ATTORNEY PROFFERS IN FORWARD AND REVERSE

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"**proffer** (**prof**-ər), *vb.* (14c) To offer or tender (something, esp. evidence) for immediate acceptance."[2]

"[W]hat the lawyers say is not evidence…."[3]

The perils and precautions associated with so-called "off the record" proffer interviews are the subject of much wise commentary. Whether and under what conditions to advise a client to speak with the government are momentous decisions. But the art or science of the attorney proffer that often precedes such an interview is worthy of like contemplation. Possibly because counsel's predictions of what a client will say are by no means binding or attributable to the client, there is a temptation to assume that they entail little or no risk. This view is short sighted. This paper describes attorney proffers on behalf of individuals in Antitrust Division investigations and so-called reverse proffers in which prosecutors make potentially valuable disclosures to advance negotiations for testimony.

I. The Immunity Proffer – A Tradition

The attorney proffer long has been enshrined at the Division as the first step in considering immunizing a witness. Internal guidance, current as of 2011, instructed prosecutors that proffers were prerequisites to seeking witness immunity authority:

> Proffers may be taken from the attorney representing the individual or from the individual himself. Usually, the best practice is to obtain an attorney proffer first, which then the individual must confirm in its essential details before immunity is sought. This practice protects both the individual and the Government from becoming involved in inadequate proffers. It also has the advantage of establishing a degree of trust between opposing counsel that is essential for successful

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[2] *Black's Law Dictionary* (9th ed. 2009), *available at:* Westlaw BLACKS

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[3] *Third Circuit Model Criminal Jury Instructions*, 1.08 Evidence (What is; is Not), *available at*: http://www.ca3.uscourts.gov/sites/ca3/files/2012%20Chapter%201_0.pdf

negotiations.[4]

To obtain a formal immunity order[5], prosecutors are obliged to represent to a court that a witness's testimony may be necessary to the public interest and that the witness has refused, or likely will refuse, to testify on the basis of the privilege against self-incrimination. In practice, the prosecutors are obliged to satisfy a number of requirements for their superiors to approve immunity whether upon application to the court or by agreement. For counsel, the most important of these are:

- the value of the person's testimony or information to the investigation or prosecution;
- the person's relative culpability in connection with the offense… and his or her criminal history; and
- the possibility of successfully prosecuting the person prior to compelling his or her testimony. [6]

In some cases, prosecutors decide to seek or confer immunity based on circumstances and speculation rather than anything defense counsel says. But the practice of conferring "blind immunity" to preserve the element of surprise in the grand jury is rare.[7] More often, Division lawyers require some indication of what the witness would say under oath. In the usual case, then, counsel must decide whether and how to fashion a proffer that makes the client valuable to the government but not most culpable.

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[4] *Antitrust Division Grand Jury Practice Manual* (2011), November 1991 (1st Edition) V-41, *available at:* http://www.justice.gov/atr/public/guidelines/4371.htm

[5] Pursuant to 18 US.C. § 6001, *et seq*.

[6] **Decision to Request Immunity—The Public Interest**
Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness "may be necessary to the public interest." Some of the factors that should be weighed in making this judgment include:
- The importance of the investigation or prosecution to effective enforcement of the criminal laws;
- The value of the person's testimony or information to the investigation or prosecution;
- The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
- The possibility of successfully prosecuting the person prior to compelling his or her testimony;
- The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

United States Attorneys' Manual at 9-23.210 *available at:* http://www.justice.gov/usam/usam-9-23000-witness-immunity#9-23.210

[7] *See* Dan K. Webb, Robert W. Tarun, Steven F. Molo, *Corporate Internal Investigations* (Law Journal Press 2003) pg. 15-13

II. The Proffer Process in Practice

What can counsel expect from expressing a willingness to describe the witness's probable testimony? At times, counsel is able to extract a government promise that, if the substance of the attorney proffer is confirmed in the witness's interview, immunity will be conferred. Some prosecutors decline to make any promises at all until the interview, an approach seen less often at the Division than in United States Attorneys' Offices. Moreover, it is not uncommon for the attorney proffer process to extend over a series of meetings at which prosecutors seek details from counsel and pose questions intended for the witness.

Prosecutors vary widely on how much information they disclose in an effort to prompt a proffer. Division prosecutors usually assume, justifiably, that attorneys for individuals will have learned a good deal about the investigation from corporate counsel. Still, the prosecutors have no way to be sure what counsel for an executive actually knows about the investigation. Moreover, information individual counsel acquires from exchanges with corporate counsel normally is subject to a joint defense/common interest agreement.[8] Hence, counsel is wise to approach discussions with the prosecutors as if counsel knows nothing except that the client was subpoenaed or otherwise attracted official attention.

Counsel's first encounter with the government may yield few particulars about the inquest either because the prosecutors are wary of making disclosures or the investigation is new. At best, general details, such as the product market, the number and identities of supposed corporate conspirators, and the witness's general role in the conspiracy may be forthcoming. There are some important questions counsel should try to resolve before any consideration is given to preparing a proffer on behalf of the client.

Where the government had a chance to interview the client before counsel was retained, such as in a "drop-in" interview, counsel is obliged to determine whether the prosecutors believe the client dissembled. Government skepticism about the witness's credibility, if not addressed, can sabotage an attorney proffer from the start. Moreover, if the prosecutors believe a false statement case is viable, an attorney proffer, let alone an interview, may be out of the question. Fortunately, exculpatory denials in unrepresented interviews rarely derail the proffer process. Prosecutors normally put aside doubts about

[8] *See* Kathryn M. Fenton, "Conflict and Ethics Issues Arising from Joint Defense/Common Interest Relationships", *The Antitrust Source*, December 2009, *available at*: www.americanbar.org/content/dam/aba/publishing/antitrust_source/DEC09_Fenton12-17f.authchcck.dam

the witness based on statements without benefit of counsel if there is a reasonable chance that the proffer process will lead to a truthful interview.

Likewise, counsel should inquire whether the client is suspected of any obstructive acts such as the destruction of evidence or influencing other witnesses. The answers to such questions are essential both to counsel's advice whether to make a proffer and ultimately whether to advise the client to submit to an interview. The possibility of a serious obstruction issue alone may make an attorney proffer inadvisable unless the government will commit to declining prosecution in the interest of obtaining the witness's testimony.

Finally, counsel should consider whether the likelihood of electronic monitoring of the client makes an attorney proffer inadvisable. The fact that most cartel investigations do not include surveillance evidence may incline counsel to overlook this possibility. The government is obliged only to disclose evidence of *unlawful* surveillance[9] and usually will decline to affirm or deny the existence of any surveillance during the investigation. In the unlikely event the prosecutors elect to disclose the existence or even the recordings from surveillance, counsel should defer formulating a proffer until the government's disclosures are thoroughly reviewed with the client.

III. The Ambiguous Proffer Invitation

While Justice Department guidance tends to refer to proffers in connection with immunity, the same proffer protocol is employed when prosecutors look for a cooperation plea agreement. Since the client could well be a defendant no matter what happens in the process, the immediate challenge is for defense counsel to decide whether any statement about the client's evidence is advisable. For years, prosecutors and defense counsel engaged in a predictable minuet in which counsel for the individual asked whether the client was a mere" subject" of the investigation or a "target". Department guidance about advice to grand jury witnesses defines these terms.[10] In antitrust

[9] The government's obligation to affirm or deny the existence of any surveillance or unlawful act or exploitation thereof derives from 18 U.S.C. § 2511 and described in *United States v. Gelbard*, 408 U.S. 41 (1972). *See also*, *United States Attorneys Manual*, *Criminal Resource Manual* at Section 727. Civil Contempt, *available at:* http://www.justice.gov/usam/criminal-resource-manual-727-civil-contempt

[10] "A 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization, which is a target, is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. … A 'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation."

See United States Attorneys' Manual 9-11.151 **- Advice of "Rights" of Grand Jury Witnesses** available at: http://www.justice.gov/usam/usam-9-11000-grand-jury#9-11.153

investigations, a "subject" typically is a person who at least has knowledge of, or even some degree of culpability in the conspiracy, but yet has a chance of avoiding indictment. "Targets", in Division parlance, almost certainly should expect to be indicted. The following operative assumptions are useful:

- An individual who is served with a subpoena and whom the government specifies cannot be represented by corporate counsel, must be considered a "subject"; but
- That subpoenaed individual normally has not attained "target" status because the Division does not subpoena "targets" save in extraordinary cases[11]; but further,
- The government often opens proffer discussions with counsel for "targets" such where a decision has been made to "carve out" or exclude them from any corporate non-prosecution agreement.

Prosecutors and defense counsel often avoid the explicit classifications in favor of a dialogue over whether the individual yet may somehow avoid prosecution entirely. While this tends to be a short conversation, it is a critical one. Where immunity remains a possibility, counsel's decision to disclose hypothetical information about the client's testimony including culpability may be simpler than otherwise.

IV. Proffers in the Age of Amnesty

With the success of the Division's Leniency Program[12] in accelerating Sherman Act criminal investigations, the chances of negotiating immunity have diminished decidedly. Unless the prosecutors already consider the subject of investigation an immunity candidate, the government's request for an attorney proffer is much more likely a call for plea negotiations. The question for counsel in the opening exchange with the Division is whether the client still can attain immunity or a non-prosecution agreement. Sooner or later, the answer usually is no. After all, most U.S. cartel investigations now commence with conditional amnesty for a corporation, which normally supplies a bevy of cooperating executives all likely to testify without criminal consequence.

So what does counsel gain by predicting the client's evidence where it is evident that immunity is out of the question? The Division explicitly agrees that counsel's statements in attorney proffers will not be attributed to the witness.[13] Still, counsel must

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[11] *See United States Attorneys' Manual* 9-11.150 **- Subpoenaing Targets of the Investigation** *available at:* http://www.justice.gov/usam/usam-9-11000-grand-jury#9-11.150

[12] The Antitrust Division's Leniency Program, *available at:* http://www.justice.gov/atr/leniency-program

[13] *See* Exhibit 1 hereto for a recent example of this agreement on the part of the Division.

assume that even the lawyer's non-binding putative statements about what the client's version will be of practical use to the government and its agents. An attorney proffer may equip the prosecutors with new avenues of investigation of the client or, even worse, with information with which to prepare a so-called "perjury trap".[14] No client tells counsel everything.

If an initial conference with the prosecutors makes it clear that immunity is out, counsel should consider seriously whether to say anything to the government about the client's position. The strong temptation is for counsel to make limited hypothetical disclosures in such circumstances because they are not evidence and may even prompt the prosecutors to share some evidence to inform counsel's advice to the client.

Every revelation, even though not evidence, is useful to the government, which, after all, is pursing an active investigation. The risks of attorney disclosures must be discussed with the client and prepared with the same level of care as the client interview itself. Counsel must do all possible to ensure that the attorney proffer does not oversell the client's evidence or disclose defenses that may be needed if the proffer process fails.

V. Attorney proffers and the client interview

The attorney proffer exchange also is the occasion to settle the ground rules for a possible client interview. Counsel should request a copy of any letter the prosecutors would propose to govern the client's interview and, in cases of foreign nationals, to provide the witness "safe passage" for this purpose. These are not purely mechanical discussions, although Division assurances are formulaic and officially non-negotiable. Somewhat dubiously referred to as "Queen for a Day" letters, such agreements include promises and warnings that:

- no statement made by the witness during the interview will be used directly against the witness in any legal proceeding, except that the statement may be offered against the witness to impeach the witness's testimony or to rebut evidence offered on the witness's behalf;
- the government may use any statements made in the interview in a prosecution of the witness for false statements or declarations, obstruction of justice, or perjury; and
- the government is free to use any information directly or indirectly derived from the interview to pursue its investigation and in any subsequent prosecution of the witness or others.

[14] Aptly described, with citations to case and law review commentary in the *United States Attorneys' Manual – Criminal Resource Manual* at Section 1756, *available at:* http://www.justice.gov/usam/criminal-resource-manual-1756-perjury-cases-special-problems-and-defenses-perjury-trap

Both in fashioning an attorney proffer and advising the client, counsel must be conscious that proffer interview agreements invariably require the witness to waive the broad codified exclusion from evidence of both witness statements and counsel's plea discussions under Rule 410 of the Federal Rule of Evidence.[15] Some counsel decline to advise signing "Queen for a Day" agreements for this reason alone. In cases in which it is clear that the government is immoveable in requiring a guilty plea, counsel still must do everything possible to protect the client from his or her own statements in interview until a deal is concluded.

What the prosecutors say about the contemplated interview, including its timing and whether the contents will be shared with other agencies or foreign enforcers, can be highly useful information even if counsel and the client decide against an interview. With this background, counsel has every reason to be cautious about setting the stage for a client proffer interview through even speculative predictions of testimony.

VI. Prompting the Reverse Proffer

If there is a potential bright spot in the proffer picture for defense counsel it derives from the bounty of evidence the government acquires from applicants under the Leniency Policy. Increasingly, Division prosecutors extend proffer invitations in the hope of completing prosecutions in which they already have a high level of confidence. With some exceptions, prosecutors in this position are much more apt to describe at least some of their proof in what, in recent years, have come to be known as "reverse proffers".

Although Division lawyers may hesitate to call their disclosures to defense counsel reverse proffers, they seem much more likely than formerly to make disclosures to induce cooperation. Yielding otherwise unattainable intelligence about the case, such disclosures can pinpoint inconsistencies, legal pitfalls and even opportunities to undermine the prosecutors' certainty. While is not always available when it could be

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[15] Rule 410. Pleas, Plea Discussions, and Related Statements

"**(a) Prohibited Uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal, Procedure 11 or a comparable state procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present."

most useful, the reverse proffer can put counsel in a much better position to advise the client whether to submit to an interview and what to seek as consideration in return.

VII. The Road ahead for the attorney proffer and its reverse cousin

The Deputy Attorney General's recent pronouncement assigning priority to the prosecution of individuals for corporate misconduct could influence the proffer minuet at the Division.[16] While this guidance specifies that "resolution of a corporate matter will not "provide protection from criminal or civil liability for any individuals" unless there are "extraordinary circumstances", the Division's Corporate Leniency Policy is cited as an "approved departmental policy" that abides. On the other hand, another principle also provides that any resolution of corporate cases must include a "plan to resolve individual cases," and any declination to prosecute individuals must be memorialized."

To the extent prosecutors now are mandated to account for every culpable actor in a cartel investigation, it is reasonable to expect some effect on proffer discussions even in the Division. For example, it is not hard to imagine more specific reverse proffers designed to elicit details to complete investigations where much evidence already is known, much as the Leniency Policy has inspired more focused disclosures by way of reverse proffers currently. Another school of thought is that Division prosecutors may be more inclined to confer "blind immunity" on less culpable individuals in the interest of expedition. It is a bit soon to tell how the new emphasis on individual accountability may affect the proffer dialogue at the Division.

Conclusion

The attorney proffer and, from the defense prospective, its much-coveted cousin, the reverse proffer, are fixtures of pre-indictment discourse, but they should not be taken for granted. What lawyers say may not be evidence, but it can influence forever the client's leverage in the antitrust investigation at a time of maximum jeopardy.

[16] *See* Memorandum from Sally Quillian Yates re "Individual Accountability for Corporate Wrongdoing" dated September 9, 2015, *available a*t: http://www.justice.gov/dag/file/769036.

U.S. Department of Justice

Antitrust Division

Chicago Office

Rookery Building *312/984-7200*
209 South LaSalle Street, Suite 600
Chicago, Illinois 60604 *FAX 312/984-7299*

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BY ELECTRONIC MAIL

Re:

Dear M

This letter sets forth our agreement concerning the basis upon which you, as counsel for will provide an attorney proffer on , 201 , in connection with my office's ongoing grand jury investigation of violations of federal antitrust and related criminal laws in the industry ("Federal Investigation"). The agreement in this letter also applies to any subsequent attorney proffers that you provide regarding your client.

1. Your client has consulted with you, legal counsel of his own choosing, and both you and your client are fully aware that he is a subject of the Federal Investigation.

2. Having been so informed, you and your client have agreed to provide a hypothetical attorney proffer regarding your client's involvement, and the involvement of others, in conduct relevant to the Federal Investigation. We have made no promises to you about your client's status based on the content of the attorney proffer.

3. The United States agrees that your statements in these attorney proffers, as counsel for your client, will not be attributed to your client.

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EXHIBIT 1 - ATTORNEY PROFFERS IN FORWARD AND REVERSE

This letter constitutes the entire understanding between the United States and you regarding these attorney proffers. Please sign, date, and return an executed copy of this letter to indicate your understanding of and agreement with these terms.

Sincerely,

Trial Attorney

_____ _____
Date

Attorney for