An Ironic Corollary to the Proffer Problem: Dead-to-Rights is Better Off

By Lisa A. Mathewson

Articles in The Champion by Jon May (this issue) and Barry Tarlow (March 2005) make clear one reason that so much angst attends the decision of whether to proffer: the standard proffer agreement is a waiver of rights. Given that, defense lawyers who are convinced that their clients should proffer should always ask themselves, “Is it better to go in ‘bare’ rather than sign a letter agreeing to the waiver?”

The answer depends, of course, on what protections your client has absent the waiver. And that is why clients who have no hope of escaping prosecution may actually be better off — for proffer purposes — than those trying to proffer their way into immunity or declination. When your client’s statements are made in the course of plea discussions, Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f) will render the statements inadmissible — unless you waive the rules’ protections by signing a proffer letter. Some persuasive case law establishes that proffers given in the hope of obtaining a cooperation plea agreement are statements made “in the course of plea discussions,” and therefore are inadmissible.

A favorable case from the Eastern District of Pennsylvania lays out the analysis. United States v. Stein, 2005 WL 1377851 (E.D. Pa. 2005), proceeded as drug prosecutions often do. The Assistant U.S. Attorney told defense counsel that the government had substantial evidence against defendant Stein and that he was likely to be indicted. The government was, nonetheless, interested in exploring a plea and cooperation. The parties agreed to a proffer. The purpose, from the government’s perspective, was to assess Stein’s usefulness as a cooperating witness. The defense was acting on “the hope that the government would provide a 5K, in anticipation that there would be an indictment and a guilty plea to something.”

The government prepared its standard proffer letter, stating that the proffer would be “off-the-record” and that the defendant partially waived Rule 410 and Rule 11. Defense counsel declined to sign it. She believed that the rules protected her client’s statements, and she saw no reason to waive them. Two proffers took place and the government agreed to a 5K; but then cooperation broke down, plea negotiations fell apart, and the defendant (with new counsel) moved pretrial to suppress his proffer statements.

The government took two tacks in opposing suppression: one, arguing that the proffer became “on-the-record” once defense counsel declined to sign the letter; and two, arguing that statements made during the proffer were not made “in the course of plea discussions,” and therefore were protected neither by Rule 410 nor Rule 11. The court distinguished facially contrary case law from the First and Eighth Circuits, which have held that proffer sessions are not protected unless the terms of a plea are explicitly discussed. The First and Eighth Circuit cases were distinguishable, the court said, because the defendants in each of those cases were unrepresented. The involvement of counsel “makes it more likely that a proffer is part of a formal negotiated process directed toward a plea and not just a voluntary confession in hopes of leniency.” To the extent that the First and Eighth Circuit cases were not limited to their facts, the Stein court simply disagreed with them.

Practice Tips

As noted above, the defendant who proffers only to win a better plea agreement benefits from this analysis; the defendant who proffers to support a declination

WWW.NACDL.ORG
or immunity pitch does not. In this sense, dead-to-rights really is better off. There is no reason in principle to limit the *Stein* analysis to attempts to win a cooperation deal, although that is clearly the most common reason to proffer during plea negotiations. Attorneys who recommend proffers in the course of any plea negotiation — e.g., about amount of loss, or drug quantity — should carefully consider the applicability of Rule 410 and Rule 11(f).

The *Stein* court adopted a “totality of the circumstances” test for deciding when a proffer is actually part of a plea negotiation. Applying that test, the court cited in Stein’s favor the fact that his counsel had arranged the proffer sessions, and that both sides understood that the proffers were the first step to a negotiated plea. Even though there was no discussion of the “specific terms of a plea agreement” at the proffer sessions, the sessions were “negotiations over a central element of that eventual plea [a 5K departure]. . . and therefore part of the overall discussion of the plea.” Counsel — and clients — should keep in mind that the plain language of the rules in the abstract hope of winning leniency is not.

In this district, where *Stein* was decided, some prosecutors continue to view proffer letters as a boon to the defendant; they are surprised, but do not object, when defense counsel declines to sign. But other prosecutors have figured out the implications. I recently had a case in which a prosecutor requested a proffer after investigation had convinced him that charges were warranted. We had explicit discussions about bringing in my client so that the government could assess the client’s potential as a cooperating witness, and the possibility of a 5K plea agreement. After careful consideration and consultation with the client I told the prosecutor that the client would proffer, “given that this is the first step in negotiating a plea agreement.” The prosecutor replied that he would not accept the proffer absent a signed proffer letter, which he referred to — quite correctly — as a “signed waiver letter.” The proffer did not happen for that reason. As the client now avows his desire to go to trial, I believe that was the right decision. Counsel for any client for whom indictment appears inevitable should consider standing on the protections that the rules confer, and declining to play the waiver game.

**Notes**

1. This discussion does not address whether to proffer, only how to proceed if proffering is the right thing to do. Proffers are always risky. For example, even when proffer statements are excludable for the reasons discussed herein, the government may make derivative use of them. See, e.g., United States v. Millard, 235 F.3d 1119, 1120 (8th Cir. 2000); United States v. Rutkowski, 814 F.2d 594, 598-99 (11th Cir. 1987).
2. Id. at *2-*3.
3. Id. at *4.
4. Id. at *4, *12.
5. Id. at *10.
7. See, e.g., United States v. Morgan, 91 F.3d 1193, 1195-96 (8th Cir. 1996); (United States v. Penta, 898 F.2d 815, 816-17 (1st Cir. 1990).
9. As noted in these pages, the Booker decision has not obviated the 5K departure because many judges remain extremely unlikely to grant a variance for cooperation when the government has declined to file a 5K motion. See Brett Sweitzer and David McColgin, *Post-Booker Sentencing Litigation Strategies — Part II, The Champion,* December 2005 at 42.
10. Id. at *12.
11. The *Stein* court also distinguished cases from the Seventh, Ninth, Fourth and Fifth Circuits, in which the defendant had made statements only to agents, not to prosecuting attorneys, leaving the statements clearly outside the plain language of the rules. Id. at *10, n.12.

**About the Authors**

Lisa A. Mathewson is counsel at Welsh & Recker P.C., specializing in white collar criminal defense. She represents a broad range of individual and corporate clients in traditional criminal proceedings and related civil or administrative enforcement actions. Her practice includes pharmaceutical, securities, health care, tax, and other matters. She has been practicing in this arena for almost 10 years, following a clerkship at the District of Columbia Court of Appeals.

Lisa A. Mathewson
Welsh & Recker P.C.
2000 Market Street, Suite 2903
Philadelphia, PA 19103
215-972-6430
Fax 215-972-6436
E-mail lam@welshrecker.com