New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 103
TUESDAY, NOVEMBER 29, 2016

Outside Counsel

Expert Analysis

Second Circuit Clarifies Scope Of Proffer Agreement Waivers

By **Harry Sandick**

And **Helen P. O'Reilly**

Although securing a cooperation agreement after proffering to the government can lead to enormous benefits for those who successfully navigate the process, the negative consequences of a failed proffer are profound. Assessing the risks of whether to proffer and enter into a proffer agreement is an important part of federal criminal practice. These written agreements between federal prosecutors and a subject of a criminal investigation set the ground rules for the future use by the government of a defendant's statements made during a proffer session.

The agreements typically involve a partial waiver of the protections provided by Fed. R. Crim. P. 11 and Fed. R. Evid. 410 which together provide that evidence of any "statement made during the course of plea discussions with an attorney for the prosecuting authority" is inadmissible against the defendant. Fed. R. Evid. 410(a)(4); Fed. R. Crim. P. 11(f). However, the Supreme Court held in *United States v. Mezzanatto*, 513 U.S. 196 (1995) that the protections afforded under Rule 410 can be waived in proffer agreements, thereby opening the door for a defendant's statements to be used against him if plea negotiations fail.

> The Second Circuit clarified how and when certain defense tactics at trial can open the door to the introduction of the otherwise-protected proffer statements.

In an important recent decision, in *United States v. James J. Rosemond*, 15-0940-cr (Nov. 1, 2016) the U.S. Court of Appeals for the Second Circuit clarified how and when certain defense tactics at trial can open the door to the introduction of the otherwise-protected proffer statements. *Rosemond* has relevance both to white-collar criminal defense practitioners and to those who practice in the gang-related context in which *Rosemond* arose.

Proffer Agreements

The standard proffer agreements in the Southern and Eastern Districts of New York typically protect the defendant from the government's use of factual assertions made during plea agreements. This is necessary because the factual assertions made in the proffer are inevitably inculpatory: The point of a proffer is for a defendant to admit his participation in the crime and to explain who else was involved in committing the crime. The defendant's goal in a proffer is to persuade the government that he can be an effective witness for the government at trial, by admitting guilt and providing substantial assistance to the government. However, the proffer agreements normally include a clause whereby the defendant agrees that his proffer statements may be used by the government to rebut evidence or arguments offered by or on his behalf at any stage of the criminal prosecution.

When a trial defense is inconsistent with statements made in the proffer,

HARRY SANDICK *is a partner at Patterson Belknap Webb & Tyler and a former assistant U.S. attorney for the Southern District of New York.* HELEN P. O'REILLY *is an associate with Patterson Belknap.*

the defense can risk waiving that agreement not to disclose the factual statements made in the proffer. As a result, the risk of triggering the waiver provision has long imposed severe limits on cross-examination strategies and arguments that counsel can safely employ without risking the admission of a proffer statement.

Since *Mezzanatto*, courts have addressed on a case-by-case basis when the door is opened to admitting proffer statements. The Second Circuit has demonstrated a broad willingness to enforce proffer agreement waivers in a wide variety of circumstances. See, e.g., *United States v. Barrow*, 400 F.3d 109, 117-18 (2d Cir. 2005). In *Barrow*, for example, the defense lawyer stated in his opening argument that "this is a case of mistaken identity"and then asked the undercover agent whether he had fabricated evidence in support of the government's case. During the proffer, the defendant admitted that he committed the crime for which he was later tried. Id. at 114. The trial court allowed statements in the proffer to be admitted—which became a basis of the appeal of the conviction. The Second Circuit affirmed the conviction.

The Second Circuit has commented on the fact-specific nature of the relevant inquiry. See *United States v. Roberts*, 660 F.3d 149, 158 (2d Cir. 2011) (holding that the distinction between asserting facts and challenging the sufficiency of evidence depends on the "'unique insights' a district court gains from actually seeing and hearing these matters pursued in the dynamic context of a trial," and that the court was unlikely to "second guess reasonable assessments informed by such insights").[1] This judicial posture has left defense counsel in the precarious position of assessing whether certain lines of cross-examination or argument may lead to the admission of damaging proffer statements. The stakes are very high: If any part of a defense is deemed to be inconsistent with a proffer, it is possible that the entire proffer may be admitted as evidence against the defendant.

Rosemond Case

In *Rosemond*, the Second Circuit held that the district court had applied the waiver provision so broadly as to infringe on the right to counsel. The case involved allegations of a conspiracy to commit murder-for-hire of members of a rival music management business in violation of 18 U.S.C. §1958, as well as firearms, money laundering, and narcotics counts. The defendant signed a standard proffer agreement that prohibited the government from using statements against him except to rebut factual assertions made by him or on his behalf at a later proceeding. During one such proffer session, the defendant made statements indicating that he understood the murder victim would be killed and not merely assaulted or kidnapped. Slip Op. at 13.

The stakes are very high: If any part of a defense is deemed to be inconsistent with a proffer, it is possible that the entire proffer may be admitted as evidence against the defendant.

Plea negotiations proved unsuccessful, and the case went to trial. At both the initial trial and on retrial, defense counsel sought to cross-examine the government's key witness about whether the defendant had used the words "murder" and "kill" during their meetings. The government objected, arguing that this line of cross-examination and any summation relying on it was designed to suggest that the defendant wanted the victim assaulted or kidnaped, not killed, and therefore contradicted statements made in the proffer admitting intent to kill.[2] Slip Op. at 17-18. The district court ruled in favor of the government and held that the door would be opened if defense counsel argued or implied that the government failed to prove that the defendant had intended to murder—as opposed to merely shoot—the victim. Defense counsel decided to limit its cross-examination in order to avoid opening the door to the admission of the proffer statements.

The circuit reversed and held that the district court unduly circumscribed defense counsel's argument and his cross-examination of government witnesses. Relying on its decision in *United States v. Oluwanisola*, 605 F.3d 124, 133 (2d Cir. 2010), the court rejected the government's argument that the defense opened the door as long as it did something more than cast doubt on a witness' general credibility.[3] The court held that questioning a witness about his knowledge, recollection and perception of an event—more than merely casting doubt on witness credibility—did not amount to a factual assertion contradicting the proffer statements. Slip Op. at 27. In particular, the court clarified that asking a witness what he discussed with others or perceived was not equivalent to contradicting the defendant's admissions in his proffer. Notwithstanding having proffered, a defendant remains entitled

to argue that the government has failed to prove specific elements of the crime. Id. at 39.

Adding clarity for all concerned about what is permitted without opening the door to the admission of the proffer statements, the court listed six circumstances in which a defense jury address or cross-examination approach is not a factual assertion and therefore does not trigger the waiver provisions:

- Pleading not guilty;
- Arguing generally that the government has not met its burden of proof;
- Arguing specifically that the Government has failed to prove particular elements of the crime, such as intent, knowledge, identity, etc.;
- Cross-examining a witness in a manner to suggest that he was lying or mistaken or was not reporting an event accurately;
- Cross-examining a police officer about discrepancies between his testimony and his earlier written report; and
- Arguing that the government failed to present corroborating evidence.

Id. at 29-30.

The court also laid out a list of when factual assertions will trigger the waiver, and noted that, generally, "[w]hen the defense introduces an exhibit or offers testimony from a defense witness, there is a greater likelihood that new facts are being asserted." Slip Op. at 26-27.

- Asserting, in an opening statement, that someone other than the defendant was the real perpetrator of the crime;
- Accusing an officer, in cross-examination, that he had fabricated a meeting with a confidential informant where defense counsel had argued mistaken identity in his opening statement;
- Arguing that a shooting was "an intended kidnapping gone wrong," when the defendant admitted in a proffer session that the shooting was "an intentional murder";
- Proffering documentary evidence that implied that a cooperating witness was not present as alleged by the Government, where the evidence was offered not just to impugn the witness's credibility, but to prove a fact that contradicted the defendant's proffer statement.

Id. at 30-31.

The court acknowledged that, of course, "[c]hallenges to the sufficiency of the Government's evidence will often carry with them the inference that events did not actually occur consistent with the Government's theory, and thus—at some level—are arguably contrary to the proffer statements." Id. at 34. However, this same inference is present when a defendant pleads "not guilty." A "not guilty" plea is not a "factual assertion," as it does not "propose an alternate version of events inconsistent with the proffer statement." Id. Likewise, defense counsel was free "to argue that certain inferences from the Government's proof should not be drawn." Id.

Rosemond stands for two propositions. First, it limits the government's ability to argue that the door has been opened when defense counsel is only casting doubt on whether the government has proved its case or whether its witnesses have been truthful. A failed proffer session should not preclude the ability to advance any trial defense, which would be the result from an overbroad reading of the proffer agreement. Second, it lays out more concrete guidance for courts, prosecutors and defense counsel about when the door has been opened. A jurisprudence of doubt is of no aid to a defendant and his attorney trying to decide the risks of proffer or the risks of trial. *Rosemond* provides some helpful clarity to litigants making these tough decisions.

1. In *Roberts*, the defense counsel "did not argue simply that the government would fail to produce sufficient evidence to carry its burden, that [the government's witness] would prove not to be a credible witness, or that the government would offer no evidence to corroborate his testimony." Id. at 158. Rather, defense counsel argued that the case was a "reckless" prosecution based on "bad information" that had not been corroborated" and was a story that did not "add up." Id. at 159. During the proffer, the defendant had acknowledged his participation in the offense charged in the indictment.

2. The court reviewed for harmless error based on the objection in the first trial. Slip Op. at 22, 38.

3. In *Oluwanisola*, defense counsel questioned a government witness about the absence of a written report and also asked questions relating to the defendant's alleged role in the conspiracy, but was prohibited from asking further questions about the witness' credibility lest the proffer statements be admitted. Id. at 129-31. The court explained that "[t]here is no inconsistency or contradiction between a defendant's admission that he robbed the bank and his challenge to a witness's testimony that the witness saw the defendant rob the bank and recognizes the defendant." Id. at 133. As in the other cases, the defendant admitted that he committed the charged offense—a fact arguably inconsistent with his trial defense.