where there has been a plea bargain, the lack of a causal connection between the bargain and the confession precludes exclusion of the confession.”³ In other words, establishing the “causal connection”—that the client made the statement during a plea discussion—becomes critical to obtaining the protection of Rules 11(f) and 410. While one might think that any time a client under investigation agrees to speak with the prosecutor in the hopes of obtaining leniency she is implicitly engaging in plea negotiations, the limited case law addressing this issue does not take such a broad view.

Plea Discussions

As a preliminary matter, for a client’s statements to the government to be made “in the course of plea discussions,” the individual must be facing actual or imminent

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criminal charges;⁴ where the prosecution is not even contemplating charges, there is nothing to negotiate. The Second Circuit has made clear that the single most important factor in determining if such statements are protected under the Rules is whether the individual has “express[ed] the hope that a concession to reduce the punishment will come to pass.”⁵ Simply offering to cooperate without requesting anything in return is insufficient to qualify a conversation as plea bargaining.⁶ Someone seeking the protections of the Rules is therefore required to “at least...make manifest his intention to seek a plea bargain before he takes the route of self-incrimination.”⁷

Accordingly, although not strictly necessary for a finding that a client’s discussions with the government constitute plea negotiations, a court may examine whether the parties discussed potential terms of a plea in making this determination.⁸ Although the Second Circuit has recognized that preliminary discussions—i.e., discussions that do not reference specific terms of a plea agreement—may be entitled to protection under the Rules,⁹ other circuits require specific discussion of the plea. And an individual’s mere efforts to convince a prosecutor that she is not guilty of any crime and should not be charged are generally not protected by the Rules.¹⁰

By this reasoning, a “plea bargain” is an agreement in which the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor. Thus, where the defendant does “not contemplate pleading guilty either to the charges for which he [is] being held or to any other charges,” his statements may not qualify as plea negotiations under the Rules.¹¹

Further, the defendant’s goal in engaging in the discussion must be for a reduced punishment, and not solely for another reason (for example, to avoid deportation or to obtain leniency for a third party).¹²

Courts in the Southern and Western districts of New York have looked to the two-step analysis established by the Fifth Circuit in *United States v. Robertson* for guidance in determining whether certain statements arise in the course of plea negotiations and are thus protected under the Rules.¹³ Although the Second Circuit has not yet adopted this specific test, the focus of the test is similar to the Second Circuit’s focus; namely, whether the defendant made “manifest his intention to seek a plea bargain.”¹⁴

Accordingly, under the first prong of *Robertson*, the courts examine “whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion.” Second, the court considers “whether the accused’s expectation was reasonable given the totality

of the objective circumstances.”

Notably, under this analysis, the failure of a client to make known his intent to plea is fatal to a finding he was engaged in plea negotiations, because a “silent hope, if uncommunicated, gives the officer or prosecutor no chance to reject a confession he did not seek.” However, once a prosecutor is on notice that the client intends to try to negotiate a plea, the prosecutor must affirmatively reject the possibility of a plea agreement to remove the discussion from the cover of Rules 11(f) and 410.¹⁵

Other Limits

Because, under Rules 11(f) and 410, the government cannot use an individual’s statements to impeach her or to rebut any arguments offered on her behalf at trial, including those issues raised sua sponte by the court, the Rules offer broader protection than today’s standard proffer agreement. But the Rules do have certain limits, in addition to applying solely to statements made to the prosecution in the course of plea discussions. For example, Rule 410 itself sets forth two exceptions to the inadmissibility of such statements. First, evidence of plea discussions is admissible “in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.” Second, under the rule, statements a defendant makes during plea discussions are admissible “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.”

It also appears that the Rules protect only statements made during plea negotiations, and not derivative evidence found

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by the government as a result of the statements; many courts, including the Western District of New York, have held there is no “fruit of the poisonous tree” theory under the Rules.¹⁶ Notably, however, the Second Circuit has suggested in dicta that it might find otherwise, stating: “‘Rule 11...[is] designed to [be] applied to statements that are to be used in evidence, or evidence

obtained through the use or exploitation of the statements.’”¹⁷

Finally, the terms of any plea agreement can limit the protections provided by the Rules. In short, once the parties reach a final agreement, the terms of the agreement supersede the Rules and control for any subsequent proceeding.¹⁸

Conclusion

The inquiry into what constitutes “plea discussions” covered by Rules 11(f) and 410 is highly fact-specific. Attorneys who choose to rely on the Rules instead of a proffer agreement when taking clients in to speak with the government can maximize the chances that a court will conclude the Rules apply by, for example, clearly stating to the prosecuting attorney early in the negotiation process the client’s intent to engage in discussions with the goal of reaching a plea deal, and making sure any written material presented to the prosecutors are labeled clearly as related to such discussions.



1. See, e.g., *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005); *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004).

2. 400 F.3d at 120-121.

3. *United States v. Levy*, 578 F.2d 896, 902 (2d Cir. 1978).

4. *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1148 (2d Cir. 1978).

5. *Levy*, 578 F.2d at 901; see also Fed. R. Evid. 410 advisory committee’s note.

6. E.g., *Levy*, 578 F.2d at 901; *United States v. Moore*, 463 F. Supp. 1266, 1272 (S.D.N.Y. 1979); *United States v. Morgan*, 91 F.3d 1193, 1196 (8th Cir. 1996).

7. *Levy*, 578 F.2d at 901.

8. *United States v. Stern*, 313 F. Supp. 2d 155, 168 (S.D.N.Y. 2003); see also *Morgan*, 91 F.3d at 1196.

9. *United States v. Serna*, 799 F.2d 842, 849 (2d Cir. 1986), abrogated in part on unrelated grounds by *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993); *United States v. Fronk*, 173 F.R.D. 59, 68-9 (W.D.N.Y. 1997).

10. E.g., *United States v. Cunningham*, 723 F.2d 217, 228 (2d Cir. 1983) (in dicta); see also *United States v. Kerik*, 531 F. Supp. 2d 610, 619 (S.D.N.Y. 2008).

11. *United States v. Cross*, 638 F.2d 1375, 1380 (5th Cir. 1981).

12. *Arroyo-Angulo*, 580 F.2d at 1148; *United States v. Robertson*, 560 F.2d 647, 651 (5th Cir. 1977).

13. *United States v. Mannino*, 551 F. Supp. 13, 18 (S.D.N.Y. 1982); *Fronk*, 173 F.R.D. at 67-8; see also *United States v. Robertson*, 582 F.2d 1356, 1364-68 (5th Cir. 1978).

14. *Mannino*, 551 F. Supp. at 19 (quoting *Levy*, 578 F.2d at 901).

15. Id. at 19; see also *United States v. Galestro*, 2008 WL 2783360, at 22 (E.D.N.Y. July 15, 2008).

16. See, e.g., *Fronk*, 173 F.R.D. at 71; *United States v. Stein*, 2005 WL 1377851, at 14 (E.D. Pa. June 8, 2005); *United States v. Cusack*, 827 F.2d 696, 697-98 (11th Cir. 1987).

17. *United States v. Hinton*, 703 F.2d 672, 679 (2d Cir. 1983).

18. *United States v. Stirling*, 571 F.2d 708, 731 (2d Cir. 1978); *United States v. Doe*, 671 F. Supp. 205, 208 (E.D.N.Y. 1987).