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Proffer, Plea and Cooperation Agreements in the Second Circuit

The Department of Justice oversees 93 U.S. Attorney's offices throughout the country and beyond. Thousands of criminal prosecutors in these offices are responsible for enforcing a uniform set of criminal statutes, sentencing guidelines and Department of Justice internal policies.

Among the basic documents that are criminal prosecutors' tools of the trade are proffer, plea and cooperation agreements. These documents govern the relationship between law enforcement and many of the subjects, targets and defendants whom DOJ investigates and prosecutes.

Any belief that these agreements are as uniform as the laws and policies underlying them, however, has been dispelled, at least in the U.S. Court of Appeals for the Second Circuit. A new report of the Federal Bar Council reveals that, among the six districts that comprise the Second Circuit, there are substantial differences between many of the "form" agreements utilized by the U.S. Attorney's offices in those districts.¹

Following is a summary of some of the most significant differences that have been identified by the council among the form agreements used in New York state.

Proffer Agreements

The basic function of the proffer agreement is to allow a witness (or



defendant) to make statements to the government without fear that those statements will be used directly against the witness in a later prosecution. While years

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ago this agreement was as simple as its purpose suggests — and still is in some jurisdictions² — over time it has expanded greatly in scope and complexity, so much so that little is left of its protections for the witness with potential criminal exposure.³ Nevertheless, significant differences remain among the proffer agreements used in New York. For example:

Extent of Protection. While the

Northern and Western districts provide that proffer statements will not be used in any criminal proceeding, the Eastern and Southern agreements are narrower, promising only that such statements will not be introduced in the government's case-in-chief or at sentencing. Thus, proffer statements in those districts may be offered at detention hearings and suppression hearings as well as grand jury proceedings.

Death Penalty Proffer. The Eastern District's proffer agreement has a provision that assures a witness or defendant that proffer statements will not be considered by the U.S. Attorney's Office in deciding whether to recommend to the attorney general that the death penalty be sought. The value of this salutary provision, however, is at best uncertain, particularly in light of the attorney general's recent decision to reject the Eastern District's recommendation not to seek the death penalty against a would-be cooperating defendant and to order that office to seek his execution instead.⁴ Indeed, nothing in the agreement explicitly prevents the attorney general from considering proffer statements, notwithstanding the office's promise not to consider them in making its recommendation.

Government's Use of Statements. All four districts allow the government to use leads derived from proffer statements, and to impeach the witness with the statements should the witness later testify. The Southern and Eastern districts' agreements go further, however, and also authorize the government to use proffer

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statements in rebuttal. What is more, the agreements permit rebuttal not only of evidence offered by the witness, but also of “factual assertions” (Eastern) and even “arguments” (Southern) of defense counsel.

These far-reaching rebuttal provisions have provoked considerable judicial scrutiny, with reported decisions of at least four district judges criticizing, or at least questioning the enforceability of, the provisions.⁵ In one of these cases, *United States v. Duffy*, Judge Nina Gershon went so far as to hold the provision unconstitutional, on the ground that it impermissibly infringed upon the defendant’s right to present a defense and to the effective assistance of counsel at trial.

Witness Lying. While all four districts allow use of a witness’ proffer statements in a false statements or perjury prosecution, the Northern and Western districts’ agreements go further and, if the witness lies, authorize use of the statements in a prosecution for any underlying offenses disclosed during the proffer. The Western District provides the witness with the right to move to suppress statements in this circumstance, with the government then bearing the burden of proving the witness’ misconduct by a preponderance of the evidence. Even so, proffers in these districts are plainly high-stakes affairs.

Safety Valve. Both the Southern and Eastern districts’ agreements state that, if a defendant proffers in order to receive “safety valve” treatment under Sections 2D1.1(b)(6) and 5C1.2 of the Sentencing Guidelines, the proffer statements may be used to calculate the defendant’s guideline range. This exception to the no-use-at-sentencing promise requires a defendant to weigh the benefit of the safety valve reduction against the risk that the proffer will disclose information that will raise the guideline level to an equal or greater degree.

Use at Sentencing. The Eastern District’s agreement makes clear that, consistent with Second Circuit case law, the government cannot withhold relevant information from the sentencing court —

proffers included. What the agreement does provide, however, is that the government will not offer proffer statements into evidence during the sentencing proceeding, thus assuring that these statements will not be relied upon by the court in computing the defendant’s sentence.

Reciprocity. The Western and Southern districts’ agreements provide that proffer statements may be disclosed to another law enforcement agency or prosecutor’s office only if the receiving agency agrees to abide by the terms of the proffer agreement — thus explicitly prohibiting a theoretical end-run around the protections of the agreement.

Polygraph. The Western District agreement provides for the witness’ consent to a government-administered polygraph examination.

Plea Agreements

The basic “plea bargain” — the defendant pleads guilty to some charge, the government agrees not to bring and/or dismiss other charges, and the potential sentencing range is defined — can be found in all four districts’ plea agreements. However, considerable variation exists in the manner in which this bargain is effectuated.

Waiver of Rights. One trend in the Southern and Eastern districts is for plea agreements to require the defendant to waive an increasing number of judicially and statutorily created rights, in addition to the right to trial and related rights. Thus, the defendant is required to waive his or her right to further discovery (including exculpatory and impeachment material), the right to bring a Hyde Amendment claim with respect to any dismissed charges, and (in the Eastern District) the right to a jury determination of sentencing-related factual issues.

Departure Motions. Both the Southern and Eastern districts’ agreements provide that the government will not move for an upward departure, with the Western District agreement authorizing such a

motion only if the grounds for it are set forth in the agreement. The Northern District provides no similar assurance with respect to upward departures.

On the other hand, the Southern District agreement is unique in requiring a defendant to forego the opportunity to move for — or even suggest, to the sentencing court or the Probation Department — a downward departure. (In the Western District, a defendant may seek such a departure, but only on grounds set forth in the agreement.)

While the provision does not actually prevent a judge from granting a downward departure, it certainly makes it far less likely that a defendant will receive one. While one district court has upheld the legality of this type of provision,⁶ its fairness is certainly subject to debate, particularly in view of the ever-increasing limitations on district judges’ ability to grant such a departure in the first place.⁷ Of a piece with this policy is the Southern District’s practice, unique among the four, of reserving the right to take a position on where within the guideline range a defendant should be sentenced.

At one time, DOJ policy provided for one- to two-level downward departures for alien defendants who agreed to be deported after serving their sentences. However, that policy was rescinded in 1998.⁸ Currently in New York, only the Western District agreement provides for this reduction.

Guideline Estimates. The Southern and Eastern districts both provide estimated guideline calculations — the former in a so-called Pimentel⁹ letter, the latter in the agreement itself. The Northern District, on the other hand, does not, and even disclaims its ability to determine a defendant’s criminal history category in advance of the pre-sentence investigation.

Use of Plea Statements. The Northern District agreement provides that factual admissions in the agreement are admissible in any subsequent proceeding — even if the plea does not transpire or is later withdrawn.

Cooperation Agreements

The districts' cooperation agreements all provide the basic cooperation bargain: a guilty plea and the full cooperation of the defendant in the investigation and prosecution of others in exchange for the prospect of a 5K1.1 downward departure motion and a substantially reduced sentence. Within those general parameters, variation exists in the nature of the defendant's obligations, the extent of his or her potential benefits, and the consequences of a defendant's breach.

Defendant's Obligations. Each agreement defines differently the scope of what the defendant must disclose. The Eastern District requires the defendant to provide information regarding "all criminal activities" of the defendant and others; the Southern and Northern districts require similar disclosure but only if the government asks about it; and the Western District requires such disclosure but only as to specified offenses. The Southern District goes further, however, and also obligates a defendant, whether asked or not, to disclose all crimes as well as all administrative, civil and criminal proceedings, investigations or prosecutions in which the defendant was a subject, target, party or witness.

Other procedural obligations vary as well. The Eastern District agreement has a right-to-counsel waiver for debriefings — an effort to contractually overrule the Second Circuit's decision in *United States v. Ming He*.¹⁰ The Western District agreement, in contrast, guarantees the right to have counsel present at debriefings. Both the Eastern and Northern districts' agreements prohibit the defendant from disclosing his or her cooperation. And the Western District agreement requires that the defendant continue to cooperate even after sentencing.

Defendant's Benefits. All the agreements provide for the filing of a 5K1.1 motion if the defendant provides substantial assistance to the government and otherwise complies with the agreement.

The Northern and Western districts' agreements make clear that the defendant's entitlement to such a motion does not depend on the outcome of an investigation or prosecution. The Western District agreement also contemplates that the government will recommend, in its departure motion, a reduction of a specific number of guideline levels.

The Northern District alone provides so-called 1B1.8 protection,¹¹ thus ensuring that a defendant's disclosure of uncharged criminal activity will not be used to determine or upwardly depart from his or her guideline range. The Eastern District allows for the possibility of 1B1.8 protection in the event a defendant makes a good faith effort to cooperate but is unable to provide the requisite substantial assistance for a 5K1.1 motion.

Finally, both the Southern and Eastern districts provide that, when appropriate, the government will seek to admit the defendant into the Witness Security Program or otherwise provide suitable security measures. In addition, both districts' agreements contemplate providing cooperating alien defendants with support in their efforts to secure immigration-related relief.

Defendant's Breach. All four districts provide four major consequences of a defendant's breach: the guilty plea stands; the government can prosecute the defendant for any crimes, even those disclosed by the defendant during the course of his or her cooperation; the government can use statements made during cooperation in any such prosecution; and the government need not file a 5K1.1 motion.

In the Southern, Eastern and Northern districts, the decision whether to declare a defendant in breach rests with the government. In contrast, the Western District agreement provides that, if the government believes the defendant has breached the agreement, it may petition the court for an order relieving it of its obligations and must establish the breach to the court's satisfaction, by a preponderance of the evidence.

Conclusion

What emerges from the Federal Bar Council's examination of the New York districts' proffer, plea and cooperation agreements is the fact that, despite the Department of Justice's efforts to impose uniformity in many areas of federal criminal practice, these districts retain considerable discretion to fashion agreements consistent with the laws, customs, traditions and practices in particular districts.

The wisdom of these inconsistencies can be debated. What is clear, however, is that counsel must be fully familiar with the terms of these agreements and not assume that the same "boilerplate" provisions apply everywhere.

(1) See Federal Bar Council, Committee on Second Circuit Courts, "Proffer, Plea and Cooperation Agreements in the Second Circuit" (June 2003). The author, together with Committee Chairman Marco Schnabl, Steven R. Peiken, Michael Kim, and the U.S. Magistrate Judge Robert M. Levy, was a member of the subcommittee that authored the report.

(2) Vermont's proffer agreement is two paragraphs, totaling 11 lines of text.

(3) See, e.g., R. Zabel & J. Benjamin, "Are 'Queen for a Day' Pacts Courtesans?," NYLJ (June 13, 2001); F. Hafetz & B. Garson, "The 'Queen for a Day' Agreement: A High Risk Venture," Business Crimes Bulletin (April 2001); R. Morvillo & R. Anello, "Cooperation: The Pitfalls and Obligations for Defense Attorneys," NYLJ (Dec. 5, 2000).

(4) W. Glaberson, "Ashcroft's Push for Execution Voids Plea Deal," The New York Times (Feb. 1, 2003).

(5) *United States v. Maynard*, 232 F.Supp.2d 38, 39 (E.D.N.Y. 2002) (Weinstein, J.); *United States v. Duffy*, 133 F.Supp.2d 213, 216 (E.D.N.Y. 2001) (Gershon, J.); *United States v. Lauersen*, 2000 WL 1693538 at * 7-8 (S.D.N.Y. Nov. 13, 2000) (Pauley, J.); *United States v. Doe*, 1999 WL 243627 at * 9 (E.D.N.Y. Apr. 1, 1999) (Gleeson, J.).

(6) *United States v. Zukerman*, 129 F.Supp.2d 198, 200 (E.D.N.Y. 2000).

(7) See, e.g., the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. 108-21.

(8) *United States v. Sentamu*, 212 F.3d 127, 128 (2d Cir. 2000).

(9) *United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991).

(10) 94 F.3d 782 (2d Cir. 1996).

(11) See U.S.S.G. § 1B1.8.

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