New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 231—NO. 104 TUESDAY, JUNE 1, 2004

WHITE-COLLAR CRIME

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Allowing Use of Proffer Statements at Trial

The "proffer" session is a method by which the subject of an investigation conveys information directly to the prosecution to either establish the value of his or her cooperation or to render explanations of conduct designed to preclude prosecution. It is a valuable tool for the prosecution, as it allows a first-hand assessment of the credibility of the person proffering as well as his or her story. What is unclear is whether proffers represent the best way for a subject to convey information to the prosecution for several reasons. First, 18 U.S.C. §1001 applies to the session and prosecutors seem to be prone to utilizing that statute whenever they believe they have been lied to. Second, the proffer session is now conducted under a written agreement that is so one-sided that it provides little protection against the use of the statement against the person proffering if no deal is struck and prosecution follows.

'Queen for the Day' Agreements

The standard proffer agreements offered by the U.S. Attorney's Offices for the Southern and Eastern Districts of New York, also known as "Queen for a Day" agreements, traditionally have provided that the government agrees not to offer any of the proffered statements in its case-in-chief or in

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connection with any sentencing proceeding[1] but may use the proffered statements to pursue leads and to impeach subsequent testimony. In recent years, prosecutors in the Southern and Eastern Districts have expanded the terms of the agreement to allow the government to use the statements to rebut any evidence or arguments offered by or on behalf of the defendant.[2] Thus, those who agree to participate in a proffer session are required to waive their rights under Rule 410 of the Federal Rules of Evidence, which prevents the use of proffer statements at trial against the person who made them.[3] This provision has made most defense practitioners uncomfortable and, as a result, has been challenged when invoked by the government at trial. With the Second Circuit's decision earlier this year in *United States v. Velezi*v[4] and an opinion issued by a Southern District judge just days later, *United States v. Parra*,[5] defendants will have a harder time challenging that waiver provision.

The argument against the enforceability of the waiver provision typically is (1) that the proffer agreement was not entered into knowingly and voluntarily; (2) that the agreement is unconscionable or otherwise unenforceable-a contract law argument often based on the uneven relationship between the person making a proffer and the prosecutor; and/or (3) that the agreement violates "Sixth Amendment rights to make a defense [at trial] and to have the effective assistance of counsel in making that defense."[6]

In its 1995 decision in *United States v. Mezzanatto*,[7] the U.S. Supreme Court, in an opinion by Justice Clarence Thomas, held that, per the agreement so providing, the government could use a defendant's statements during plea discussions to impeach him where the defendant himself testified at trial in a manner inconsistent with those statements.

United States v. Mezzanatto

The Court held that, "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of [Rule 11(e)(6)(D) of the Federal Rules of Criminal Procedure and Rule 410] is valid and enforceable."[8] In response to an argument based on the unequal bargaining power of prosecutors and people engaging in proffer negotiations, the Supreme Court stated, "[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether." In a concurring opinion, three Justices noted that the case was about using proffer statements for impeachment only and warned that "a waiver to use such statements in the case in chief would more severely undermine a defendant's incentive to negotiate and thereby inhibit plea bargaining."

Until a couple of years ago, the law in this

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circuit concerning whether Rule 410 could be waived in proffer agreements tended to favor defendants. The Second Circuit seized on the "knowing and voluntary" standard in *Mezzanatto* one year later in *United States v. Ready*.[9] *Ready* involved a waiver in a plea agreement (not a proffer agreement) of the right to appeal, not of rights under Rule 410. But the court's language is applicable to the waiver of other "essential rights"[10]: courts must "scrutinize waivers closely," i.e., "assure that the waiver … is knowing and voluntary," and "apply them narrowly … using applicable principles of contract law." The *Ready* court also noted that "the Government ordinarily has certain awesome advantages in bargaining power."

Quoting extensively from *Ready*, Southern District U.S. District Judge William Pauley, in *United States v. Lauersen*[11] found that the defendant there had not "knowingly waived her rights as to the admissibility of statements made during her proffer for purposes beyond impeachment," including "to 'rebut' evidence or arguments presented on her behalf." The facts in *Lauersen* established that though the defendant had been advised that her statements could be used to pursue leads and impeach her, neither the defendant's attorney nor the prosecutor had given the defendant any explanation of the portion of the agreement regarding the ability of the government to use her statements to rebut positions she might adopt at trial.

The defendant in *United States v. Duffy*[12] secured an even more definitive victory in the Eastern District, where Judge Nina Gershon — with a focus on the Sixth Amendment — used strong language to strike down the U.S Attorney's Office's standard waiver provision allowing the government to use the defendant's proffer statements "to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of" the defendant. Without reaching the question of whether the defendant's waiver was knowing and voluntary, the court, relying on the Sixth Amendment, found that the provision caused the defendant to "effectively forfeit[] fundamental aspects of his rights to make a defense at trial and to the effective assistance of counsel at trial."

Judge Gershon expressed practical and "line-drawing" concerns as well. While the defendant's attorney, the court found, would not be required "to sit silently at trial," the waiver provision "does prevent him from making any sort of meaningful defense" since "any affirmative theory of factual innocence… would permit the government to offer [the] proffer." The court also addressed concerns based in contract law; after noting that the "awesome" disparities between prosecutor and defendant "are not diminished merely because a defendant is executing a proffer agreement rather than a plea agreement." The court found that the waiver provision at issue "exploits this power imbalance."

The Tide Turns

United States v. Gomez,[13] a Southern District case decided in 2002, was the first sign that the courts in this Circuit might follow the leads of other Circuits addressing this issue [14] and not continue to find fault with the waiver provision allowing the government to use proffer statements to rebut the defendant's case. In *Gomez*, Southern District Judge Denny Chin took a somewhat literal contract-law based approach, rejecting what the defendant in Gomez referred to as the "bright-line rule" of *Duffy*. "To the contrary," Judge Chin wrote, "I hold that where a proffer agreement is entered knowingly and voluntarily and its terms are clear and unambiguous…it is enforceable, at least to the extent that the Government may use the defendant's proffer statements to rebut evidence or arguments offered on his behalf at trial, even where he does not testify."

Judge Chin reasoned that a "proffer agreement is a contract that should be enforced in accordance with principles of contract law." The "parties should be held to the terms of their agreement," which provides a benefit to both: the defendant gets an opportunity to be heard and may receive a substantial downward departure in sentencing; in return, he must be truthful. "Fairness requires," the court went on, "that he be held to that agreement" because "[i]f the proffer agreement is not enforced, a defendant will have less incentive to be truthful."

The relative disparity between prosecutors and defendants did not trouble Judge Chin. While the court admitted that the government "does have significant bargaining power in these situations," it claimed that that is because the government "has substantial evidence to prove the defendant's guilt." A disparity based in the defendant's guilt "is no basis for holding the agreement unenforceable."

The *Gomez* court also relied on the policy argument that "plea bargaining and cooperation should be encouraged." If proffer agreements are not enforced, the court reasoned, prosecutors will be reluctant to enter into cooperation agreements because they will not have assurance that the defendant will tell the truth. Finally, the court addressed the Constitutional and practical concerns raised in *Duffy*. "Defense counsel," the court claimed, "are able to put on a meaningful defense without opening the door to the admission of proffer statements" and may even present evidence inconsistent with a defendant's proffer statements. If they do so, however, "it is only fair that the Government then be permitted to present the defendant's own words in rebuttal."

In *United States v. Velez*, the U.S. Court of Appeals for the Second Circuit considered the validity of a waiver provision "identical to the one" in *Gomez* and reached an identical result, adopting almost identical reasoning.[15] After reviewing *Mezzanatto*, *Duffy*, and *Gomez*, the court "respectfully decline[d] to adopt the position advanced in *Duffy*, and… note[d] with approval the recent, contrasting opinion in" *Gomez*. Quoting extensively from that opinion, the Second Circuit adopted Judge Chin's contract law and policy arguments, and also noted, like Judge Chin, that "a defendant remains free to present evidence inconsistent with his proffer statements, with the fair consequence that, if he does, 'the Government [is] then…permitted to present the defendant's own words in rebuttal.' "

In a nod to *Duffy*, the *Velez* court stated that it "do[es] not lightly dismiss the observation in *Duffy* that the Government holds significant bargaining power in arranging proffer sessions and securing a waiver provision as a prerequisite for a defendant's participation." But the court agreed with the *Mezzanatto* language that

"[t]he mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether" and took Judge Chin's position that any disparity "is likely attributable to the Government's evidence of the defendant's guilt."

Just one week after the *Velez* decision, Southern District Judge Peter Leisure issued an opinion in *United States v. Parra* revisiting the waiver issue. Though the court recognized that "Velez upholds the Proffer Agreement not only against constitutional challenges, but also against…arguments… grounded in contract law," the court nonetheless laid out in detail the contract law arguments concerning Rule 410 waiver provisions as none of the prior courts in the Circuit had.

The court first found that the defendant — whose attorney had reviewed the terms of the proffer agreement with him before they signed it (as had the Assistant U.S. Attorney at the proffer session) — had knowingly and voluntarily waived the provisions of Rule 410.[16] It was not necessary, the court held, for the government to prove that it had used "layman's terms" in explaining the agreement; "but only that defendant understood the Agreement's terms so that he could knowingly decide whether to sign" it.

In addressing the defendant's next claim, that "some or all of the form proffer agreement is void in every case because it violates principles of contract law," the court noted that those principles require that "courts construe ambiguities in proffer agreements against the drafter, the government" and "apply fairness principles to the terms of the proffer agreement." The court then knocked down each of the defendant's three contract law arguments: that the terms of the proffer agreement are ambiguous; that the agreement is void for unilateral mistake of fact; and that the agreement is void for lack of consideration. Finally, the court found that broad use of the government's proffer agreement does not violate public policy.

In finding the agreement "clear and unambiguous," the court concluded that "the government need not define every word in the proffer agreement it drafts" as "[t]o do so would burden the proffer agreement with legal explanations, warnings, and technicalities, perhaps making it less clear." The court then observed that the defendant's mistake of fact argument-that he assumed that by signing the proffer he was going to reduce his jail time-"simply restates in contract law terms his argument that he did not knowingly and voluntarily waive his rights."

Defendant's lack of consideration argument was the most interesting to Judge Leisure, who noted that "the Court has not found any case that has addressed the issue of consideration in a proffer agreement." Defendant's argument was that, though the government admittedly had conferred a benefit on him by meeting with him, the proffer agreement itself does not state the benefit of the bargain offered by the government and therefore the agreement should be invalidated because the lack of consideration renders it unconscionable. After pointing out that "[j]udges in this Court have found uniformly that a defendant receives something of value by signing the form proffer agreement" — the "opportunity to be heard"[17] — Judge Leisure concluded that the agreement did make a statement that, though "minimal … sufficiently memorializes the benefit the government confers." The agreement stated, "[t]he Client has agreed to provide the Government with information, and to respond to questions, so that the Government may evaluate Client's information and response in making prosecutive decisions."

It is our view that lawyer's proffers are far safer than client proffers. Client proffers should be avoided if a possibility of trial exists because the proffer agreement substantially restricts the ability to defend.

1. This article discusses the use of proffer statements at trial. For cases on the use of proffer statements at sentencing, see *United States v. Fagge*, 101 F3d 232 (2d Cir 1996); *United States v. Chaparro*, 181 FSupp2d 323 (SDNY 2002); *United States v. Doe*, No. 96 CR 749, 1999 WL 243627 (EDNY 1999).

2. See, e.g., provisions at issue in *United States v. Velez*, 354 F3d 190 (2d Cir 2004) (Southern District provision), and in *United States v. Duffy*, 133 FSupp2d 213 (EDNY 2001). Perjury, obstruction of justice and false statements prosecutions are always excepted from these provisions.

3. Rule 410 provides that "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 who made the plea or was a participant in the plea discussions."

4. 354 F3d 190 (2d Cir. 2004).

5. 302 FSupp 2d 226 (SDNY 2004).

6. *United States v. Duffy*, 133 FSupp2d 213.

7. 513 US 196 (1995).

8. The Court's reference to these rules reflects the fact that Fed R Crim P 11(e)(6)(D) previously contained language substantively identical to Rule 410 of the FRE; Rule 11 underwent an amendment in 2002, which eliminated Rule 11(e)(6)(D) and added Rule 11(f), which simply cross-references Rule 410 of the FRE

9. 82 F3d 551 (2d Cir 1996).

10. *United States v. Duffy*, 133 FSupp2d 213; see *United States v. Lauersen*, No. 98CR1134, 2000 WL 1693538 (SDNY Nov. 13, 2000) (interpreting Ready).

11. 2000 WL 1693538.

12. 133 F Supp2d 213.

13. 210 FSupp2d 465 (SDNY 2002).

14. See *United States v. Krilich*, 159 F3d 1020 (7th Cir 1998), cert. denied, 528 US 810 (1999); *United States v. Burch*, 156 F3d 1315 (DC Cir1998), cert. denied, 526 US 1011 (1999).

15. Prior to *Velez*, at least two other Southern District judges had agreed with the *Gomez* analysis as well; see *United States v. Avendan*o, No. 02 CR. 1059, 2003 WL 22454664 (SDNY Oct. 29, 2003) (Swain, J.); *United States v. Chen Xiang*, No. S102CR271, 2003 WL 21180400 (SDNY May 20, 2003) (Casey, J.), as had at least two Eastern District judges, see *United States v, Maynard*, 232 F. Supp 2d 38 (EDNY) (Weinstein, J.); *United States v. Calvin Johnson*, 02 CR 259, slip op. (EDNY 2002) (cited in *Maynard*).

16. The court distinguished *Lauersen* and *Avendano* cases where the court found the waiver was knowing and voluntary based on weaker evidence than that in *Parra*.

17. Citing *Gomez* (Chin, J.) and *Chaparro* (Cote, J.).

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