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Dangers of Proffering Information to the Government

For the criminal justice system to work effectively, communication between the prosecution and the defense is important. Defense attorneys constantly consider whether to provide information to the government as to the lack of culpability of their clients. Sometimes they seek to offer valuable cooperation to prosecutors or simply want to plea bargain in an attempt to insulate clients from a prolonged period of incarceration.

Historically, much of the needed exchange of information to effectuate these processes comes from the client proffering information for prosecution evaluation. Over time, federal prosecutors have made this process more and more difficult by imposing through proffer agreements a series of stringent rules surrounding any direct tendering of information by subjects of investigations or defendants. This has led to many defense attorneys refusing to engage in client proffer sessions and instead utilizing as a substitute the attorney's proffer. The recent Kerik indictment demonstrates that this method of communication also poses peril to the client, even in the absence of a proffer agreement.

Proffer Sessions

• ***The Law Governing the Admissibility of Statements Made During Proffer Sessions.*** Recognizing the importance of communication between the defense and prosecution, the law generally deems statements made during proffer sessions to be inadmissible in subsequent court proceedings against a client pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence. Rule 11(f) provides that "[t]he admissibility

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or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

Rule 410(4) states that except as otherwise provided, "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for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible against the defendant. Rule 410 has two exceptions, namely: "such a statement is admissible: (i) 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, or (ii) 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."

Proffers Made by Clients

Prosecutors are not fond of these protections as they believe that they encourage misinformation to be provided without deterrence. Thus, the proffer agreement was invented to cause these protections to be waived. In *United States v. Mezzanatto*, the Supreme Court held that a defendant may waive the right to prevent the admissibility of proffered statements so long as the waiver is knowing and voluntary. The Court concluded that since "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution," evidentiary rules should be subject to a similar presumption.[1]

The modern proffer agreements contain significant waivers of a client's rights regarding the admissibility of the statements made during the proffer session. These waivers permit the government to use the statements against the individual in a variety of circumstances. For instance, a typical agreement drafted in the U.S. District Court for the Southern District of New York provides that the statements may be used "to rebut any evidence or arguments offered by or on behalf of the 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 the Client."[2] This clause severely limits the defense in a trial following a failed proffer.

District and circuit courts have applied the Supreme Court's decision in *Mezzanatto* broadly in allowing the government to use a defendant's proffer statements as rebuttal evidence. This is true even where the defendant does not testify. In *United States v. Barrow*,[3] the defendant appealed his drug convictions arguing that the admission into evidence of his pretrial proffer statements were erroneous. The U.S. Court of Appeals for the Second Circuit held that the waiver provisions of the defendant's proffer agreement were triggered by defense counsel's opening statement and cross-examination of witnesses.

Mr. Johnson was arrested for selling crack to a confidential informant on multiple occasions in the spring of 2001. Mr. Johnson then sought to cooperate. He signed a proffer agreement which provided that prosecutors could use his proffer statements "as substantive evidence to cross-examine [Mr.] Johnson and as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [Mr. Johnson] at any stage of a criminal prosecution."[4] At the ensuing proffer sessions, Mr. Johnson made several statements to the

prosecutors admitting that he sold crack cocaine and dealt drugs at the location in question. Ultimately, Mr. Johnson decided not to cooperate with the government.

In his opening statement, the defendant's lawyer told the jury that the government's case was one of mistaken identity. This defense was furthered during cross-examination of certain witnesses during trial. Thereafter, the government argued that it was entitled to rebut the assertions made by counsel in his opening statement and on cross-examination with proffer statements made by Mr. Johnson admitting that he sold crack on the same street on which the crime occurred. Mr. Johnson's attorney objected, noting that while his client had made this admission, "[h]e did not admit…that he sold on any of the occasions presently charged in the indictment."

The government argued that this distinction was "disingenuous" because "at the time of the proffer statements," Mr. Johnson had access to the complaint which charged specifically the dates and details of the transactions that occurred at the location in question. The district court ruled that defense counsel's assertions were rebutted by evidence of the defendant's proffer statements "that he sold crack cocaine from that location during the same time period," although the court advised counsel that he could argue to the jury that the admissions did not relate to the dates charged in the indictment.[5]

Appealing the district court's decision, Mr. Johnson argued that only a specific or direct contradiction between his proffer statement and an assertion by counsel could trigger the waiver clause contained in his agreement with the government. The Second Circuit disagreed. The court found that the proffer agreement waiver extended to any proffer statement that fairly rebuts a factual assertion made on the defendant's behalf. Indeed, the court found that the waiver provision could be applied to any evidence offered directly or elicited on cross-examination, and that the statement made during counsel's opening statement unequivocally identifying someone else as the perpetrator of the crime was a "'factual assertion' within the four corners of the waiver provision."[6]

The 'Barrow' Decision

Barrow is in line with other cases that have found that proffer statements may be used in rebuttal even if the defendant does not testify or offer evidence in direct contradiction to statements made during the proffer sessions.[7] Courts also have held that the government may use certain proffer statements in their case-in-chief. In *United States v. Burch*,[8] the defendant was convicted of possession with intent to distribute cocaine. He appealed his conviction arguing in part that the trial court was erroneous in allowing the government to use in its case-in-chief certain statements made by the defendant during debriefing sessions with the government and at a plea hearing.

After his arrest, Mr. Burch entered into plea negotiations with the U.S. Attorney's Office, culminating in an agreement in which he pleaded guilty to possession with intent to distribute. Later, defendant filed a motion seeking to withdraw his guilty plea alleging that he was innocent and had agreed to plea because of threats from a codefendant. After a hearing, the trial court allowed Mr. Burch to withdraw his guilty plea, but stated that it would not allow him the benefit of Rule 11 or Rule 410 to restrict the admissibility of certain statements that he had made.

The defense bar views the proffer agreement as akin to a contract of adhesion. Courts have acknowledged that the government holds bargaining power in arranging proffer sessions and securing waiver provisions as a prerequisite for a defendant's participation.

Finding that Mr. Burch had voluntarily and knowingly waived his rights under these rules in his plea agreement and at the time of his guilty plea colloquy, the trial judge ruled that statements made during post-agreement debriefing sessions and at his guilty plea could be used as part of the prosecution's case.[9] The U.S. Court of Appeals for the District of Columbia Circuit affirmed this decision, finding that the trial court did not abuse its discretion in permitting the admission of these statements.[10] The trial court did limit its holding, however, noting that statements made during plea negotiations—before the execution of a formal plea agreement—could only be used for rebuttal or impeachment purposes.

The defense bar views the proffer agreement as akin to a contract of adhesion. Courts have acknowledged sympathetically that the government holds significant bargaining power in arranging proffer sessions and securing waiver provisions as a prerequisite for a defendant's participation. Yet courts resist invalidating the waiver provisions of proffer agreements, concerned that to do so would be in "direct contravention of the criminal justice system's legitimate goal of encouraging plea bargaining in appropriate circumstances."[11]

The defense argues that just the opposite is true. Observers contend that significant risks exist for defendants entering into proffer agreements given that they ultimately hamstring defenses at trial. As a result, many contend that the terms of proffer agreements should at least be limited to permit waiver only for the purposes of "1) impeachment of a criminal defendant who testifies at variance with the proffer, and 2) rebuttal of defense witness testimony that materially and explicitly conflicts with the proffer."[12] Some counsel attorneys to advise their clients to refuse to sign proffer agreements in most circumstances, reasoning that the client will still have the protections of Rule 11 and Rule 410 and that "[i]f the government needs the information, the AUSA will proceed [without an agreement]."[13]

Attorney Proffers: Kerik

To avoid the consequences of a failed proffer, in some instances, defense counsel provide information to the government outside the presence of the client. Until recently, this was deemed a safe course of conduct. The government's case against former New York City Police Commissioner Bernard Kerik demonstrates that significant risks lurk in such attorney proffers.

In November 2007, a grand jury in the Southern District of New York returned a 16-count indictment against Mr. Kerik charging him with conspiracy to deprive New York City and its citizens of honest services, filing false tax returns, making a false statement on a loan application, and making false statements to the Executive Branch of the federal government. The charges contained in the federal indictment grew out of an investigation into Mr. Kerik's activities by the New York City Department of Investigation and the Bronx County District Attorney's office. In June 2006, these investigations led Mr. Kerik to plead guilty in state court, pursuant to a plea agreement, to two misdemeanor charges involving violations of the New York City Administrative Code and the New York City Charter.[14]

During the Bronx investigation, the government was looking into whether Mr. Kerik had received illegal benefits from a construction company in exchange for business for the company from the city. At issue were approximately $255,000 of improvements made to Mr. Kerik's home

apartment. In addition, questions arose as to whether Mr. Kerik improperly concealed a loan that he obtained from a realtor to make the down payment on the apartment.

Mr. Kerik's attorneys met with the Bronx investigators and related certain information from their client. According to the government, Mr. Kerik's attorneys told investigators that: 1) Mr. Kerik had paid for all of the renovations to his apartment himself and that they had totaled approximately $50,000 and 2) Mr. Kerik had taken a loan from a realtor in order to make the down payment and that the loan was repaid in 2003.[15] During his guilty plea, however, Mr. Kerik allocuted that: 1) he accepted $165,000 in renovations to the apartment from the construction company knowing that the company intended to engage in business dealings with the city and 2) he failed to disclose on required annual financial disclosure reports that he had outstanding loans from the realtor. After accepting his guilty plea, the state court sentenced Mr. Kerik to fines and penalties totaling $206,000.

Shortly thereafter, the federal government began its investigation into Mr. Kerik's conduct, including certain actions taken by Mr. Kerik during the Bronx investigation and allegations of obstructive behavior on his part. Mr. Kerik was represented in the state investigation by two attorneys, only one of whom continued to represent him during the federal investigation. After Mr. Kerik was indicted, the government informed the attorney that his representation in both the state and federal cases posed a possible conflict of interest.

Specifically, the government announced its intention to call as a witness the other attorney who represented Mr. Kerik in the state action in support of their conspiracy charges against Mr. Kerik, arguing that the attorney's testimony would show Mr. Kerik's efforts to conceal his corrupt agreements from investigations. According to the government, the attorney would testify both as to the false exculpatory account by Mr. Kerik of the renovations to his apartment and the admission the defendant made concerning the loan from his realtor.[16]

Further, the government indicated that they would seek to develop and corroborate the attorney's testimony by inquiring about statements made by Mr. Kerik in front of both attorneys, including the one who continued to represent him in the federal action. Accordingly, the government argued that the current attorney would either be subpoenaed as a witness or act as an unsworn witness, creating a conflict of interest when the attorney cross-examined his former colleague or addressed the testimony in his closing statements. For these reasons, the government sought remedial action by the court.

In response, Mr. Kerik's attorney argued that the statements at issue were made in connection with plea discussions and therefore were not admissible under Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure. The defense asserted that because Mr. Kerik exhibited a subjective expectation to negotiate a plea at the time of the discussion and that Mr. Kerik's expectation was reasonable, the circumstances pursuant to which the statements were made constituted "plea discussions" under the rule.[17] Further, the defense argued that this applied whether the statements were made directly by the defendant or by an attorney authorized to make such statements. Because the statements were inadmissible, the defense reasoned that Mr. Kerik's attorney faced no conflict.

The government replied that despite the ultimate guilty plea the statements at issue were not plea discussions, but statements made denying the defendant's guilt. Citing the Second Circuit in *United States v. Levy*,[18] the government asserted that although Rule 410 was intended to encourage a defendant's participation in plea discussions, it should not be read so broadly as to immunize patently untrue statements.

Further, the government asserted that even if the circumstances under which Mr. Kerik's attorney proffered the statements to the state investigators could be characterized as plea discussions, they would still not be excludable under the rules. Focusing on the qualifying portion of Rule 410(4), the government argued that because the statements at issue were made during discussions that ultimately resulted in a guilty plea which was not withdrawn, they were not inadmissible under the rule.[19] Reasoning that the evidence was highly relevant, necessary, and admissible the government argued that Mr. Kerik's attorney should be disqualified due to an unwaivable conflict.[20]

In January 2008, the court ruled in favor of the government, disqualifying Mr. Kerik's attorney as counsel, writing that it was "impossible for this Court to see how [the attorney's] representation of the Defendant does not jeopardize both the Defendant's right to effective assistance of counsel and the court's need to preserve the integrity of the process."[21] Concluding that the statements at issue were not privileged because they were communicated with the intention that they would be passed on to government's investigators and also were admissible under the crime-fraud exception, the court found that Mr. Kerik's attorney was operating under an unwaivable conflict. Accordingly, Mr. Kerik was given 30 days to find conflict-free counsel.

Conclusion

Although tactically sound, prosecutors' insistence on utilizing proffered statements against defendants discourages communication between prosecution and defense. This is neither envisioned by the rules nor good for the system. Until the government changes it views, however, defense counsel must be cautious when considering whether to counsel a client to proffer information to the government or sign a proffer agreement.

1. 513 U.S. 196, 201 (1995).
2. National Association of Criminal Defense Lawyers, Materials for Panel Discussion on Proffers, Philadelphia, Pa. (May 4, 2006) (available at http://www.nacdl.org/__852566CF0070A126.nsf/0/2894D892ACFD589A8525715E00703873?Open).
3. 400 F.3d 109 (2d Cir. 2005).
4. Id. at 113-114
5. Id. at 114-115.
6. Id. at 119.
7. See also *United States v. Krilich,* 159 F.3d 1020 (7th Cir. 1999) (holding that proffer statements can be offered to rebut testimony elicited on cross-examination).
8. 156 F.3d 1315 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999).
9. Id. at 1319.
10. Id. at 1323.
11. *United States v. Velez,* 354 F.3d 190, 195-96 (2d Cir. 2004).
12. Benjamin A. Naftalis, "'Queen for a Day' Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules," Columbia Journal of Law and Social Problems (2003).
13. Diana Parker, "Defending Federal Criminal Cases," Law Journal Press (2007).
14. Letter from the Government to Honorable Stephen C. Robinson, *United States v. Kerik,* 07 Cr. 1027 (Nov. 29, 2007).
15. Id. at pp. 3-4.
16. Id. at p. 9.
17. Memorandum of Law in Opposition to the Government's Motion to Disqualify Counsel, *United States v. Kerik,* 07 Cr. 1027 (Dec. 7, 2007) (setting forth Second Circuit's two-tier analysis to determine whether a particular set of facts and circumstances constitutes a plea discussion).
18. Letter from the Government to Honorable Stephen C. Robinson at p. 13, *United States v. Kerik,* 07 Cr. 1027 (Dec. 12, 2007) (citing *United States v. Levy,* 578 F.2d 896 (2d Cir. 1978)).
19. Id. at pp. 14-15.
20. The parties also disputed whether the statements were protected by the attorney-client privilege. The substance of those arguments are not the subject of this article.
21. *United States v. Kerik,* 531 F. Supp.2d 610 (S.D.N.Y. 2008).