

Navigating the Cooperation Process in a Federal White Collar Criminal Investigation

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A Practice Note examining the process when representing individuals and companies cooperating in a federal white collar criminal investigation. Specifically, this Note explains initiating and maneuvering through the cooperation process (including proffers and cooperation agreements), trial testimony, and sentencing.

Once an individual or entity decides to try to become a government cooperator (see Practice Note, *Evaluating Whether an Individual or Entity Should Cooperate in a Federal White Collar Criminal Investigation* ([w-005-4546](#))), the process usually begins with a proffer (see Proffers). If the government accepts the individual or entity as a cooperator, the two parties typically execute a written agreement (see *The Agreement*). Throughout this process, the cooperator should be aware of the potentially severe consequences for seeking to withdraw from the agreement (see *Withdrawal from the Agreement*).

PROFFERS

The government does not offer or agree to cooperation without first knowing how the potential cooperator can assist the government's investigation. The cooperation process typically begins with either an attorney proffer or a client proffer. An attorney proffer is where counsel meets with the government without the client present and outlines hypothetically what the client is expected to state during a client proffer (see *Attorney Proffers*). A client proffer is where the client, with counsel present, meets with the government and answers its questions (see *Client Proffers*). A proffer agreement governs a client proffer and typically waives any of the client's protections under Federal Rule of Evidence (FRE) 410. The proffer agreement only provides the client with limited protections.

ATTORNEY PROFFERS

Because a client proffer exposes the client's statements to potential later government use (see *Pitfalls of a Client Proffer*), the ideal starting point of cooperation is for counsel to offer the government

an attorney proffer. The government does not always accept counsel's offer to provide an attorney proffer. An attorney proffer carries slightly less risk than a client proffer because, among other reasons, it can be difficult for the government to use an attorney's statements against the client. The government may, however, use the statements to further its investigation.

During an attorney proffer, counsel should explain the client's participation in the conduct under investigation and the ways in which the client may assist the government's investigation. If the client has engaged in significant misconduct that is outside the scope of the government's investigation, counsel should consider asking the government whether cooperation is still available even if the government learned about the misconduct. If counsel is seeking a non-prosecution agreement (NPA), counsel should advocate for why that type of agreement is appropriate (see *The Agreement*). To prepare for the initial attorney proffer, counsel should have extensive discussions with the client on all topics counsel intends to cover during the proffer to ensure that counsel accurately conveys the client's information.

Counsel should inform the government that the statements she makes are hypothetical and that she does not have first-hand knowledge regarding the contents of the statements. During the attorney proffer, counsel should recount the information she has prepared in advance and typically not respond to any questions the government asks with additional information she has not prepared and vetted with the client. Counsel generally should respond to the government's questions by stating that she needs to discuss them with her client first and follow-up with the government at a later time.

Following the attorney proffer, the government prepares a report memorializing the meeting. The government may disclose the report to a defendant as *Brady* or Jencks material in a trial where counsel's client testifies on the government's behalf (see, for example, *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 161-65 (2d Cir. 2008) (ordering a new trial because the government violated *Brady v. Maryland*, 373 U.S. 83, 87 (1963) when it failed to provide the defense the government's notes from an attorney proffer)).

Counsel must therefore ensure that:

- She does not veer off of her script that the client has approved.
- A paralegal or another attorney takes accurate notes.

Counsel should assess the government’s reaction to the information disclosed in the attorney proffer. Counsel should ask the government:

- Whether it found the information truthful and possibly helpful to its investigation.
- Whether and with what obligations the government is likely to offer the client:
 - a cooperation agreement;
 - an NPA; or
 - a deferred prosecution agreement (DPA).

Counsel can then determine whether to either:

- Offer another attorney proffer.
- Bring her client in to proffer.
- Withdraw from the process altogether.

Without receiving some comfort from the government regarding a favorable resolution, it is usually unfavorable to proceed further.

If the government is interested in the client cooperating and implies that if everything goes well the client would receive an NPA or the government would submit a substantial assistance motion, the next step is typically a client proffer session.

CLIENT PROFFERS

The client generally must participate in a proffer before the government offers a cooperation agreement, an NPA, or a DPA. The attendees at a client proffer session typically include:

- The client, which in the case of an entity is its representative (typically in-house counsel).
- The client’s counsel.
- The prosecutors.
- The federal agents.

The cooperator usually must sign a proffer agreement, which provides the cooperator with some protection from the government’s use of statements made during the proffer session against the cooperator in any later proceeding. Before the first client proffer, counsel should explain the proffer agreement to the client in detail and answer any questions. At the beginning of the client proffer, the prosecutor asks the client whether counsel has explained the agreement and if the client has any questions. Even if counsel has explained the proffer agreement, prosecutors often explain the terms again and then ask the cooperator to sign the agreement.

During a client proffer, the prosecutors and agents interview the client in an effort to evaluate:

- The importance of the client’s information to the government’s investigation.
- The client’s exposure to criminal charges in the investigation.
- The client’s credibility.
- The client’s potential to be a persuasive witness in a grand jury proceeding or at trial.
- Any aspects of the client’s background that the government may need to address during direct examination at a trial. For example:

- drug or alcohol abuse;
- psychiatric disorders; or
- unrelated criminal conduct.

As early as the first attorney or client proffer, the government should outline the types of assistance it expects. Counsel should indicate her initial view on whether she believes a cooperation agreement, an NPA, or a DPA is appropriate and ask for the government’s view. If counsel is not personally familiar with the prosecutor or the agency, division, office, or section involved, she should seek assistance from the local bar regarding the types of agreements typically offered and the reputations of the prosecutors handling the case.

The cooperation process generally requires more than one client proffer and often can require many more for the government to be comfortable that the client is being truthful (see *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993) (recognizing the risk to obtaining the truth when the government uses rewarded criminals as witnesses and expecting the government “to take all reasonable measures to safeguard the [criminal justice] system against treachery”). The government seeks to corroborate everything the client states using, for example, other witnesses or documents (see *United States v. Osorio*, 929 F.2d 753, 761-62 (1st Cir. 1991) (holding that the government is obligated to affirmatively seek out impeachment material)).

The number and length of the proffers depend on:

- The complexity of the subjects involved in the investigation.
- The type of cooperation the client is providing.
- The client’s actual and perceived truthfulness.
- The client’s criminal history.

The government can require a cooperator to participate in an investigative operation without counsel present. Counsel should obtain an agreement with the government extending the protections of the proffer agreement to any statements the cooperator makes during any investigative operation. Otherwise, the government can use the cooperator’s statements made during the investigative operation against the cooperator.

Proffers generally are not audio or video recorded. A member of the prosecution team (a prosecutor, paralegal, or agent) instead usually takes notes and then often prepares a memorandum based on those notes. When an FBI agent takes notes, for example, the agent usually prepares a memorandum on Form 302. When a cooperator testifies at trial, the government usually provides the defense all proffer memoranda as *Brady* or *Jencks* material and also may provide the underlying rough interview notes. Counsel must take accurate notes during the client proffers in case an inconsistency arises with the government’s proffer notes.

Counsel also should take careful notes during every client proffer because counsel needs a complete record of the client’s cooperation to:

- Negotiate an appropriate sentencing recommendation with the government and the probation office.
- Persuasively describe the client’s cooperation at the sentencing hearing to obtain the best sentence for the client.

For more information on memorializing a proffer, see Standard Document, Internal Investigations: Witness Interview Memorandum ([w-001-3894](#)).

PITFALLS OF A CLIENT PROFFER

The single largest risk of any client proffer is that the client provides untruthful information or fails to disclose information, which, at a minimum, can jeopardize the individual's ability to obtain a cooperation agreement and, in the worst case, can subject the individual to prosecution for either:

- Making false statements (18 U.S.C. § 1001).
- Obstruction of justice (18 U.S.C. §§ 1503, 1505, and 1512(c)).

Before agreeing to a client proffer, clients must understand and accept the importance of complete honesty and full disclosure. It usually is counterintuitive for clients to disclose their participation in criminal activities. Therefore, counsel should not subject a client to a proffer unless and until the client is prepared to be unconditionally honest and forthcoming and not attempt to minimize her role in the criminal conduct.

Another significant risk of a client proffer is that after the proffer, the government does not offer a cooperation agreement. The proffer agreement typically provides that the government will not use statements made during the proffer against the client, except under certain exceptions. The proffer agreement also typically requires the client to waive her rights under FRE 410. Therefore, any statement made during the proffer that does not result in a guilty plea and that falls within one of the agreement's exceptions permitting the government to use the statement, can be used against the client in several ways under certain circumstances, potentially compromising her ability to defend against any prosecution (see *United States v. Rosemond*, 2016 WL 6436837, at *11-12 (2d. Cir. Nov. 1, 2016) (listing circumstances where defendant's trial testimony may and may not allow the government's use of the defendant's prior statements made during a proffer)).

For example, during a proffer, if an individual discussed her stock trading activity and later testified at her trial that she never traded a share of stock, the government can, under most proffer agreements, offer into evidence the client's contradictory statements. Most proffer agreements also permit the government to use proffer statements as leads to obtain other evidence.

In many cases, an individual's statements during a proffer are so incriminating that they preclude any credible trial defense, potentially leaving the individual without:

- Cooperation credit.
- The ability to meaningfully contest the charges.

MITIGATING THE CLIENT PROFFER'S PITFALLS

To protect against the risks, counsel should consider:

- Offering an attorney proffer (see Attorney Proffer).
- Obtaining assurances from the prosecutor (after confirming through due diligence the trustworthiness of the prosecutor) that a cooperation agreement is a likely outcome for counsel's client if the client is:

- truthful;
 - willing to cooperate; and
 - valuable to the government's investigation.
- Limiting any initial client proffer to a discussion of the conduct under investigation and not permit the client to respond to any unrelated questions. This can minimize the risk that the government investigates and prosecutes the client for activities beyond what the government already knows. The government may insist on exploring certain areas even during the initial proffer as a condition to obtaining future cooperation credit. Counsel may need to make a decision on the spot regarding the degree of questioning to permit, if any.
 - Speaking to the government without executing a proffer agreement. Under FRE 410, statements made during plea negotiations generally are not admissible. Therefore, FRE 410 can be used to protect proffer statements made in the absence of a proffer agreement. This approach, however, carries a significant risk that a judge later reviewing the proffer statements does not find them to be statements made in the context of plea negotiations. The law on this issue is inconsistent amongst the circuits (compare *United States v. Barrow*, 400 F.3d 109, 116 (2d Cir. 2005) (holding that FRE 410 covers a defendant's proffer statements) and *United States v. Penta*, 898 F.2d 815, 817-818 (1st Cir. 1990) (holding that "plea discussions means plea discussions" and FRE 410 does not protect preliminary discussions); and see *United States v. Edekmann*, 458 F.3d 791, 804-06 (8th Cir. 2006) (applying rule that courts must evaluate the totality of circumstances to determine whether statements were made "in the course of plea discussions")). Conversely, with an executed proffer agreement, the government must at least demonstrate that the defendant opened the door before it may use the proffer statements.
 - Prosecutors may refuse to meet with the client without an executed proffer agreement, which forecloses the client's opportunity to become a cooperator.

THE AGREEMENT

The DOJ principally enters into three kinds of agreements with cooperators to reward substantial assistance:

- Cooperation agreements (see Cooperation Agreements).
- NPAs (see NPAs).
- DPAs (see DPAs).

In a cooperation agreement, the cooperator agrees to plead guilty and cooperate with the government in exchange for the government's promise to move for a substantial assistance departure at sentencing. Unlike cooperation agreements, NPAs and DPAs do not require a guilty plea, but instead only require cooperation in exchange for the government's promise not to prosecute or to later drop the charges.

For individual cooperators, the government more frequently uses NPAs and cooperation agreements. DPAs generally are for cases in which the government determines that it is appropriate to dismiss previously-filed felony or misdemeanor charges after a period of compliance. Prosecutors typically employ DPAs for entities and generally do not use them for individuals, except for certain low-level offenses where the government finds that the appropriate disposition is the dismissal of the charges.

COOPERATION AGREEMENTS

A cooperation agreement is a type of plea agreement settling the charges against a defendant. Each agency, division, office, and section uses different forms for cooperation agreements. A cooperation agreement typically takes the form of a written plea agreement under Rule 11 of the Federal Rules of Criminal Procedure (Rule) and is signed by:

- The defendant.
- The defense attorneys.
- The government attorneys.

The government usually presents the signed written agreement at the time of the defendant's guilty plea to the judge, who either accepts or rejects it. The most common reason a judge rejects a cooperation agreement, as with any plea agreement, is where the defendant cannot provide a sufficient factual allocution to the charged criminal conduct. Although defendants typically enter cooperation agreements hoping to be rewarded for their help in the form of a reduced sentence or fine, the government does not and cannot guarantee this benefit. The sentencing judge retains the discretion to impose any reasonable sentence up to the statutory maximum.

Before entering into a cooperation agreement, counsel should attempt to obtain sample agreements from prior cases with the same agency, office, division, or section from, for example, the government's website or the local bar. Counsel also should consult with attorneys experienced with the prosecutors involved in the case to negotiate the best overall package. Although the government rarely deviates from its standard form agreements, there may be points on which the government is flexible as a matter of local practice. For example:

- The extent of crimes included in the plea, for example, some jurisdictions require the cooperating defendant to plead to all crimes, while other jurisdictions may allow a defendant to plead to only some of the defendant's admitted crimes.
- The extent of other criminal conduct for which the government agrees not to prosecute the defendant in the future.
- The extent to which the immunity provisions exclude certain crimes, for example, most federal plea agreements exclude criminal tax violations from the immunity provisions.
- The calculation of the applicable sentencing range under the Sentencing Guidelines, which the government may or may not include in a cooperation agreement.
- The calculation of financial penalties, such as restitution and forfeiture, for example, some cooperation agreements refer to specific amounts, while others leave the amounts open.
- The extent to which the government agrees to provide any other form of assistance besides writing a substantial assistance letter, for example, the government may promise to bring an individual's cooperation to the attention of state authorities or immigration authorities.

(For examples of cooperation agreements, see Plea and Cooperation Agreement, *United States v. Chandler*, No. 211-cr-511 (E.D. Cal. Feb. 24, 2012), Plea and Cooperation Agreement, *United States v. Lipkin*, No. 10-cr-228 (S.D.N.Y. May 31, 2011), and Plea and Cooperation Agreement, *United States v. Davida*, No. 15-cr-534 (N.D. Ill. Sept. 8, 2015).)

Because a cooperation agreement is a formal contract, judges interpret the agreement according to contract law principles. The cooperator's obligations can include commitments to:

- Waive indictment.
- Plead guilty to one or more specified crimes contained in a criminal information (Fed. R. Crim. P. 7).
- Participate in government interviews.
- Disclose information about all known criminal activity.
- Participate in investigative operations.
- Produce all requested non-privileged documents and other tangible evidence.
- Not commit further crimes.
- Disclose the existence and status of all money, property, or assets of any kind obtained through the cooperator's participation in criminal activity.
- Cooperate with other agencies, such as the SEC.
- Prepare to give testimony (see Trial Testimony).
- Testify truthfully, if called:
 - before a grand jury;
 - at trial; and
 - at any pre- or post-trial hearing.

The government typically retains the right to:

- Decide whether to make a substantial assistance motion (see The Government's Refusal to Make a Substantial Assistance Motion).
- Make a sentencing recommendation.
- Bring to the court's attention all relevant facts that:
 - are related to the cooperator's criminal activity; and
 - affect the Sentencing Guidelines calculation.

Counsel must consider negotiating the following terms with the government before the client enters into a cooperation agreement:

- The charges to which the cooperator will plead guilty.
- The number of counts to which the cooperator will plead guilty.
- Any enhancements the government will seek to include in its proposed Sentencing Guidelines calculation (see, for example, US Sentencing Guidelines §§ 2B1.1(b)(2), 2B1.1(b)(10)(C), 3B1.1, and 3C1.1).
- The loss or gain calculation the government will seek to include in its proposed Sentencing Guidelines calculation (see, for example, US Sentencing Guidelines § 2B1.1(b)).
- The conduct for which the government will grant immunity (although immunity offers an important protection for the client, it also highlights the uncharged conduct to the probation department and the judge).

A cooperation agreement may state that the government will not use any incriminating information provided under the agreement against the client (US Sentencing Guidelines § 1B1.8(a)). Even if the government includes this language in the agreement, the government may still use incriminating information learned from cooperation against the client:

- If the government knew of the information before the parties entered into a cooperation agreement.

- To determine the relevant Criminal History Category and whether the defendant is a Career Offender under US Sentencing Guidelines § 4B1.1.
- In a prosecution for perjury (18 U.S.C. §§ 1621, 1623), obstruction of justice (18 U.S.C. §§ 1503, 1505, and 1512(c)), or making a false statement (18 U.S.C. § 1001).
- If the defendant breaches the cooperation agreement (see Cooperation Agreements).
- In connection with a government 5K1.1 motion for a downward departure (for example, the government is allowed to disclose any involvement learned during proffers to explain to the court the defendant's assistance even if this disclosure causes the court to learn of bad acts that would otherwise be withheld (see *United States v. Mills*, 329 F.3d 24, 29-31 (1st Cir. 2003))).

(US Sentencing Guidelines § 1B1.8(b) (1)-(5).)

This language in the agreement also does not protect incriminating statements the client makes to the probation department during a presentence interview and the government or court can use those statements against the defendant at sentencing (see *United States v. Jarman*, 144 F.3d 912, 914-15 (6th Cir. 1998) and *United States v. Miller*, 910 F.2d 1321, 1325-26 (6th Cir. 1990)).

The government generally requires that defendants plead guilty to the most serious readily provable charge consistent with the nature of the criminal conduct that:

- Has an adequate factual basis.
- Makes likely the imposition of an appropriate sentence.
- Does not adversely affect the investigation or prosecution of others.

(See US Attorneys' Manual § 9-27.430.)

Various government agencies, divisions, offices, and sections may interpret these guidelines differently. For example, some US Attorney's Offices require cooperators to plead guilty to every offense the cooperator committed, regardless of whether the government has evidence to prove the conduct beyond the cooperator's own admissions. Other US Attorney's Offices only require a plea to the offense or offenses that are the subject of the immediate investigation.

Similarly, judges may take different approaches when weighing a defendant's cooperation at sentencing. For example, where cooperators plead guilty to conduct that the government previously had been unaware of, some judges view this as an example of the cooperator's honesty and good faith, and reduce the sentence accordingly. Other judges may believe that the cooperator's admission does not excuse the conduct and weigh the additional charges when sentencing the cooperator.

Counsel may seek to include in the agreement a particular range for the government's sentencing recommendation. Notably, although the government can agree to recommend a specific sentence or sentencing range under Rule 11, the government generally does not enter into those types of agreements with cooperators (Fed. R. Crim. P. 11). Cooperation agreements instead typically leave open the full range of sentencing possibilities. This helps enhance the cooperator's credibility if she testifies at trial, because the government can tell the jury that the cooperator has not been guaranteed any particular sentence in exchange for her testimony.

If the cooperator complies with her obligations under the cooperation agreement, cooperation agreements typically require the government to:

- Before sentencing, bring the timeliness, nature, extent, and significance of the cooperator's cooperation to the attention of the probation office and the judge.
- Make a substantial assistance motion requesting the judge impose a lenient sentence to reflect the cooperator's substantial assistance in the investigation and prosecution.
- Not oppose a downward departure adjustment for acceptance of responsibility under US Sentencing Guidelines §§ 3E1.1(a) and (b) (US Sentencing Guidelines §§ 3E1.1(a) and (b)).

Courts construe any ambiguity in a cooperation agreement against the government (see, for example, *White v. United States*, 425 A.2d 616, 618 (D.C. 1980)).

A cooperator's failure to fulfill any provision in a cooperation agreement constitutes a breach, which may relieve the government from its reciprocal obligations (see The Government's Refusal to Make a Substantial Assistance Motion). Cooperation agreements typically include language that prevents the defendant from withdrawing her guilty plea, even if the government rescinds the cooperation agreement due to the defendant's breach. This creates the possibility that a cooperator pleads guilty but does not obtain any benefits from cooperating. The government often asserts that a cooperator breached a cooperation agreement when the cooperator did not testify truthfully (see, for example, *SEC v. Conradt*, No. 12-cv-8676 (S.D.N.Y. June 16, 2016) (finding that the cooperator breached his cooperation agreement by "watering down his prior testimony" and ordering disgorgement of \$980,000 instead of the \$2,500 previously agreed to in the cooperation agreement)).

Even if the cooperator breaches the agreement, the government can still make a substantial assistance motion. The government's motion informs the judge of everything, good and bad, about the cooperator.

NON-PROSECUTION AGREEMENTS (NPAs)

In an NPA, the government typically agrees not to prosecute an individual for certain alleged crimes in exchange for the individual's agreement to:

- Provide substantial assistance to the government's investigation.
- Disclose information about all known criminal activity.
- Produce all requested non-privileged documents, records, or other tangible evidence.
- Disclose the existence and status of all money, property, or assets of any kind obtained through the individual's participation in criminal activity.
- Pay some amount of restitution, including any taxes that were not paid.
- Cooperate with other agencies, such as the SEC.
- Testify truthfully, if called:
 - before a grand jury;
 - at trial; or
 - at a pre- or post-trial hearing.
- Not commit further crimes.

The NPA is signed by:

- The defendant.
- The defense attorneys.
- The government attorneys.

The government generally disfavors NPAs because they allow cooperators to admit wrongdoing without facing legal consequences. The DOJ has strict guidelines for NPAs and only approves them in rare cases. (See US Attorneys' Manual § 9-27.620.)

The US Attorneys' Manual instructs prosecutors to insist on an offer of proof or its equivalent from defense counsel before entering into an NPA (US Attorneys' Manual § 9-27.620). Therefore, the government requires one or more proffers before agreeing to an NPA (see Client Proffers).

Before the government enters into an NPA, the following three circumstances must exist:

- The unavailability or ineffectiveness of other means of obtaining the desired cooperation.
- The apparent need of the cooperation to the public interest.
- Approval by an appropriate supervisory official.

(US Attorneys' Manual § 9-27.600.)

First, the prosecutor must examine whether any other methods of obtaining cooperation are available, including:

- Seeking cooperation after a trial and conviction.
- Bargaining for cooperation as part of a plea agreement under Rule 11(c) (Fed. R. Crim. P. 11(c)).
- Compelling cooperation under a use immunity order (18 U.S.C. §§ 6002-6005 and see US Attorneys' Manual Criminal Resource Manual §§ 716, 717, and 718).

(US Attorneys' Manual § 9-27.600.)

Because these methods leave open the possibility of prosecution, the DOJ prefers each over entering into an NPA (US Attorneys' Manual § 9-27.600 (instructing that it is "desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct")).

Second, the prosecutor must weigh all relevant circumstances to determine whether cooperation is in the public interest, including:

- **The importance of the case.** This is a significant threshold issue. According to the US Attorneys' Manual, prosecutors only should use NPAs in cases involving serious offenses or where "successful prosecution is otherwise important in achieving effective enforcement of the criminal laws."
- **The value of the cooperation.** Prosecutors must carefully assess the probative value of the cooperation. Prosecutors should consider whether:
 - the cooperator will be forthcoming;
 - the cooperator's testimony or other information will be credible;
 - the cooperator's testimony or other information can be corroborated by other evidence;
 - the cooperator's testimony or other information will materially assist the investigation or prosecution; and

- substantially the same benefit can be obtained from someone else without an agreement not to prosecute.

■ **The cooperator's relative culpability and criminal history.**

Ordinarily, it is not in the public interest to use someone with greater culpability as a cooperator (for example, the leader of the criminal enterprise), to prosecute lower level participants. Likewise, it is not in the public interest to enter into an NPA with someone who has committed other serious offenses.

(US Attorneys' Manual § 9-27.620.)

Counsel should use these factors and the client's mitigating circumstances to argue that an NPA is warranted. Mitigating factors for an individual may include that the cooperator:

- Did not fully appreciate her actions or the results that would occur.
- Did not and could not profit personally from the criminal conduct.
- Has no prior criminal history.
- Has positive or sympathetic personal characteristics.
- Compares favorably with other cooperators who received NPAs in past cases.

For an entity, a mitigating factor may be that the employees' criminal actions violated the corporation's code of conduct, policies, or rules.

Third, a prosecutor must secure approval from the US Attorney or a supervisory Assistant US Attorney before entering into an NPA, to ensure that NPA policy and practice remains uniform across districts (US Attorneys' Manual § 9-27.620). The particular supervisory approvals vary across offices, but typically include both a unit chief as well as a more senior supervisor.

Even if a prosecutor promises an NPA, the prosecutor's supervisor may still reject the NPA. Individuals seeking NPAs should, if possible, obtain a signed agreement before taking actions that place them in legal jeopardy, such as:

- Testifying on the record about criminal conduct.
- Producing documents to the government over which the individual may otherwise have claimed a Fifth Amendment act-of-production privilege (see *Fisher v. United States*, 425 U.S. 391 (1976) and *United States v. Hubbell*, 530 U.S. 27 (2000)).

In cases where prosecutors refuse to offer NPAs, counsel should consider appealing to the prosecutor's supervisors, who typically have more experience with NPAs and a better sense of the kinds of cases in which NPAs are appropriate.

In negotiating an NPA, counsel should carefully consider the scope of the immunity provision. An NPA usually contains an agreement not to prosecute the cooperator for certain specified conduct, which should include both:

- The conduct under investigation.
- Any other potentially criminal conduct that the cooperator may be asked about while testifying during any trial.

The NPA is typically limited to a promise that the particular agency, division, or US Attorney's Office will not prosecute the cooperator. Other divisions, agencies, or US Attorney's Offices, typically are not bound to the terms of the NPA. (US Attorneys' Manual § 9-27.630.) The NPA typically states that if the cooperator requests, the

government will bring the fact, manner, and extent of her cooperation to the attention of the prosecutors not covered by the agreement.

In some instances where a witness has arguably not committed any crime, the government and counsel for the witness will agree that the protection of an NPA is unnecessary and the witness will simply testify under a subpoena. Where the witness arguably has not committed any crime, but still wants protection, the witness and counsel can consider whether to insist on receiving an NPA before testifying.

DEFERRED PROSECUTION AGREEMENTS (DPAs)

DPAs are similar to NPAs, in that a prosecutor agrees not to prosecute, usually, but not always, in exchange for cooperation. Unlike NPAs, under a DPA the government typically files charges against the cooperator in the district court to comply with the Speedy Trial Act of 1974 (18 U.S.C. §§ 3161-3174; and see US Attorneys' Manual Criminal Resource Manual § 628). The parties' understanding is that after a certain period of time the government will dismiss the charges if the cooperator has complied with the terms of the agreement. Because the cooperator is charged, in deciding whether to enter into the DPA, the government assesses the factors for initiating and declining charges set out in the US Attorney's Manual. For individuals the factors include:

- The sufficiency of the evidence.
- The likelihood of success at trial.
- The probable deterrent, rehabilitative, and other consequences of conviction.
- The adequacy of noncriminal approaches.

(US Attorneys' Manual § 9-27.220 to § 9-27.270.)

For entities, in addition to evaluating the factors for individuals, the government also assesses these additional factors to take into account the unique nature of the corporate person:

- The nature and seriousness of the offense.
- The pervasiveness of wrongdoing within the corporation.
- The corporation's history of similar misconduct.
- The corporation's willingness to cooperate in the investigation.
- The existence and effectiveness of the corporation's pre-existing compliance program.
- The corporation's timely and voluntary disclosure of wrongdoing.
- The corporation's remedial actions.
- Collateral consequences.
- The adequacy of remedies, such as civil or regulatory enforcement actions.
- The adequacy of the prosecution of individuals responsible for the corporation's malfeasance.

(US Attorneys' Manual § 9-28.300 to § 9-28.1300.)

A DPA includes the defendant's admission of wrongdoing and may include the defendant's agreement to:

- Not commit future violations.
- Pay a fine.
- Provide substantial assistance to the government's investigation.

- Produce all requested non-privileged documents, records, or other tangible evidence.
- Disclose the existence and status of all money, property, or assets of any kind obtained through the individual's participation in criminal activity.
- Pay some amount of restitution, including any taxes that were not paid.
- Cooperate with other agencies, such as the SEC.
- Appoint a monitor.
- Implement a new compliance program.
- Testify truthfully, if called:
 - before a grand jury;
 - at trial; or
 - at a pre- or post-trial hearing.

A DPA is signed by:

- The defendant.
- The defense attorneys.
- The government attorneys.

TIMING OF APPEARANCES

Where the government offers a cooperation agreement requiring the defendant to plead guilty, the government typically seeks to have that agreement signed and the plea entered before the judge as soon as practical, but no later than the start of the trial of the first non-cooperating defendant the cooperator will testify against. If the cooperator does not have a signed cooperation agreement before being called to testify, there is a risk that the government can prosecute the cooperator based on statements made on the witness stand. Under those circumstances, the cooperator should invoke her Fifth Amendment right to avoid self-incrimination. For this reason, the government typically makes an effort to ensure that cooperation agreements are finalized in advance of testimony. By having the cooperator plead guilty before testifying at trial, the government can also present the cooperator to the jury as an individual who:

- Has accepted responsibility for her conduct.
- Is telling the truth to comply with the cooperation agreement because any breach risks a longer sentence.
- Has not been promised any particular sentence.

TRIAL TESTIMONY

Before testifying against other defendants, a cooperating witness is likely to spend many hours meeting with the government to prepare for trial. Counsel should attend all trial preparation meetings with the government.

At the meetings, the prosecutors prepare the cooperator:

- To provide clear testimony that the jury understands.
- For anticipated attacks from defense counsel (for example, that the cooperator is falsely testifying to obtain a lighter sentence (see, for example, *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (observing that due to the serious questions of credibility involved in a cooperator's testimony, courts provide defendants wide latitude to probe a cooperator's credibility during cross-examination))).

If counsel is not present for any of the trial preparation meetings, the government usually asks:

- Counsel to grant permission to meet with counsel's client in counsel's absence.
- The cooperator to sign a formal waiver of her counsel's presence with the government (see, for example, *United States v. Ming He*, 94 F.3d 782, 794 (2d Cir. 1996) (holding that cooperators are entitled to have counsel present at debriefing meetings, unless they explicitly waive that right)).

Counsel should not exclusively rely on the government to prepare her client to testify. A successful prosecution is more beneficial to the cooperator at sentencing. The impression the cooperator makes during trial also can have a significant impact on the sentence the judge imposes. The trial judge often is the same judge who sentences the cooperator, even if the judge was not initially assigned to the case.

SENTENCING

The judge usually sentences a cooperator after all anticipated trial testimony is complete so that the entirety of the cooperation and its results are before the judge. When determining the extent of a substantial assistance departure for an individual, judges consider:

- The significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance received (see *United States v. Losovsky*, 571 F. Supp.2d 545, 546 (S.D.N.Y. 2008)).
- The truthfulness, completeness, and reliability of the defendant's testimony.
- The nature and extent of the defendant's assistance.
- Any injury suffered or risk of danger resulting from the defendant's assistance.
- The timeliness of the defendant's assistance.

(US Sentencing Guidelines § 5K1.1.)

Under Section 8C4.1(a), judges evaluate the following factors to determine the extent of a substantial assistance departure for an entity:

- The significance and usefulness of the entity's assistance, taking into consideration the government's evaluation of the assistance received.
- The nature and extent of the entity's assistance.
- The timeliness of the entity's assistance.

(US Sentencing Guidelines § 8C4.1(a).)

An individual cooperator is usually focused on the potential term of imprisonment, while an entity cooperator is usually most concerned with the amount of fine imposed.

Even though the Sentencing Guidelines range is no longer mandatory, the government's substantial assistance motion still plays a prominent role at sentencing (*United States v. Booker*, 543 U.S. 220, 245 (2005)).

THE GOVERNMENT'S SUBSTANTIAL ASSISTANCE MOTION

In advance of the cooperator's sentencing hearing, the government typically files a substantial assistance letter indicating that the

government intends to make a substantial assistance motion at sentencing. The substantial assistance letter:

- Details the cooperator's substantial assistance.
- Asks the judge to sentence the cooperator in light of the factors set out in Section 5K1.1 or Section 8C4.1(a) of the Sentencing Guidelines.

The government's substantial assistance letter should address each of the factors Section 5K1.1 or Section 8C4.1(a) set out and explain how the cooperator met those factors (see Sentencing).

The government often shares with counsel a draft of the government's substantial assistance letter in advance of sentencing. Counsel should review the substantial assistance letter carefully to:

- Ensure that the government accurately described the defendant's cooperation.
- Determine which parts, if any, the government should file under seal and redact from any version it publicly files.

After reviewing the government's submission, counsel should make an independent sentencing submission:

- Reiterating and expanding on the government's arguments for why a reduced sentence is appropriate.
- Addressing any areas of disagreement with the government.
- Showing the cooperator's conduct was an aberration (for example, by using excerpts from the character letters submitted on the cooperator's behalf).

Some U.S. Attorney's Offices include in the cooperation agreement a set level of reduction for the cooperative tasks performed, such as a five-level reduction for testifying at trial or a three-level reduction for wearing a wire. These agreements also prohibit the cooperator from moving for a downward departure for any reason other than the reductions the government has described for cooperation. If these restrictions are not part of the cooperation agreement, counsel should include in her submission reasons supporting any downward departure or variance (other than for cooperation), for example, age, health, or family responsibilities.

THE SENTENCING HEARING

At the sentencing hearing, the government usually:

- Recites the history and extent of the defendant's cooperation.
- Describes the results of the defendant's assistance, including the convictions and guilty pleas the government obtained.
- Moves for a departure under Section 5K1.1 or Section 8C4.1(a).
- Describes the sentences imposed on other cooperators involved in the investigation.
- Details the defendant's prior criminal history (see, for example, *United States v. Tchiapchis*, 306 Fed. App'x 627, 628 (2d Cir. 2009) (holding that judge's sentence that provided a smaller departure due to prior criminal history was not unreasonable)).
- States its position on sentencing, for example, by:
 - recommending a sentence;
 - agreeing or disagreeing with the probation department's sentencing recommendation; or
 - objecting to, not taking a position on, or supporting a potential sentence below the Sentencing Guidelines range.

Counsel typically compares the sentences or fines imposed on others in the investigation, including those stemming from:

- Guilty pleas from other cooperators.
- Guilty pleas from defendants who did not cooperate.
- Jury verdicts.

Judges often use the sentences others received as a starting point at sentencing. Counsel should compare and contrast the role:

- Each cooperator played in:
 - aiding the government in its investigation; and
 - the criminal conduct.
- The non-cooperating defendants played in the criminal conduct.

The amount of reduction can vary amongst judges and locales. For example, some judges may give a blanket percentage reduction off of each cooperator's Sentencing Guidelines range. Other judges may tailor the reduction based on the amount and importance of the cooperation each cooperator provided.

THE GOVERNMENT'S RULE 35 MOTION

A cooperator's sentence also can be reduced after sentencing on the government's filing of a motion under Rule 35 (Fed. R. Crim. P. 35). This can occur either because:

- The cooperator obtains new information.
- The particular jurisdiction requires cases to move quickly to sentencing and the cooperator had not completed cooperating with the government at the time of sentencing, for example, the cooperator had not testified against all her co-conspirators.

Like a motion under Section 5K1.1, a Rule 35 motion allows the judge to reduce a cooperating defendant's sentence for providing substantial assistance to the government in an investigation. A judge considering a Rule 35 motion may consider all of a defendant's assistance, both pre- and post-sentencing, in determining the extent of any sentence reduction.

The timing of the cooperator's post-sentencing assistance is significant. Rule 35 motions generally must be made within one year of sentencing. If the government moves more than one year after sentencing, the sentence only can be reduced if either:

- The defendant did not know the information until a year or more after sentencing.
- The defendant provided the information to the government within one year of sentencing but it did not become useful to the government until more than one year after sentencing.
- The defendant was unable to reasonably anticipate the usefulness of the information until one year after sentencing and then promptly provided the information to the government once the defendant recognized the information's usefulness.

THE GOVERNMENT'S REFUSAL TO MAKE A SUBSTANTIAL ASSISTANCE MOTION

The government can choose not to make a substantial assistance motion because:

- The cooperator did not provide substantial assistance.
- The cooperator otherwise breached the agreement.

If the government's refusal is based on an evaluation of the defendant's cooperation, a judge typically gives the government's determination great deference because she usually views the government to be in the best position to evaluate the defendant's cooperation. In some cases, however, the judge may be well suited to review the defendant's cooperation (see, for example, *United States v. Knights*, 968 F.2d 1483, 1488 (2d Cir. 1992) (holding that where the cooperation involved only in-court testimony, the judge was well situated to evaluate the defendant's cooperation obligations)). In those cases, the cooperator may have to demonstrate by a preponderance of the evidence that she provided substantial assistance (see *United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir. 1991)).

If the government bases its refusal on something other than the evaluation of the defendant's cooperation, the court reviews the government's reasoning to determine whether it was rationally related to a legitimate government objective. An example of an improper refusal is if the government's decision was based on the defendant's race or religion. (*Wade v. United States*, 504 U.S. 181, 185-86 (1992).)

Some circuits have gone beyond the constitutional inquiry and also may conduct a good faith review of the government's refusal to make a substantial assistance motion (see, for example, *Knights*, 968 F.2d at 1487 and *United States v. Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995)). The government's obligation to act in good faith requires only that the government be honestly dissatisfied with the defendant's efforts (*United States v. Reeves*, 296 F.3d 113, 116 (2d Cir. 2002)). Other circuits have confined the inquiry to whether the government based its decision on an unconstitutional motive (see, for example, *United States v. Benjamin*, 138 F.3d 1069, 1073 (6th Cir. 1998)).

A court may order specific performance as a remedy for the government's breach (see *United States v. Rexach*, 896 F.2d 710, 713-14 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990) and *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990), *cert. denied*, 499 U.S. 969 (1991)).

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