

Explaining the Inexplicable: The Perks and the Perils of Proffer Sessions and Best Practices for Explaining it All to Your Client

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Envision this: You are sitting in your office one day and the phone rings. It is a former colleague from the office where you were both federal prosecutors. Her firm is representing a large company, eight of whose employees have received invitations to visit with a federal prosecutor investigating the company. The only other thing your former colleague tells you is that none of the employees receiving this invitation are high level officers or corporate decision makers, but rather “salt of the earth,” hard working employees of the company. She tells you that your mission, should you choose to accept it, is to visit with the employees, talk to them about representation¹ and explain the ins and outs of the proffer process to them. This kind of call occurs every day in a white collar defense practice. Despite the common-place nature of this kind of call, the exercise of submitting to an interview with a federal prosecutor is fraught with risks and uncertainties for most clients, and ones that are not easily explained or understood. This article attempts to identify some of those risks from both the client’s and practitioner’s perspective, and suggests ways in which these risks can be identified and explained to clients whose closest encounter with a prosecutor before now has likely been from viewing episodes of Law and Order. But even a lawyer with sophisticated white collar clients needs to carefully evaluate an invitation to proffer and to explore the great potential risks that exist with his or her client.

I. BASIC CONCEPTS

A. What is a Proffer Session and Proffer Agreement?

A proffer session is a meeting between the defense and the prosecutor in the course of an ongoing government investigation. There are two typical types of proffer session: an attorney proffer and client proffer. The former is a meeting with only defense counsel and the government present in which a “hypothetical” version of events is presented, and will not be the focus of this article. The latter includes your client who will be interviewed by the prosecutor and possibly federal agents or attorneys from other agencies involved in the government investigation.

A proffer agreement, often referred to as a “Queen for a Day” agreement, is typically in the form of a letter from the US Attorney’s office handling your case which you and your client will sign prior to the start of the interview.² The proffer agreement will govern the terms of the interview, and most importantly, will control how the government can use information gained during the session.

A standard proffer agreement offers a type of limited use immunity, preventing the government from making “direct” use of your client’s statements, i.e., the government cannot offer the statements made during the proffer session directly against your client if he or she is subsequently prosecuted. However, most proffer agreements provide that the government can use

the information that your client provides to follow up leads and conduct further investigations. If those leads and further investigations capture new evidence, such evidence can be used to indict and convict your client.

Proffer agreements vary between US Attorney's offices, and most include more exceptions to the limits on the use of client statements noted above. For example, the US Attorney's Office for the Eastern District of New York has a standard proffer agreement that allows the government to use statements to rebut any inconsistent evidence or **arguments** introduced or elicited by the defense, including through cross examination of government witnesses, or to rebut arguments or issues raised **sua sponte** by the court.³ In fact, some commentators and scholars believe that the growth of exceptions to the use limitations has, in some jurisdictions, destroyed the value of signed proffer agreements entirely. Recent cases demonstrate that courts literally construe proffer agreements, and allow the government to use proffer statements to rebut even general arguments made by defense counsel.⁴

Accordingly, by signing a proffer agreement, you and your client are granting the government permission to use your statements against you in all but the most limited circumstances. Moreover, with or without a proffer agreement, if your client lies to the government, he or she will be subject to additional federal criminal charges.

B. Are You Making a Proffer or Negotiating a Plea?

Unlike statements made in a proffer session, Rule 410 of the Federal Rules of Evidence prevents the admission of statements made as part of a plea negotiation against a defendant. Most proffer agreements require that a client **waive** these protections, and such waivers have been consistently upheld in court.⁵ Regardless of jurisdiction, a fact-intensive analysis is required to determine whether statements were made in the context of a plea negotiation, often turning on what discussions defense counsel had with the prosecutor when the session was arranged or at the beginning of the interview, and the client's understanding of

the purpose of his or her interview.⁶ While a full exploration of the cases is beyond the scope of this article, you should certainly not entertain a proffer session before you and your client fully understand whether the meeting is within the scope of protected plea negotiations or not.

C. Available DOJ Guidance

Perhaps not surprisingly, given the wide variation in standard proffer agreements between US Attorney's Offices, and the variation between jurisdictions as to how to determine whether a proffer session constitutes protected plea negotiations,⁷ the Department of Justice through the US Attorney's Manual offers little specific guidance for line prosecutors with regard to this area of the law. The US Attorney's Manual covers the topic of "Immunity" generally, and the companion Criminal Resource Manual distinguishes between use, transactional, and "informal immunity" agreements.⁸ The brief discussion of informal immunity is the most closely related to the practice of proffer agreements, but neither source delineates rules or guidelines for US Attorneys to follow.⁹

D. The SEC Proffer

The SEC also frequently uses proffer sessions in the course of its investigations, including those conducted in conjunction with federal prosecutors. The standard SEC proffer agreement prohibits the SEC from using those statements "against that individual in any subsequent proceedings, except that the Commission may use statements made during the proffer session as a source of leads to discover additional evidence and for impeachment or rebuttal purposes..."¹⁰ Absent a separate agreement between the witness and a prosecutor, the SEC will not, unless compelled, share information gained through a proffer session with another agency or regulator unless the recipient agrees to be bound by the terms of the SEC proffer agreement. The SEC will also share the statements in connection with a false statement, perjury or obstruction of justice prosecution. Unlike the DOJ, the SEC provides specific guidance to its staff and mandates the use of a standard written proffer agreement. Deviation from the standard written agreement is only possible if specifically approved.¹¹

II. WHAT TO CONSIDER WHEN THE PROSECUTOR ASKS YOUR CLIENT TO MAKE A PROFFER

A. Accept the Invitation or Politely Decline?

The first consideration is a threshold question that in the rush to address a government request, might be overlooked. And that is simply, whether to accept the offer to make a proffer at all? Given the tremendous risks for most clients, you should weigh carefully whether it makes more sense to decline the offer.

Let's return to our hypothetical phone call from your former colleague. You have been retained, and have now met with some of your clients and counsel for the company, and you've reviewed the relevant records. The prosecutor asks you if your clients are willing to speak with his office. In your discussion with the prosecutor, you learn the nature of the probe and whether the government thinks your clients have criminal liability. Based on what the prosecutor tells you, plus your own investigation to date, you determine that your clients are unlikely to be prosecuted, but you cannot be certain. You do not have access to all the information that the government could have, and perhaps your clients have not given a sufficiently fulsome version of events.

Given the risks and information about which you are unaware, are there any rewards in this scenario? Probably the one and only potential reward is that after a successful proffer the government may confirm that your client is simply a witness and unless circumstances change, is unlikely to be prosecuted, which can be of great comfort to most clients. And, if your client truly does have criminal liability, the fact of the matter is that you will not be able to negotiate a plea or immunity deal without first proffering. So, you might need to tell your client that he or she has no choice but to proffer.

However, while risk of exposure on the merits of the investigation are low, the risk for being accused of obstruction or making false statements to the government is very real. The risk of misstatement in such circumstances, or the risk that the government might later learn information that contradicts your clients statements, may actually be higher than in a more discrete investigation

into a specific crime. The question then is whether the mere potential for a comforting word from the government about your client's status is worth the risk of making a proffer.

Another important consideration in determining whether to proffer is how prepared the prosecutor is to pursue his or her case and how critical a witness is your client. If the prosecutor is at the initial stage of an inquiry, he or she might be looking for an education about the industry and its particular practices or key players. Perhaps if your client did not meet with the prosecutor, it would be harder for the prosecutor to learn key nuances about the industry, thus protecting your client and his or her employer. On the other hand, perhaps your client can shape the prosecutor's viewpoint before an unshakeable, and perhaps negative, opinion forms in the prosecutor's mind. Can your client be a force for molding the prosecutor's view?

B. What to Ask for if you Accept?

If you accept the government's offer, you must next consider what you should ask the prosecutor to provide you before going in.

1. Proffer Agreement

First and foremost, as laid out above, you need to consider whether you will ask for a written proffer agreement. Keep in mind that some prosecutors will insist that a written agreement be signed before the proffer session will begin. A written agreement will clarify the expectations of the prosecutor and the risks to the client, including what protections (such as Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410) your client may be giving up.

Consider also whether, despite the lack of protection established by case law in your jurisdiction, your client may prefer to avoid a written proffer agreement.¹² Certain clients, such as highly placed executives, may want to avoid a written agreement because of the perception it might create with fellow employees, shareholders, or clients of the company. Why would someone need a type

of immunity agreement if they did nothing wrong? Should the fact that such a written agreement exists become public knowledge, the “optics” could be difficult. Your client may want to meet with prosecutors but may wish to do so without a formal written proffer agreement. Moreover, if things should go awry and your client is ultimately charged, you and your client may want the ability to argue that your client would never have met with the government with no immunity protection whatsoever if he or she believed that what he did was illegal.

2. Is there Leverage When it Comes to Language in the Agreement?

What leverage exists depends in large part on the nature of the government investigation and the exposure faced by your client. It is rare for prosecutors to agree to change the language of a proffer agreement. Generally, these documents are carefully crafted by committees within U.S. Attorney's Offices to address district-wide issues and challenges, and it is not realistic to expect the language to change in the normal course. However, if your client is a key witness without whom the government cannot hope to bring an indictment, perhaps a prosecutor might have incentive to seek the requisite approvals to change offending language. Sometimes, additional protections that are quite fact specific, such as safe passage for a foreign based client to attend an interview, can be arranged in a separate side letter. Additionally, it is possible to limit the scope of an initial proffer to the actual conduct about which the prosecutor is concerned, rather than a general exploration of all of your client's potential criminal liability. But to expect anything additional, such as an agreement that a defendant's statements will not be used to consider the appropriate sentencing guidelines range, is unrealistic.

3. Immunity

Another consideration for your client, instead of proffering pursuant to an agreement with admittedly limited protections, is whether to ask for immunity. If the government believes that your client truly has no criminal exposure, and is just a witness in the prosecutor's case, receiving a grant of immunity is not an unusual result. However, in many offices, AUSAs are trained not to grant immunity, or even offer it, without a full understanding of the client's value as a witness. Otherwise, the prosecutor could be buying the proverbial “pig in a poke.” Too often then, an offer of immunity comes only after a proffer session, or at the very least, from an attorney proffer at which the client might not even appear.

Regardless of the likelihood of an affirmative answer, the tactical practitioner would do well to insist on full immunity before a proffer session, especially where the risk of indictment is otherwise low. A prosecutor who wants to talk to a witness has two choices: issue an invitation to proffer, and if the invitation is declined, either do nothing or issue a subpoena. Once a subpoena is issued, a prosecutor must grant immunity to the witness because of the privilege against compelled self incrimination.

A defense attorney must exercise this option only after having thoroughly interviewed his or her client, reviewed any pertinent documents, perhaps spoken to company counsel if applicable, and after having had several conversations with the prosecutor to get a complete understanding of the strength of the government's case. Advising a client to seek immunity where the client has true criminal exposure, however minimal, is a risky venture for the practitioner and the client. Accordingly, play this card sparingly, and only if after a full assessment of the facts and circumstances you can honestly advise your client that he or she is unlikely to get indicted if he or she refuses to meet with the prosecutor informally.¹³

4. Perjury Trap

You cannot rule out that your client has not been completely honest with you in discussing the events about which the prosecutor is interested. If you have any qualms that your client is being anything other than completely truthful with you, you cannot allow him or her to proffer, since doing so would undoubtedly expose your client to criminal charges of lying to federal agents.

government that you kept a second set of books which revealed the true income of the company, and told the government where those books could be found, the government can go find those books, do its own analysis of the information therein, and then indict you for fraud. This is so even if they never would have found the books without you.

III. HOW TO PREPARE

Assume you have determined that it would be in your client's best interest to enter into a proffer agreement with the government, it is imperative that your client fully understands what he or she is getting into, and the risks and potential benefits. Then, assuming your client accepts your advice to enter into a proffer agreement with the government, you must prepare your client carefully and thoroughly before any meeting ever occurs.

A. How to Explain the Process to Your Client

As the title of this article indicates, the ins and outs of a proffer agreement are not easily explained. The best method of explaining a proffer agreement is to do so in simple, small steps, all the while highlighting the limited protection that one actually gets from a standard federal proffer agreement.

For example, many clients have a hard time understanding the difference between what kind of statements are protected, and what kinds of statements are permitted to be used. The following example is a useful tool to explain this concept:

If you tell the prosecutor that you knowingly overstated the income of your company on financial reports, the prosecutor cannot use that admission against you. He cannot call a witness to say, "on such and such date, client came to my office and told me that he overstated the income of your company." However, if, in the course of your proffer, you tell the

In addition, it can be hard to get clients to understand that it is **always** better to tell the truth than not. Despite the discomfort or embarrassment that clients have about what they did or knew, if they are going to sit down across the table from federal agents and prosecutors, they have to be prepared to come clean. Martha Stewart, Scooter Libby, and Roger Clemmons demonstrate the stark reality that often, prosecutors cannot ultimately prove the substantive charge they set out to investigate. However, they can and do charge and prove lying to federal officials.

B. How to Prepare Your Client for the Interview

Ask a lot of questions to make sure your client understands what they are being told, and have them put what you have explained into their own words. Ask them if they are **sure** they understand. Keep careful notes to record your client's exact questions and then revisit them before you meet with the government.

Once you and your client carefully weighed the pros and cons, and are both satisfied that it is more beneficial to proffer than not, you must set about preparing your client for the meeting. It is critical that your client be thoroughly prepared, not only substantively, but also practically in terms of what to expect. Accordingly, spend a lot of time describing the scene and how the questioning will go. Tell the client how many people will be there and your impressions of the government interlocutors (with whom you have already met if you have done your job well). Talk about the room, the size of the table, whether there will be windows, and as many details as you can muster.

More importantly however, thoroughly interview your client about his or her background, education, job experience, and professional licenses and then delve into the facts and background of the case. If documents have been produced to the government, review each and every document to determine whether the government is likely to have questions about them. Go over those documents with your client. You never want your client to be surprised by a question from the government regarding a document which your client has produced. However, generally, do not show your clients documents that they either did not produce or with which they are uninvolved, since generally you do not want your client to get “educated” about information of which he or she was previously unaware. As long as it is a truthful answer, “I don’t know” is a perfectly fine answer.

You should always meet with the prosecutor before a proffer in an attempt to learn the specific questions, or at least areas of concern, that the prosecutor wants to cover in a meeting. Prosecutors want proffer sessions to go smoothly and be productive just as much as defense counsel and their clients do. Therefore, they are often willing to preview the questions. Similarly, ask prosecutors to provide you with the documents about which they are interested. Sometimes prosecutors agree to do this but just as often they do not. Regardless, it is imperative that you never assume that, just because a prosecutor highlights certain documents, those documents represent the finite universe of documents that are important to your client’s case.

Finally, do a role play with your client right before the meeting. This is also an imperative step that will help prepare your client for the questions, and to formulate and articulate thoughtful answers. Generally, this process will allow clients to be more confident and comfortable during their interview.

Using a detailed “witness guide” that you provide to clients can be very useful to structure preparation meetings. The guide sets out basic rules and guidelines for proffer preparation, and an example is attached as an exhibit to this article. You should spend several hours in advance of a

meeting with the government going over these general rules. Clients need to understand why the thorough preparation is necessary so that they will have the patience and focus to get through a long day or two of questions and answers ahead of their actual proffer session. Allude to studying for an important test, or having an important job interview, remind them about first impressions, and no second chances. Once they understand the benefits to them, they will realize the importance of the preparation. However, in reality, sometimes clients don’t appreciate the preparation until after the proffer session is over and they happily realize that there were no surprises.

IV. CONCLUSION

Proffer sessions are a critical step in any white collar investigation and you are likely to encounter many of them during your career. As long as you are able to evaluate the potential risks to your client in each case, make sure your client understands the limited protections provided by most agreements, and thoroughly prepare, you and your clients will navigate the tricky decision making involved in this process successfully.

ENDNOTES

1. Issues of conflict and joint representation are beyond the scope of this article. It goes without saying that such a multiple representation could not occur without thoroughly exploring these issues and obtaining waivers, where appropriate, from the clients. It would also behoove the careful practitioner to at least discuss the joint representation with the prosecutor or government attorney to investigate any potential conflicts about which neither you nor the individual clients may be aware.

2. Two sample proffer agreements, one from the Eastern District of New York and one from the Northern District of California, are included as exhibits to this article.

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

4. See *United States v. Oluwanisola*, 605 F.3d 124, 131-34 (2d Cir. 2010) (finding that mere challenges to sufficiency of the evidence as to elements of a crime would not trigger a proffer waiver, but that where defense counsel made arguments or asked questions which implicitly contained a factual assertion contrary to proffer statements, a waiver could be triggered); *United States v. Schwartz*, 541 F.3d 1331, 1355-57 (11th Cir. 2008) (construing a clause in a proffer agreement waiving defendant's right to a *Kastigar* hearing as implicitly waiving defendant's right to challenge use of his statements before the grand jury)

5. See e.g., *United States v. Merz*, 2010 WL 3965856, *3 (3d Cir. Oct. 12, 2010) (finding that prosecutors abiding by terms of proffer agreement, specifically clause waiving Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 limits on derivative use, had acted properly); *United States v. Velez*, 354 F.3d at 196; *United States v. Pielago*, 135 F.3d 703, 710-711 (11th Cir. 1998).

6. *United States v. Edelmann*, 458 F.3d 791, 804-806 (8th Cir. 2006); *United States v. Wood*, 879 F.2d 927, 936 (D.C. Cir. 1989); *United States v. Robertson*, 582 F.2d 1356, 1364-68 (5th Cir. 1978); see also *United States v. Mannino*, 551 F. Supp. 13, 18-19 (S.D.N.Y. 1982).

7. 1st Circuit:

United States v. Penta, 898 F.2d 815, 817-18 (1st Cir. 1990) (declining to adopt a Second Circuit standard, and holding that "plea discussions means plea discussions"); cf. *United States v. Serna*, 799 F.2d 842, 849 (2d Cir. 1986) (finding that "preliminary discussions must be considered as part of the overall plea bargaining process"), abrogated on other grounds by *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993) (en banc).

2d Circuit:

United States v. Barrow, 400 F.3d 109, 116 (2d Cir. 2005) (stating that "[s]tatements made by defendants in proffers sessions are covered by Rule 410").

8th Circuit:

United States v. Edelmann, 458 F.3d 791, 804-806 (8th Cir. 2006) (using a "totality of the circumstances" test to decide when a proffer session was protected as a plea negotiation); also *United States v. Morgan*, 91 F.3d 1193, 1196 (8th Cir. 1996).

DC Circuit:

SEC v. Johnson, 2008 WL 384182, *1 (D.D.C. Feb. 13, 2008) (stating that the test is "whether the parties intended to 'dispose of the matter through extraction of information, and possibly a plea.'" (quoting *United States v. Wood*, 879 F.2d 927, 936 (D.C. Cir. 1989))).

8. US ATTORNEY'S MANUAL, § 9-23.100 (available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/23mcrm.htm); Criminal Resource Manual, §§ 716 – 719 (available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00700.htm).

9. See *id.*

10. Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, § 6.2.1 (available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>). The SEC also sets out the language to be used in all Commission proffer agreements. See *id.* at § 3.3.7.

11. Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, §§ 3.3.7 and 6.2.1.

12. Note also that the SEC explicitly provides for "oral assurances" in some circumstances. See Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, § 6.2.1.

13. It is possible, that even after bestowing immunity for compelled testimony, the prosecutor might seek to informally interview the witness ahead of the grand jury or trial appearance. If this scenario occurs, the careful practitioner will insure that the immunity agreement extends to cover any meetings or sessions outside the compelled testimonial appearance.

I. Guidelines on Responding to Questions

A. Make sure you understand the question before answering it.

1. You cannot provide a truthful answer if you do not understand the question. Ask the questioner to repeat it or clarify it if you have any doubt as to what is being asked.
2. If the question is in two parts, answer one part at a time.
3. If you do not understand the meaning of a word used by the questioner (either generally or in the specific context of the question), tell the questioner you do not understand the meaning of XXXX and do not provide an answer to the question until you understand the word's meaning.
4. Feel free to take your time. Give a question as much thought as necessary to understand it. Pause before answering.

B. Answer the question as directly and succinctly as possible.

1. Quite simply, keep your answers as short as possible and only answer the direct question asked.
2. Do not try to anticipate "where the questioner is going" and then provide the answer that "you think the questioner wants."
3. Rather, listen carefully to the question, make sure you understand it, and then answer the question directly with as few words as possible.

C. Often, the most correct answer is "I don't know" or "I don't remember."

1. In the interview or deposition context, it is common for a witness to want to impress and/or assist the questioner. Unfortunately, attempting to assist the questioner often results in the witness answering questions when the witness has no basis of knowledge.
2. Often, the most appropriate answer is "I don't know" or "I don't remember." Because there is nothing articulate or helpful about such responses, they are often difficult to state. You should feel comfortable and confident in giving these answers. Even though human nature compels you to want to provide some type of helpful answer – DON'T.
3. Be aware, however, that "I don't know" and "I don't remember" are completely different answers. "*I don't know*" means you never knew. "*I don't remember*" means that you knew at one time but cannot remember at this time. "*I don't remember*" preserves for you the right to recall the information at some later time. "*I don't know*" is difficult to refute at a later time.

- D. Do not guess, speculate, conjecture or volunteer your opinion.
1. Only provide information that is to the best of your recollection. If you have no recollection, then your answer should be “I don’t know” or “I don’t remember.”
 2. If you have a recollection but cannot remember precise times or conversations, you may respond in a general manner. E.g., “I remember something about that, but I cannot recall the details.”
 3. Do not guess, even if you feel you should know the answer.
- E. Stick to the facts. Talk about what you saw, heard or did. Do not use the language of opinions, conclusions or characterizations.
- F. Beware of time estimates, such as dates and periods of time. If you do estimate, make it clear that you are doing so.
- G. Be careful of leading questions. To the extent that the questioner asks you to agree to a set of facts which has been articulated, you should not agree with the stated facts unless you agree completely with each fact recited. These questions often start with “Isn’t it true that . . .” “Don’t you agree that . . .” “Isn’t it fair to say that . . .”
- H. Do not volunteer information in moments of awkward silence. Once you give an answer, stick with it. It is a common ploy of the questioner to look at you after you give your response as if there is something more you should say. Don’t fall for it.
- I. Make sure you read a document before answering questions about it. If you are asked a question about a document, make sure you read the document carefully before you answer. This is true even if you are familiar with the document. Often, documents do not say what you think they say. Always refer to the document itself before giving your answer.
- J. Don’t hesitate to admit you have had discussions with counsel, but do not volunteer the substance of these discussions. Any question to which the answer involves something told to you or by you to in-house counsel, or us, is privileged.
- K. ALWAYS TELL THE TRUTH. This is the most important instruction.
- L. Any questions?

PROFFER AGREEMENT

With respect to the meeting of ~~Georgianna Vargo~~ ("Client") and attorney ~~William A. Vargo~~, with ~~Sean Haran~~ and ~~Jan~~ ~~Harmon~~ of the United States Attorney's Office and Special Agents ~~William A. Vargo~~ and ~~William A. Vargo~~ of the FBI, held at the offices of the United States Attorney for the Eastern District of New York ("the Office") on July 12, 2007 (the "Meeting"), the following understandings exist:

1. **THIS IS NOT A COOPERATION AGREEMENT.** Client agrees to provide the Office with information, and to respond to questions, so that the Office may evaluate Client's information and responses in making prosecutorial decisions. By receiving Client's proffer, the Office does not agree to confer immunity, make a motion on Client's behalf, or enter into a cooperation agreement, plea agreement or non-prosecution agreement. The Office makes no representation about the likelihood that any such agreement will be reached in connection with this proffer.

2. In any prosecution brought against Client by the Office, except a prosecution for false statements, obstruction of justice, or perjury with respect to acts committed or statements made at or after the Meeting, the Office will not offer in evidence any statements made by Client at the Meeting (A) in its case-in-chief or (B) at sentencing. The Office will, to the extent it believes it is required by law, notify the Probation Department and the Court in connection with sentencing of any statements made by Client at the Meeting. If such notification is made, the Office also will notify the Probation Department and the Court of the Office's agreement not to offer in evidence any such statements at sentencing.

3. Notwithstanding paragraph (2) above, the Office may use any statements made by Client: (A) to obtain leads to other evidence, which evidence may be used by the Office in any stage of a criminal prosecution (including but not limited to detention hearing, trial or sentencing), civil or administrative proceeding, (B) as substantive evidence to cross-examine Client, should Client testify, and (C) as substantive evidence to rebut, directly or indirectly, any evidence offered or elicited, or factual assertions made, by or on behalf of Client at any stage of a criminal prosecution (including but not limited to detention hearing, trial or sentencing).




4. It is further understood that this agreement is limited to the statements made by Client at the Meeting and does not apply to any oral, written or recorded statements made by Client at any other time or to any other information provided at the Meeting. Moreover, the provisions of Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410 do not apply to any statements made by Client at the Meeting, and Client shall not assert any claim under these or any other provisions of law that such statements or any leads therefrom should be suppressed.

5. No understandings, promises, or agreements have been entered into with respect to the Meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.


Dated: Brooklyn, New York
July 12, 2007

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York


By:





Assistant U.S. Attorneys


Agent


Agent

I have read the entire agreement and discussed it with my attorney. I understand all of its terms and am entering into it knowingly and voluntarily.


Client


Attorney for Client

PROFFER AGREEMENT

With respect to the meeting of Mary Shaffer ("Client") and Joseph Avergun ("attorney") with Kirstin M. Ault of the United States Attorney's Office, and Special Agents Jason Chin and Brandon Bridges of the Drug Enforcement Administration held at the offices of the United States Attorney for the Northern District of California ("the Office") on April 19 and 20, 2010 ("the meeting"), the following understandings exist:

(1) In any prosecution brought against Client by the Office, the Office will not offer in evidence any statements made by Client at the meeting (A) in its case-in-chief or (B) at sentencing. The Office may use any statements made by Client and any other information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used by the Office in any stage of a criminal prosecution (including but not limited to detention hearing, trial or sentencing).

(2) Notwithstanding paragraph (1) above, the Office may use any statements made by Client at the meeting for any purpose (A) should Client testify or (B) to rebut any evidence offered, or factual assertions made, by or on behalf of Client at any stage of a criminal prosecution (including but not limited to detention hearing, trial or sentencing).

(3) It is further understood that this agreement is limited to the statements made by Client at the meeting and does not apply to any oral, written or recorded statements made by Client at any other time or to any other information provided at the meeting. Moreover, the provisions of Fed. R. Crim. P. 11(f) and Fed. R. Evid. 408 and 410 do not apply to any statements made by Client at the meeting. No understandings, promises, or agreements have been entered into with respect to the meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.

Dated:

JOSEPH P. RUSSONIELLO
United States Attorney
Northern District of California

By:

KIRSTIN M. AULT
Assistant U.S. Attorney

MARY SHAFFER
Client

JASON CHIN
Special Agent

JOSEPH AVERGUN

BRANDON BRIDGERS