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WHITE-COLLAR CRIME

Expert Analysis

Attorney Proffers: Practical Considerations and Some Law Too

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One of the frequently used tools in a white-collar defense attorney's kit—the attorney proffer of facts on behalf of a client—is not uniformly defined and will often proceed without any written or express oral understanding as to what ground rules apply. Unlike client interviews, which typically are governed by a written proffer or so called "Queen for a Day" agreement that provides the client certain limited but defined protections against his or her statements being affirmatively used in a later proceeding, federal prosecutors generally pronounce no formal policies regarding attorney proffers.

Attorney proffers can be used for a host of reasons—to demonstrate innocence, to lay out facts as a foundation for a plea deal, or to show how a client can be valuable to the government as a witness. Attorney proffers may be highly beneficial for both sides: They can provide the defense lawyer with an early opportunity to influence the government's view of the case and allow prosecutors to learn information that may properly inform their view of an individual or entity and further their investigation without negotiating immunity or addressing other testimonial issues. For defense counsel, a critical but sometimes elusive prerequisite is to have done enough investigation and spent enough time with the client to have sufficient confidence that the information to be proffered is reliable. Handled with care, however, an attorney proffer can provide a critical opportunity to gauge a prosecutor's reaction while limiting the risk of compromising the client's potential defense at trial.

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Because they can be so useful to both sides, prosecutors and defense lawyers often have a strong incentive to find a way for such conversations to proceed without putting either side at undue risk. Custom and experience, combined with the modest amount of legal authority in the area, provide a few important guideposts for counsel. Counsel making a proffer should take care to couch their statements hypothetically, thereby putting prosecutors on notice that they are not intended to be, and are not in a form capable of being, used against their client. Counsel should not be surprised to see prosecutors later disclose information provided in attorney proffers to another defendant pursuant to the government's duties to disclose exculpatory information or prior witness statements. Finally, making attorney proffers on behalf of corporate entities in connection with internal investigations poses risks that the information conveyed

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may be deemed to have waived the work product protection otherwise applicable to such investigation.

Legal Parameters And Case Law

The case law addressing the principles around the potential admissibility of statements made in attorney proffers generally arises under three rules of evidence. Pointing toward admissibility is the rule that statements are not hearsay and thus may be admissible as a statement of a party-opponent if made by a person whom the party authorized to speak on the subject or made by the party's agent on a matter within the scope of that relationship. See Fed. R. Evid. 801(d)(2)(C) and (D). Tending to cut against admissibility are Fed. R. Evid. 410, which provides that statements made during plea discussions with a prosecutor are inadmissible against the defendant if no plea resulted or the plea later was withdrawn, and Fed. R. Evid. 408, which generally provides that conduct or a statement made during compromise negotiations about a claim is not admissible on behalf of any party regarding the validity or amount of a disputed claim.

A key decision assessing the application of the party-opponent statement rule to a counsel statement in a criminal case is *United States v. Valencia*, 869 F.2d 169 (2d Cir. 1987). According to the government, in informal discussions seeking his client's release on bail, Valencia's counsel told the prosecutor that Valencia was innocent, and was not selling cocaine with co-defendant Bolivar, with whom he was arrested, but had just met her that day and was trying to "pick her up." The government later obtained evidence showing that Valencia and Bolivar had a years-long relationship. The district court ruled that the government could not offer counsel's statements against Valencia at trial, and the government, invoking Fed. R. Evid. 801(d)(2)(C) and (D), appealed. The Second Circuit upheld the ruling over a strong dissent, stating that in criminal cases, courts had to take care to avoid broadly allowing the use of prior statements by counsel against a defendant to avoid trenching on important constitutional protections. The court found that the district judge acted within his discretion to exclude the statements because, among other reasons, admitting them could chill potential plea discussions and "inhibit frank discussion between defense counsel and prosecutor on various topics that must be freely discussed," as well as because the statements were made informally, and thus there was risk of dispute about precisely what was said, and because the statements did not prove an element of the crime but only could potentially show consciousness of guilt or be used for impeachment.

Some subsequent decisions have limited *Valencia* to its facts, with one unpublished out-of-circuit district court decision holding that *Valencia* does not apply in the context of a formal attorney proffer. In *United States v. Ahmed,* 2006 WL 3210037 (D. Mass. August 3, 2006), during the lengthy pre-indictment phase, counsel for Ahmed, who was under investigation for Medicare fraud, met with prosecutors, making statements and presenting a detailed chart as part of an effort to demonstrate his client's innocence. Prosecutors later charged Ahmed with Medicare fraud as well as obstruction of justice in part for causing to be prepared false documents to be presented by his counsel at the meeting. In ruling that evidence from the meeting was admissible at trial, the district court distinguished *Valencia*, explaining that Ahmed's counsel's statements were made at a preplanned formal meeting specifically and tactically arranged to present detailed facts. Accordingly, admission of the evidence would not undermine Ahmed's right to maintain his silence. Further, the statements directly proved elements of the charges, and because the statements had been reduced to the form of a stipulation (which apparently was done in part to defend a motion to disqualify counsel), there was no risk of a dispute regarding precisely what was said.

With regard to the application of Fed. R. Evid. 410, both *Valencia* and *Ahmed*, as well as a host of other decisions (see *Weinstein's Evidence*, §410.09[4]), point out the rule's limited value in circumstances that apply to many attorney proffers: because the rule applies only to discussions of a potential guilty plea, meetings where defense

counsel seeks to show why a client should not be charged at all are typically are found to be outside the protection of Rule 410.

Some help can be found, however, in the historical background of Fed. R. Evid. 408. The Advisory Committee Notes to that Rule state that it was adopted to broaden the common law rule that a statement of counsel made in connection with an effort to negotiate a disputed claim was admissible unless it was stated to be hypothetical or otherwise couched in terms indicating it was not in a form that could be utilized, citing *McCormick On Evidence* §251. In addition to the fact that a statement phrased hypothetically is not technically a statement at all, and thus not admissible on that basis, a review of the hoary case law cited in *McCormick* reveals reasoning consistent with modern practice. When counsel prefaces statements with the proviso that they are made "hypothetically" or "without prejudice" or the like, counsel is using accepted terms to put the prosecutor on notice that the statements are not intended to be usable. See, e.g., *White v. Old Dominion S.S. Co.*, 102 N.Y. 660 (1886) (cited in *McCormick*) (discussing and applying common law rule that "an agreement could be fairly implied from the circumstances that [an admission] was not to be used afterward to his prejudice"). The concept is the same as telling a journalist that comments are "off the record" or "on background." Indeed, in today's practice, the very use of the phrase "attorney proffer" to describe the conversation arguably serves the same notice function. Compare *United States v. Levy*, 578 F.2d 896, 901 (2d Cir. 1978) (rejecting application of Rule 410 protection to statements by a defendant to a DEA agent following arrest, because statement was not made as part of an express discussion of reduced punishment: "A silent hope, if uncommunicated, gives the officer or prosecutor no opportunity to reject a confession he did not seek.").

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Prosecutors' Discovery Obligations Regarding Attorney Proffers

Despite efforts to make attorney proffers "off the record," case law reveals that information provided during such proffers likely will be subject to later disclosure by the government pursuant to its obligations to produce exculpatory information under *Brady v. United States* and *Giglio v. United States*, and pursuant to its obligations to produce witness statements under the Jencks Act, 18 U.S.C. §3500(e).

In *United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008), the defendant, general counsel for an investment corporation that handled Connecticut's state pension funds, was convicted of racketeering, wire fraud, and obstruction of justice related to consulting contracts given to associates of state officials. The Second Circuit considered on appeal defendant's argument that notes taken by an FBI agent during an attorney proffer made by counsel for a cooperating witness should have been disclosed to him.

Rejecting the district court's finding that the proffer notes were not "materially inconsistent" with the witness's testimony, the Second Circuit found that the notes supported an alternative version of facts that was at odds with the government's theory of the case at trial. Because this distinction was relevant to intent and because no justification existed for the government's failure to produce the notes of the attorney proffer session, the Second Circuit granted the defendant a new trial.

Similarly, in *United States v. Nacchio*, 2006 WL 8439750 (D. Co. Aug. 28, 2006), a prosecution for criminal insider trading and securities fraud, the district court found that "[a]n attorney's representations to the [g]overnment of what his or her client would testify to if called as a witness are discoverable statements," and held that attorney proffer letters and notes taken by the government during oral attorney proffers were attributable to the witness and thus producible under Jencks Act standards. *See also United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D.

Cal. 1999) (holding that Jencks Act obligations included attorney proffers: "It is reasonable to conclude that the attorney would only submit such material if it was approved by his client, the witness.").

As recently as last month, the U.S. District Court, District of Columbia, held that attorney proffer materials, including handwritten notes taken by government agents during an attorney proffer session, are discoverable as if they contain exculpatory evidence. *United States v. Saffarinia*, 2020 WL 224599 (D.C. Dist. Columbia Jan. 15, 2020) (citing *United States v. Blankenship*, 2015 WL 3687864 (S.D. W. Va. June 12, 2015)).

Such decisions point to the importance of the proffering attorney to including appropriate limitations and disclaimers on proffered information—such as expressly stating that the facts are preliminary and subject to further refinement once counsel and the client have the benefit of the client's refreshed recollection from contemporaneous documents—to help limit potentially harmful future cross-examination.

Proffers on Behalf Of Corporate Clients

Attorney proffers on behalf of corporate clients often raise special considerations for counsel based on the differing positions in the investigation of the various corporate executives and employees who may be the sources for the information proffered. Individual executives who could become the focus of the investigation may have a strong interest in learning the details of the statements of other employees to corporate counsel. Corporate counsel typically will want to assert work product protection over this material, but even an oral attorney proffer—which many counsel prefer and which has a number of advantages over providing written summaries to the government—may waive such protection.

Securities and Exchange Commission v. Herrara, 324 F.R.D. 258 (S.D. Fl. 2017), an SEC enforcement case from the Southern District of Florida, provides an example. The SEC brought action against officers of manufacturer General Cable Corp. (GCC) alleging securities law violations resulting from accounting improprieties. GCC previously had hired a law firm to conduct an internal investigation into the alleged accounting errors. During the course of that investigation, the firm interviewed dozens of GCC employees, after which the attorneys prepared notes and memoranda about the interviews.

Ultimately, GCC disclosed the investigation and the SEC began its own investigation pursuant to which it submitted a number of requests for information. Attorneys from the law firm that conducted the investigation met with the SEC and presented a timeline of events, the names of witnesses who had been interviewed, key transactions at the center of the investigation, and its conclusions. In addition, the attorneys provided oral summaries of 12 witness interviews.

The defendants in the enforcement action served GCC's law firm with a subpoena seeking to compel production of the witness interview notes and memoranda prepared by attorneys during the internal investigation. U.S. Magistrate Judge Jonathan Goodman rejected the claim that the material was protected by the work-product doctrine. The court determined that "little to no substantive distinction" existed between producing the actual written interview memoranda on the one hand and providing detailed oral attorney proffers summarizing the information contained in those interview memoranda on the other. Accordingly, any work product protection had been waived with respect to the memoranda and the law firm was compelled to produce the memos in the enforcement action against individual officers. Notably, the decision did not find that a waiver had occurred with respect to contemporaneous notes taken by the attorneys during the interviews, which formed the basis for the memoranda

Conclusion

Attorney proffers are a critical tool for defense counsel as well as prosecutors. A review of the relevant legal framework and case law shows that it provides ample support for longstanding custom and practice that allows for "frank discussion between defense counsel and prosecutor on various topics that must be freely discussed" without undue risk for either side.

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