Risks Of Today's Proffer Agreements May Outweigh Benefits

By **Jillian Berman, John Siffert and Benjamin Schwartz** (March 31, 2025)

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When conducting interviews in criminal investigations, many U.S. attorney's offices use so-called proffer agreements — a short contract between one or more sections, divisions or agencies of the U.S. Department of Justice and the individual who has agreed voluntarily to be interviewed.

The primary benefit of a proffer agreement to the interviewee is that it usually entitles them to immunity from direct use of proffered information in a future criminal prosecution for the conduct under investigation.

Yet the proffer agreements used by many U.S. attorney's offices lack protections if the information obtained by a prosecutor pursuant to these agreements is shared with other government agencies.

The lack of uniformity or clarity in how proffered information may be shared with other agencies can complicate whether defense counsel should advise a client to enter a proffer agreement.[1]

Once called "queen for a day" agreements,[2] proffer agreements were originally designed to allow a putative defendant to persuade a prosecutor to decline prosecution without fear that the interviewee's words would be used against them. And it allowed a prosecutor to assess the target's credibility and determine if the individual was a candidate for cooperation or leniency.

The prosecutor's ability to use the proffered information was quite limited. In addition to using the proffered statements for cross-examination should the defendant testify inconsistently with the proffer, the prosecutor could use the information only to pursue leads and develop additional evidence. But proffering clients' attorneys had little reason to fear additional consequences.

Proffer agreements have evolved over time, however, and now offer fewer protections to individuals,[3] such that the agreement's primary protection — direct use immunity — may be outweighed by its limitations.

This article addresses the need to include a provision in proffer agreements that would bar the prosecuting office from sharing information obtained at a proffer session with other government agencies that are not parties to the agreement. The article also explores whether, absent such a provision, the direct use immunity protections given to the proffering individual have continued vitality.

There is now a significant risk that a prosecuting office may share proffer statements with other law enforcement agencies because of the growing prevalence of overlapping investigations by different U.S. law enforcement entities — including state prosecutors and federal regulators — as well as foreign sovereigns.

The need for counsel to be attentive to this issue is especially timely given the different approaches taken by various U.S. attorney's offices toward sharing proffered information.

Proactive advocacy can yield a proffer agreement that restricts the signatory office from sharing client proffer statements at all, or only with others that adhere to the contractual terms.

Indeed, the government's refusal to include such language may be instructive as to whether to advise a client to enter a proffer agreement or make a proffer at all.

Proffer agreements lack consistency in protecting against information sharing.

While proffer agreements are customary among federal prosecutors, the DOJ has not prescribed the use of a single, uniform proffer agreement for all federal prosecutors.

Instead, individual U.S. attorney's offices and sections within the Criminal Division of the DOJ have standard proffer agreement forms used by prosecutors who work within those divisions and districts. But the language of the proffer agreements varies across the DOJ — and the different agreements do not all treat information-sharing the same.

Some U.S. attorney's offices and investigating sections use proffer agreements that restrict the counterparty agency from sharing proffer statements with other agencies unless those agencies abide by the terms of the proffer agreement.[4] Many prosecutors use proffer agreements that are silent on the issue of information-sharing.[5] Some prosecuting offices expressly state that the proffer agreement, as a general matter, does not bind other law enforcement agencies beyond the office conducting the proffer.[6]

These differences in how proffer agreements treat information-sharing with other prosecutors and law enforcement agencies are significant. White collar investigations often involve conduct that spans multiple jurisdictions and that may fall within the purview of multiple government entities.

Given the relatively permissive venue rules[7] and given the prevalence of cross-border investigations, it is important for counsel to appreciate the potential limits of the direct use immunity conferred by a proffer agreement.

The U.S. Court of Appeals for the Ninth Circuit's 2009 decision in McKnight v. Torres provides a cautionary tale for entering a proffer agreement that is silent on information-sharing with other prosecutorial entities.[8]

The petitioner in that case, Aaron Cain McKnight, had proffered incriminating information about his role in a drug importation scheme in exchange for the government's promise of limited use immunity pursuant to a proffer agreement.

The government later charged McKnight, but abided by the terms of the agreement and did not offer the self-incriminating statements made at the proffer session during a trial that ended in a hung jury.

McKnight later pleaded guilty to a superseding indictment. Around the same time, a French court — the Tribunal de Grande Instance de Paris — issued a judgment of conviction following a trial in absentia at which a record of McKnight's proffered statements was used to prove his role in the importation scheme.

On the same day that McKnight was sentenced pursuant to his guilty plea in the California case, he was taken into custody pursuant to an extradition warrant issued by French authorities.

McKnight filed a habeas petition, alleging that an extradition order filed by the U.S. government had breached the government's immunity agreement by sharing with the French authorities McKnight's incriminating admissions from proffers.[9]

The U.S. District Court for the Central District of California denied his petition, reasoning that "the immunity agreement unambiguously applies exclusively to criminal cases brought by the [U.S. Attorney] against petitioner in its role as prosecutor for the United States."[10]

On appeal, McKnight argued that, by sharing a record of his proffer with French authorities, the government had breached the terms of his immunity agreement and violated covenants of good faith and fair dealing implied by the agreement, notwithstanding the absence of any express information-sharing restriction.

In advancing these arguments, McKnight emphasized precisely the risk addressed in this article:

> If the [U.S. attorney's office], after making a promise of informal direct use immunity like the one it made in this case, were free to voluntarily disseminate a potential cooperating witness'[s] proffer to other jurisdictions, its promise of direct use immunity and the protection it was intended to provide the witness would easily be circumvented. The [U.S. attorney's office] could induce a prospective cooperating witness to incriminate himself with the promise and assurance that his statements would not be used to incriminate him directly, and then hand them off to another jurisdiction — state, federal, or foreign.[11]

The Ninth Circuit was not persuaded. McKnight had admitted that the proffer agreement language about not using "his statements 'was limited to the pending prosecution and any other prosecution [the U.S. Attorney] might bring against [him].'"[12]

The court explained that the "unambiguous words of the agreement are the end of the story," and held that because "McKnight's unambiguous agreement with the government does not contain any limitation on the government's freedom to share his admissions," the government's decision to share those admissions with French authorities "did not violate the agreement."[13]

The McKnight case makes clear the danger of relying on the terms of a proffer agreement that is silent on the issue of information-sharing, and with immunity language that is limited on its face to only the prosecuting office that is a signatory to the agreement.

The U.S. Court of Appeals for the Second Circuit's September 2024 decision in U.S. v. Maxwell provides more ground for concern.[14]

In that case, Jeffrey Epstein's nonprosecution agreement with the U.S. Attorney's Office for the Southern District of Florida provided that "the United States ... [would] not institute any criminal charges against any potential co-conspirators of Epstein."

Ghislaine Maxwell was subsequently prosecuted by the U.S. Attorney's Office for the Southern District of New York as a co-conspirator of Epstein.

In that case, Maxwell claimed that the Southern District of New York was barred from prosecuting her based on the terms of the NPA. The Second Circuit rejected this claim, finding "nothing in the NPA that affirmatively shows that the NPA was intended to bind multiple districts."[15] Indeed, the Second Circuit cited language in the NPA as evidence that the agreement was "expressly limited to the Southern District of Florida."[16]

While the Maxwell case involved the interpretation of an NPA and not a proffer agreement, its logic at the very least evidences a likely judicial reluctance to expansively read the protections in a proffer agreement.

Indeed, Maxwell's holding as to the enforceability of the Southern District of Florida's NPA borrowed from precedent concerning plea agreements.

The McKnight and Maxwell cases demonstrate the danger to individuals of assuming too readily that proffer agreements will guarantee direct use immunity — the primary benefit of such agreements.

Agreements that authorize sharing of proffer statements only with other law enforcement agencies that abide by the terms of the proffer agreement offer more protection against this risk than proffer agreements that are silent on this issue.

Yet even still, the Maxwell case is instructive: Absent explicit contractual language to the contrary, an agreement between a proffering individual and a particular U.S. attorney's office will not bind other prosecuting offices.

Even where an agreement states that the contracting U.S. attorney's office will not share proffered information absent the recipient's promise to abide by the proffer agreement's terms, a proffering individual may have little recourse where either:

- The contracting law enforcement agency abides by the information-sharing term, but the recipient nonsignatory breaches and directly uses the proffered information to prosecute the defendant; or

- The contracting law enforcement agency breaches and shares the proffered information without securing any promise that the recipient will abide by the agreement.

In either scenario, as unfair as it may seem, under Maxwell, the proffering individual may have little recourse against the recipient office.

In any event, we have found no authority suggesting that an enforceable remedy exists against a government entity that received an individual's proffer statements and then used the statements against that individual, but was unaware that the individual had contracted for direct use immunity.

The counterparty limit to immunity should be considered in evaluating proffer agreements.

DOJ guidelines mandate that no U.S. attorney's office may bind another district without the approval of the attorney general.[17] This may explain the lack of uniformity in the terms of proffer agreements among federal prosecutors.

Each case requires defense counsel to focus on whether a proposed proffer agreement

contains a provision restricting the signatory from sharing proffered information with other offices or entities.

Counsel may be willing to enter a proffer even if no such restriction exists, depending upon the conduct under investigation; the client's role; and whether other law enforcement offices or regulators are already investigating the same conduct, or are likely to do so in the future.

Where appropriate, counsel may cite the need to include protective language that restricts sharing information with other law enforcement entities.

Alternatively, counsel may propose that any such sharing of proffered information must be subject to the receiving entity acknowledging — in writing — that it is obligated to abide by the terms of the operative proffer agreement, and possibly even sign an addendum to the proffer agreement.[18]

There may be reasons for the government to refuse to include such a restriction on information-sharing, if only because of an institutional reluctance to modify a standard template.

If counsel is satisfied that there is no reason to believe the information will be shared or that the prosecuting office wishes to share it, counsel nonetheless may consider obtaining a representation from the office conducting the proffer that it is not aware of other investigations into the same conduct.

A refusal by the prosecutor to confirm this may be a factor in evaluating the good faith of the prosecuting office and the risks of entering a proffer agreement.

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[1] This article does not analyze all the various considerations relevant to whether an individual should agree to a voluntary "proffer" session. It also does not analyze considerations relevant to whether counsel should engage in an attorney proffer, another area where the legal landscape has changed. See Order, United States v. Menendez, No. 23-cr-490 (S.D.N.Y. June 17, 2024), ECF No. 473 (holding slide deck from attorney proffer was admissible as direct evidence against client).

[2] This was the name of a popular television show where the audience applause-meter determined which of several female contestants had told the most sympathetic story, with the prize being a crown bestowed on her head and gifts of home appliances.

[3] The use immunity conferred by a proffer agreement is subject to important limits, many of which have been explored by courts and commentators. See, e.g., United States v. Rosemond, 841 F.3d 95, 109-10 (2d Cir. 2016) (discussing circumstances under which client or counsel may waive immunity at trial); Ingrid S. Martin, Michael R. DiStefano, A Survey of Federal Proffer Agreements: The Shortcomings and Pitfalls in the Government's Promised Protections, 44 OCT CHAMP 16 (October 2020). For example, the government is typically allowed to use proffered statements in prosecutions for false statements or obstruction of justice. In addition, the government's ability to use proffered statements in cross-examination if the client is later prosecuted and testifies at trial now has expanded to permit such use where the client or defense counsel opens the door by presenting evidence, eliciting testimony, or even, in some districts, making attorney arguments contrary to proffered statements. Indeed, some proffer agreements, including ones we have seen from the District of Connecticut, permit use of proffered statements to rebut issues raised sua sponte by the court. Still another right usually reserved to the government in proffer agreements is that the proffer session will not be deemed a plea or settlement discussion for purposes of Federal Rule of Evidence 410 or Federal Rule of Criminal Procedure 11.

[4] For example, the standard proffer agreement used by the U.S. Attorney's Office for the Southern District of New York expressly permits that office to share proffered information with other law enforcement entities, but only on the condition that the recipient agrees to honor the terms of the proffer agreement. Form proffer agreements that we have seen being used by U.S. Attorney's Offices for the District of Connecticut, the Northern District of Georgia, the Eastern District of Michigan, and the Department of Justice's Fraud, Antitrust, and Environment Crimes sections, contain similarly protective language.

[5] Form proffer agreements used by the U.S. Attorney's Offices for the Eastern District of New York, the Northern District of New York, the District of New Jersey, the District of Massachusetts, the Central District of California, the Eastern District of Pennsylvania, the Eastern District of Texas, the Middle District of Florida, the Middle District of Tennessee, and the DOJ's Public Integrity Section, among others, are silent on the issue of information sharing.

[6] Standard proffer agreements from the U.S. Attorney's Offices for the Northern District of California, the Central District of California, the District of Colorado, and the Northern District of Alabama, among others, expressly state that the terms of the proffer agreement do not bind other law enforcement agencies.

[7] See United States v. Kurk Tang Yuk, 885 F.3d 57, 69 (2d Cir. 2018) (noting venue may lie in more than one place and explaining that, "[a]s far-reaching communications and travel are now easy and common, the 'acts constituting the offense' can, unsurprisingly, span a geographic range that extends far beyond the physical borders of a defendant's district of residence"); United States v. Lange, 834 F.3d 58, 70 (2d Cir. 2016) (holding that venue lies as to securities fraud charge in any district where a material electronic communication was sent or received and as to conspiracy charge in any district where overt act in furtherance of conspiracy was committed).

[8] McKnight v. Torres, 563 F.3d 890 (9th Cir. 2009).

[9] See McKnight, 563 F.3d at 892.

[10] Id. (internal quotations omitted).

[11] Appellant's Br. at 18-19, McKnight v. Torres, No. 08-55459 (9th Cir. July 1, 2008).

[12] McKnight, 563 F.3d at 893.

[13] McKnight, 563 F.3d at 893.

[14] United States v. Maxwell, 118 F.4th 256 (2d Cir. 2024).

[15] Maxwell, 118 F.4th at 263.

[16] Id.

[17] The Justice Manual provides that "[n]o district or division shall make any agreement . . . which purports to bind any other district(s) or division without the express written approval of the United States Attorney(s) in each affected district and/or the Assistant Attorney General of the Criminal Division." U.S. Dep't of Just., Just. Manual § 9-27.641.

[18] Because courts interpret proffer agreements according to contract principles, a signed writing would aid counsel in attempting to enforce the immunity term of a proffer agreement against a third-party law enforcement office.