Proffers, Reverse Proffers, Cooperation Agreements and Plea Agreements

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Introduction

One of the starkest differences between practice in the New York criminal courts and practice in the federal courts is the strong pull of cooperation, the process of securing a cooperation agreement and the enormous benefit a client can receive from a successful cooperation process. Yet, this entire process is fraught with danger and can lead to disastrous results. Lawyers who represent people who may be or are being prosecuted in the United States District Courts must be in a position to know where the hidden dangers lie so as to be able to steer your client clear of them.

Another aspect of federal practice which greatly differs from New York practice is the prevalence of written plea agreements. These agreements are drafted, in the first instance, by the government and, consequently, they may contain provisions that are to the government’s advantage and at your client’s disadvantage. But plea negotiation practice in federal court differs in another significant way. Prosecutors cannot usually be approached simply on the issue of whether the defendant will accept a certain amount of prison time. Defense counsel are often more successful if they can devise a plan for a plea that results in the sentencing range they are hoping to achieve; this requires a careful examination of the sentencing guidelines, the statutory scheme and related case law.

Proffers and Proffer Agreements

If a defendant or the subject of investigation one seeks to obtain a cooperation agreement, the government will ask him to sign a “proffer agreement” waiving his rights under Rule 410 of the Federal Rules of Evidence. That Rule provides that any statements made by a defendant in the course of plea discussions that do not result in a guilty plea are thereafter not admissible against him. And Rule 11(f) of the Federal Rules of Criminal
Procedure provides: “The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.”

Proffer agreements are, first and foremost, waivers of these important rights. They provide for extremely limited protections for the client including that the statements made at the meeting will not be offered by the government against your client in its direct case-in-chief at trial – with major exceptions that all but swallow that protection.

Proffer agreements permit the government to introduce your client’s statements in the event that he offers evidence or arguments that contradict his statements at the proffer. Because, in any effort to obtain a cooperation agreement, the defendant will offer incriminating statements, the proffer agreement severely limits the defenses your client can offer at trial without opening the door to the admission of his proffer statements.

In addition, a proffer agreement permits the government to use what your client says to obtain leads to other evidence which may be used against him. For example, if the defendant says he has a firearm hidden under a mattress, the agents can obtain a search warrant to search his home to seize the firearm there and the government can introduce it in evidence at your client’s trial (if the cooperation proves unsuccessful).

Counsel must bear in mind the goal of their client’s attempt at cooperation which is to secure a cooperation agreement and, ultimately, a government motion to permit a downward departure from the otherwise applicable sentencing guidelines. Section 5K1.1 of the Guidelines provides, in pertinent part, that “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.” Further, if your client is otherwise facing a mandatory minimum period of
imprisonment, but provides substantial assistance to the government, 18 U.S.C. § 3553(e) states, in relevant part, that “[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.” Accordingly, the only way your client can be successful in an attempt at cooperation is if he is in a position to provide “substantial assistance” in the investigation or prosecution of another criminal. If the defendant does not have such information or is unwilling to part with it, cooperation is simply not an option. Consequently, before even thinking about bringing in your client for a proffer, counsel is obligated to discover whether the client knows such information and wishes to convey it to the government. Never assume this is the case. The lawyer should know the client’s whole story before a proffer commences. Ideally, what your client says at a proffer will be something you have heard before in his private attorney-client communications to you alone. Then you can decide whether what your client has to offer might be something the government would likely be interested in.

Once you have determined that your client has such information, you must warn him that at a proffer session, he must provide only truthful information and must resist any temptation to lie or shade the truth to protect himself or someone else. Proffer agreements provide that if the client provides false information, he may be prosecuted for making a false statement to a federal agent in violation of Title 18, United States Code, Section 1001. And, as is often the case, if the defendant is later convicted, the government may seek to apply the obstruction of justice guideline to your client, thereby increasing his sentencing range. See U.S.S.G. § 3C1.1 (2 offense level increase in for obstruction). Because making a
full breast of one’s participation in a crime seems counterintuitive, clients are naturally reluctant to part with such information. This natural resistance must be overcome before any such meeting if there is to be any hope of a successful cooperation process.

Once you have overcome these obstacles and have learned what your client could say, counsel may speak directly to the government and provide an “attorney proffer.” An attorney proffer is a statement by the lawyer to the prosecutor it which she says—hypothetically—what her client might say if he spoke to the government. This is in the context of a plea negotiation so that these communications are covered by Rule 410. The notion is that counsel may be able to divine, from the prosecutor’s reaction, whether a proffer session could be fruitful and worthwhile. From time to time, you might hear negative comments that could cause you to hold off. After conferring with your client, you might decide to make a further attorney proffer or to beg off the process entirely.

The government’s proffer agreements in the Southern and Eastern Districts of New York explicitly state that the defendant’s proffer can be used at his sentencing to rebut any evidence or arguments he advances. Section 1B1.8 of the Guidelines provides some degree of protection from the use of the defendant’s statement. “By its terms, § 1B1.8 shields information provided by a defendant pursuant to certain proffer agreements only from use in the calculation of the defendant’s ‘applicable guideline range.’” United States v. Peyton, 186 Fed. Appx. 81, 2006 U.S. App. LEXIS 15964 *5 (2d Cir. June 19, 2006). However, if you actually obtain a cooperation agreement, that agreement will likely require a waiver of even that limited protection. See U.S.S.G. § 1B1.8(a) (“Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that
self-incriminating information provided pursuant to the agreement will not be used against
the defendant, then such information shall not be used in determining the applicable
guideline range, except to the extent provided in the agreement.”)(emphasis added).

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Once your client has proffered, it is all but impossible to successfully try the client’s
case to an acquittal. The trial court’s admission of the defendant’s inculpatory statements
was held to violate his Sixth Amendment right to the effective assistance of counsel in
United States v. Oluwanisola, 605 F.3d 124 (2d Cir. 2010). There, the district court's
rulings on the scope of a proffer agreement’s waiver provision, both with respect to defense
counsel’s opening statement and during cross examination, violated the defendant’s Sixth
Amendment rights. The Court held that a cross-examination question that attacks the
credibility of the government’s witness, without a factual assertion contradicting the facts
admitted in the proffer statement, is not sufficient to trigger the proffer agreement’s waiver
provision. By conducting such a cross-examination, a defendant has not directly or
indirectly contradicted the facts he admitted in his proffer. The Oluwanisola decision is at
least some limit on the decision in United States v. Barrow, 400 F.3d 109, 116-121 (2d Cir.
2005) in which the Circuit concluded the proffer agreement’s clause “any evidence offered
or elicited, or factual assertions made, by or on behalf of [the defendant]” applied to all
factual assertions, including those made directly during opening argument or indirectly
through cross-examination. Id. at 118. However, the Barrow court also stated that “[t]he
mere fact that a defendant pleads not guilty and stands trial is not a factual assertion that

1 See also United States v. Fagge, 101 F.3d 232 (2d Cir. 1996)(approving
prosecutor’s revelation of defendant’s proffer admission on issue of role reduction and
suggesting that agreement to withhold such information would violate public policy).
triggers the proffer agreement waiver.” Id. Moreover, “a defense argument that simply challenged the sufficiency of government proof on elements such as knowledge, intent, identity, etc., would not trigger the waiver here at issue.” Id. at 119. “Particular caution is required [by courts who are considering admitting proffer statements] when the purported fact is asserted by counsel rather than through witness testimony or exhibits.” United States v. Roberts, 660 F.3d 149, 158 (2d Cir. 2011).

The fact is that district courts have considerable discretion in deciding whether the line has been crossed. In Roberts, the Circuit held:

In close cases, the identification of what facts are being implied by counsel’s questions and arguments may depend on the “unique insights” a district court gains from actually seeing and hearing these matters pursued in the dynamic context of a trial. United States v. Barrow, 400 F.3d at 119. We are disinclined to second guess reasonable assessments informed by such insights.

Id. at 158.

If you are so unfortunate as to find yourself in a position to have to try a case in which your client has made incriminating proffer statements, a close review of the case law is required so you can attempt to predict and litigate what you can and cannot do to avoid opening the door to their admission.

Cooperation Agreements

A cooperation agreement is simply a type of plea agreement representing the settlement of the charges against the defendant usually—but not always—by means of a
guilty plea. Frequently, the government will demand that the defendant pleads guilty to every crime to which he has made an admission during his proffers even if the government did not know of them previously. This can result in an expected guidelines level or mandatory minima that are very high indeed. However, the benefit of the defendant’s bargain is not an agreement to a stipulated guidelines level but rather a motion pursuant Section 5K1.1 and 18 U.S.C. § 3553(e)(if there is a mandatory minimum).

Cooperation agreements provide that the government alone decides in its discretion whether the defendant’s attempts to cooperate merit the filing of the 5K1.1 motion (often referred to as a “5K1.1 letter”). There are obligations imposed on a cooperating defendant, including that he continue to provide truthful information, meet as required with the government, testify before a grand jury or in court if called by the government, and refrain from committing further crimes. But even if your client does everything he thinks is expected of him, it is still up to the government whether to file the 5K1.1 motion. The circumstances in which a defendant may successfully challenge the government’s decision not to file a motion are extremely limited.

“[A] defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant’s race or religion” or for a reason “not rationally related to any legitimate Government end.” Wade v. United States, 504 U.S. 181, 186, 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992). In the absence of such constitutionally impermissible action, we cannot disturb the government’s decision because the government has “a power, not a duty, to file a motion when a defendant has substantially assisted.” Id. at 185. . . . If, under the terms of the agreement, the government

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Sometimes a non-prosecution agreement can be negotiated. On other occasions, the client is not prosecuted and simply becomes a government witness.
has discretion to determine the extent of the defendant’s assistance, we review “whether the prosecutor has made its determination in good faith.” United States v. Rexach, 896 F.2d 710, 714 (2d Cir.), cert. denied, 498 U.S. 969, 112 L. Ed. 2d 417, 111 S. Ct. 433 (1990); United States v. Khan, 920 F.2d 1100, 1105 (2d Cir. 1990) (“[W]here the explicit terms of a cooperation agreement leave the acceptance of the defendant’s performance to the sole discretion of the prosecutor, that discretion is limited by the requirement that it be exercised fairly and in good faith.”). The requirement that the government act in “good faith” demands only that the government have “honest dissatisfaction with the defendant’s efforts.” Reeves, 296 F.3d at 116.

United States v. Roe, 445 F.3d 202, 207 (2d Cir. 2006).

In most cases, however, if your client obtains a cooperation agreement and lives up to his end of the bargain, the government will file its 5K1.1 motion. If it does not, its reasons will often be obvious, such as the defendant’s commission of a new crime. Even when such an event occurs, the government retains its discretion to file the motion anyway and sometimes does so while informing the sentencing court of the post-plea criminal conduct. Some lawyers refer to this as a “warts and all” 5K1.1 motion. The government can thereby give the defendant some but not all the benefit of his bargain. On the other hand, the government can unilaterally declare the defendant in breach of his agreement, thereby exposing him to a very lengthy sentence far greater than he would have faced if an ordinary plea bargain was struck.

Sometimes when the government decides to “rip up” the cooperation agreement and cannot be persuaded to renew it, counsel can negotiate a separate sentencing agreement to at least ameliorate the potential sentence. The seriousness of the defendant’s obligations in entering a cooperation agreement must be stressed to the client, however, from the
moment he decides to seek one.

**Reverse Proffers**

On occasion the government may offer your client a chance to hear the evidence the government has lined up against him. In a “reverse proffer,” it is the government which is providing the information, not the defendant. The defendant attends but is not required to and should not speak at all. The government can lay out the proof (or part of it) to the defendant in an effort to convince him that resistance in the form of a trial would be futile. From time to time, a prosecutor may ask a defendant to sign a proffer agreement to attend such a reverse proffer but the client is not required to and should not execute such an agreement because the purpose of such a meeting is not for the client to provide information but is, instead, for the government to provide information to the client and his lawyer.

A client should be advised that he should not react or make statements during a reverse proffer. In view of *Salinas v. Texas*, 133 S. Ct. 2174 (2013), your client’s reactions could arguably be admitted against him. Accordingly, it would be wise to state—at the commencement of the meeting— that the client will not be answering any questions or making any statements on Fifth Amendment grounds.

**Innocence Proffers**

Sometimes a lawyer and client believe that they can talk the government out of a prosecution. This is almost always a bad idea. The government is usually all too happy to offer what they like to call an “innocence proffer” agreement which provides even less protection that an ordinary proffer agreement. The government can then use the client’s statements against him as false exculpatory statements or as admissions of a party. And, if
the defendant is later convicted, he might well face obstruction points.

In *United States v. Shyne*, 2007 U.S. Dist. LEXIS 26994 (S.D.N.Y. Apr. 5, 2007), a defendant entered into one such agreement. In that case, the “standard” innocence proffer read:

[Nathaniel Alexander] has requested the opportunity to provide information to the Government about his involvement in the charges contained in S2 05 Cr. 1067 (KMK) and to respond to questions, so that the Government may be in a position to evaluate [his] information and responses in making prosecutive decisions. In any prosecution brought against [Nathaniel Alexander], the Government may offer at any stage of the criminal proceeding for any purpose any statement made by [him] during the meeting. [Nathaniel Alexander] agrees that he shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6)\(^3\) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that such statements or any leads therefrom should be suppressed. [Nathaniel Alexander] understands that he is waiving any and all rights in the foregoing respects. The agreement was addressed to [defense counsel], and concluded by saying, "Your signature on the line below will constitute your acknowledgment of having explained the foregoing to [Nathaniel Alexander], and [his] signature on the line below will evidence [Nathaniel Alexander's] acknowledgment and understanding of the foregoing." The agreement was signed by both Alexander and [defense counsel].

*Id.* at *14. Judge Kenneth M. Karas went on to find that the defendant’s rights were not violated when the government used his statements to obtain a superseding indictment.

\(^3\)Rule 11 was amended and reorganized in 2002; the previous subdivision, 11(e)(6), was changed to 11(f).
In *United States v. Kerley*, 544 F.3d 172, 182 (2d Cir. 2008), the Second Circuit affirmed the district court’s finding of perjury based on the defendant’s “attitude and demeanor, inconsistent explanations, and failure to raise the defenses during the innocence proffer, and a lack of supporting evidence.”

For these reasons, unless the government assures you that they are inclined to dismiss your client’s case but just need to hear it from him (and you trust/believe them), you should steer clear of an innocence proffer. In any event, entering into the so-called standard innocence proffer agreement appears to be contrary to a criminal defendant’s interests.

**Plea Agreements**

As in any case, counsel for a federal criminal defendant may seek to negotiate a plea bargain to her client’s benefit. Sometimes the government is willing to offer a plea to a misdemeanor instead of a felony. The government may be willing to offer a plea to one count of an indictment and to dismiss the remaining counts upon sentencing. The government may be willing to offer a lesser included offense of a count of the indictment. The government can agree not to file a prior felony information which would otherwise increase a mandatory minimum. Most frequently, the government will offer a stipulated guidelines level which may be more favorable than it might otherwise obtain.

Yet, the first question counsel must ask herself is whether the client is better off pleading guilty without a plea agreement. Plea agreements always have provisions that are to a defendant’s detriment. Most obviously, they can restrict the defendant’s right to appeal his sentence. They can lock him into a guidelines calculation. They can forbid applications for downward departures or for a variance from the guidelines pursuant to 18 U.S.C. §

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3553(a). Counsel should always know why the proposed plea agreement is better for her client that just pleading guilty. Often, there is a good reason to enter into a written plea agreement. But sometimes the agreement you are offered is not worthwhile.

The standard plea agreement in the Southern District of New York provides for a “stipulated Guidelines range,” the calculation of which is set forth in the plea agreement. That sort of agreement usually provides that no party may seek a “departure” from the stipulated range but either party may seek a sentence outside that range based on the 3553(a) factors. There is an alternative plea agreement in the SDNY in which the parties agree not to seek a sentence outside the stipulated range. While we always want to urge the Court to find a sentence below the guidelines range, there could be circumstances in which an agreement for a specific range is so much better than what the client would otherwise get that we might agree to a sentence within a particular range.

The standard plea agreement in the Eastern District of New York is a little different. In such an agreement, the defendant is usually required to stipulate to a guidelines calculation or not to contest one. The government, on the other hand, is not bound by their “estimate” of the applicable guidelines level. In fact, the agreement reads, “If the Guidelines offense level advocated by the Office, or determined by the Probation Department or the Court, is, for any reason, including an error in the estimate, different from the estimate, the defendant will not be entitled to withdraw the plea and the government will not be deemed to have breached this agreement.”

The Second Circuit has found that (at least where the defendant does not object), a sentence will not be vacated based on the government’s advocacy of a higher level than is in the plea agreement. See United States v. MacPherson, 590 F.3d 215, 219 (2d Cir. 2009);
but cf. United States v. Palladino, 347 F.3d 29 (2d Cir 2003). In practice, the government usually does not advocate for a higher sentencing range that the one to which they have agreed in the plea agreement. If they did so, counsel could still argue that they have breached, that the court should hold them to the estimate (unless the new range is not based on new information), and that the court should consider all this when fashioning a sentence “sufficient but not greater than necessary” to meet the goals of the Sentencing Reform Act.

Plea agreements in both districts routinely contain waivers of the right to appeal and to collaterally attack the judgment. The “collateral attack” is a reference to a post-judgment motion to vacate the judgment of conviction pursuant to 28 U.S.C. § 2255 which is the federal equivalent of a NY CPL § 4401.0 motion. The appellate waivers kick in if the Court sentences the defendant within or below the stipulated Guidelines range.

These plea agreements contain the government’s commitment that the guilty plea covers certain listed criminal conduct. The EDNY agreement says “no further criminal charges will be brought against the defendant for [fill in the blank].” The SDNY agreement says “In consideration of the defendant’s plea to the above offense, the defendant will not 

4 “It is well-settled in the Second Circuit that plea agreements ‘are construed according to contract law principles[.]’ United States v. Green, 595 F. 3d 432, 438 (2d Cir. 2010). Further, plea agreements are construed against the government, and a reviewing court must not hesitate to examine the conduct of the government to ensure it ‘comports with the highest standard of fairness.’ United States v. Vaval, 404 F. 3d 144, 152 (2d Cir. 2005) (citing United States v. Lawlor, 168 F. 3d 633, 637 (2d Cir. 1999)). In determining whether a plea agreement has been breached, courts look to ‘what the parties reasonably understood to be the terms of the agreement.’ Id. (citing Lawlor, 168 F. 3d at 636) (internal quotation marks omitted). Moreover, ‘[a] plea colloquy can be examined to determine a defendant's understanding of a plea agreement.’ MacPherson, 590 F. 3d at 223 (Newman, J., concurring) (citations omitted).” MacPherson v. United States, 2012 U.S. Dist. LEXIS 113825 (E.D.N.Y. Aug. 9, 2012)(denying MacPherson’s 2255 motion).
be further prosecuted criminally by this Office (except for criminal tax violations as to which this Office cannot, and does not, make any agreement) for [fill in the blank].” This is your client’s double jeopardy provision; he cannot be prosecuted again for the criminal conduct listed in this paragraph. If he was to be later charged with such conduct, he could impose the defense of double jeopardy. An exception is provided for RICO prosecutions under 18 U.S.C. § 1961. This coverage paragraph is a very important protection for your client. Be aware, however, that if your client is getting coverage for uncharged offenses, it telegraphs to the Court and to U.S. Probation that there are uncharged offenses for which your client may be liable.

Plea agreements can provide the parties’ agreement that restitution and/or criminal forfeiture is a sum certain. Or they can indicate that restitution is to be determined by the Court. Negotiating the terms of the criminal financial penalties is definitely something counsel should make an effort to do because these money judgments are pursued with vigor for many years after the sentence of imprisonment has been completed.

A primary concern in many cases is whether the defendant is facing a mandatory minimum period of imprisonment. If he does face one, counsel often are focused on obtaining a settlement to an offense with a lower minimum or with no minimum. In other cases, particularly fraud offenses, counsel are often concerned with negotiating a settlement with a lower guidelines range than would otherwise be sought by the government. Considerations vary depending on what guidelines apply, what enhancements might apply, what reductions should apply, and what departures might be sought. Counsel must immerse themselves in the Guidelines as applied to the case and avoid seeking “advice” from the government in this regard.
The Pimentel Letter

If you decide your client is better off with a plea without an agreement, the government is obligated—before the plea is entered—to give you a non-binding estimate of the guideline range they expect will apply. This is colloquially referred to as a “Pimentel letter” because it is taken from the case of United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir.1991). A Pimentel letter is an informational letter from the government containing an estimate of a defendant’s likely sentencing range under the Sentencing Guidelines. It is not a binding contract nor a plea agreement, but it is often relied upon by defendants in entering guilty pleas as a sort of guide to the position it can expect the government to take at sentencing. Yet, the government can and sometimes does ultimately advocate for a higher sentence. Although this approach may seem dangerous, it can provide the defendant with greater freedom to make sentencing arguments and to appeal in the event they fail to carry the day in the district court.

The Rule 11 Guilty Plea

The entry of a guilty plea differs from state court practice as well. See Fed. R. Crim. P. 11. Counsel also must be aware that clients in federal court in these Districts must make a statement admitting guilt and cannot simply answer a court’s allocution with yes and no answers. Lawyers must prepare their clients to make a statement sufficient to admit the elements of the offense to which the client is pleading guilty. Be aware that the government might want your client to say more, e.g., to name names, but all your client must do is admit his own guilt. On the other hand, if your client contests his guilt, the district court is
obligated to reject the guilty plea.\textsuperscript{5} Bear in mind that guilty pleas are often accepted by magistrate judges who can only recommend whether a plea may be accepted. Before the guilty plea is accepted, a defendant may withdraw his guilty plea for any reason or for no reason. Fed. R. Crim. P. 11(d)(1). After that, it may be withdrawn only if the defendant can show a fair and just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d)(2)(B).

When a guilty plea is entered, the judge will ask the defendant whether he has carefully reviewed the plea agreement (if there is one) with you. Counsel is obligated to thoroughly review the plea agreement with her client and to be certain he fully understands it and agrees to its terms.

* * *

Do not be afraid to negotiate the terms of a plea agreement. Sometimes the modifications you seek will be agreed upon. Creativity and persuasion are your tools. Use them to good effect.

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\textsuperscript{5} “It is true that, to establish the factual basis required by Rule 11, the district court may rely on representations of ‘the defendant, of the attorneys for the government and the defense, [or] of the presentence report when one is available,’ and indeed may use "whatever means is appropriate in a specific case.' United States v. Maher, 108 F.3d 1513, 1524 (2d Cir. 1997) (quoting Fed. R. Crim. P. 11, Advisory Committee Note (1974)). But it is error for the court to find that a factual basis exists when the defendant actively contests a fact constituting an element of the offense in the absence of circumstances warranting the conclusion that the defendant's protestations are ‘unworthy of belief.’” United States v. Culbertson, 670 F.3d 183, 190 (2d Cir. 2012)(vacating guilty plea where defendant denied he participated in a conspiracy to import five or more kilograms of cocaine).
United States District Court
Eastern District of New York

United States of America

- against -

12 CR 

Defendant.

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Attorney's Office for the Eastern District of New York (the "Office") and (the "defendant") agree to the following:

1. The defendant will waive indictment and plead guilty to an information, charging a violation of 21 U.S.C. § 963. The count carries the following statutory penalties:


b. Minimum term of imprisonment: 5 years (21 U.S.C. §§ 960(b)(2)(A) and 960(b)(2)(B)(ii)).

c. Minimum supervised release term: 4 years, maximum supervised release term: life, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 3 years without credit for pre-release imprisonment.
or time previously served on post-release supervision
(18 U.S.C. § 3583(e); 21 U.S.C. §§ 960(b)(2)(A) and 960(b)(2)(B)(ii)).

d. Maximum fine: $5,000,000
(21 U.S.C. § 960(b)(1)(B)(ii)).

e. Restitution: N/A.

f. $100 special assessment

2. The defendant understands that although imposition of a sentence in accordance with the United States Sentencing Guidelines (the “Guidelines” and “U.S.S.G.”) is not mandatory, the Guidelines are advisory and the Court is required to consider any applicable Guidelines provisions as well as other factors enumerated in 18 U.S.C. § 3553(a) to arrive at an appropriate sentence in this case. The Office will advise the Court and the Probation Department of information relevant to sentencing, including all criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant’s sentence. If the defendant clearly demonstrates acceptance of responsibility, through allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, if the defendant has accepted responsibility as described above, and if the defendant pleads guilty on or before 2012, an additional one-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(b). The defendant agrees that she will not
possession with intent to distribute cocaine, all from the period.

b. No statements made by the defendant during the course of this cooperation will be used against her except as provided in paragraphs 2, 8, and 9.

5. The defendant agrees that the Office may meet with and debrief her without the presence of counsel, unless the defendant specifically requests counsel’s presence at such debriefings and meetings. Upon request of the defendant, the Office will endeavor to provide advance notice to counsel of the place and time of meetings and debriefings, it being understood that the Office’s ability to provide such notice will vary according to time constraints and other circumstances. The Office may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Office’s ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant’s ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Office in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the Court in imposing sentence regardless of whether counsel was present at the meeting or debriefing.
6. If the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) with the sentencing Court setting forth the nature and extent of her cooperation. Such a motion will permit the Court, in its discretion, to impose a sentence below any applicable mandatory minimum sentence. In this connection, it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, including the demonstration of acceptance of responsibility described in paragraph 2, and the Office’s good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon her. The defendant agrees that, in making this determination, the Office may consider facts known to it at this time. The Office will not recommend to the Court a specific sentence to be imposed. Further, the Office cannot and does not make a promise or representation as to what sentence will be imposed by the Court.

7. The defendant agrees that with respect to all charges referred to in paragraphs 1 and 4(a) she is not a “prevailing party” within the meaning of the "Hyde Amendment," 18 U.S.C. § 3006A note, and will not file any claim under that law.
The defendant waives any right to additional disclosure from the government in connection with the guilty plea. The defendant agrees to pay the special assessment by check payable to the Clerk of the Court at or before sentencing.

8. The defendant must at all times give complete, truthful, and accurate information and testimony, and must not commit, or attempt to commit, any further crimes. Should it be judged by the Office that the defendant has failed to cooperate fully, has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, the defendant will not be released from her plea of guilty but this Office will be released from its obligations under this agreement, including (a) not to oppose a downward adjustment of two levels for acceptance of responsibility described in paragraph 2 above, and to make the motion for an additional one-level reduction described in paragraph 2 above and (b) to file the motion described in paragraph 6 above. Moreover, this Office may withdraw the motion described in paragraph 6 above, if such motion has been filed prior to sentencing. The defendant will also be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, the criminal activity described in paragraph 4 above, perjury and obstruction of justice.
9. Any prosecution resulting from the defendant's failure to comply with the terms of this agreement may be premised upon, among other things: (a) any statements made by the defendant to the Office or to other law enforcement agents on or after ____________; (b) any testimony given by her before any grand jury or other tribunal, whether before or after the date this agreement is signed by the defendant; and (c) any leads derived from such statements or testimony. Prosecutions that are not time-barred by the applicable statutes of limitation on the date this agreement is signed may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statutes of limitation between the signing of this agreement and the commencement of any such prosecutions. Furthermore, the defendant waives all claims under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or rule, that statements made by her on or after ____________, or any leads derived therefrom, should be suppressed.

10. This agreement does not bind any federal, state, or local prosecuting authority other than the Office, and does not prohibit the Office from initiating or prosecuting any civil or administrative proceedings directly or indirectly involving the defendant.
15. Apart from the written proffer agreements dated , no promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties. This agreement supersedes any prior promises, agreements or conditions between the parties.
To become effective, this agreement must be signed by all signatories listed below.

Dated: Brooklyn, New York, 2012

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

By: __________________________
Assistant United States Attorney

Approved by:

______________________________
Elizabeth A. Geddes
Supervising Assistant U.S. Attorney

I have read the entire agreement and discussed it with my attorney. I understand all of its terms and am entering into it knowingly and voluntarily.

______________________________
Defendant

Approved by:

______________________________
Richard Willstatter, Esq.
Counsel to Defendant
Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Attorney’s Office for the Eastern District of New York (the “Office”) and (the “defendant”) agree to the following:

1. The defendant will plead guilty to the sole count of the above-captioned indictment, charging a violation of 18 U.S.C. § 545. The count carries the following statutory penalties:


   c. Maximum supervised release term: three years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to two years without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. § 3583 (b) & (e)).

e. Restitution: $5,100

f. $100 special assessment

2. The defendant understands that although imposition of a sentence in accordance with the United States Sentencing Guidelines (the "Guidelines" and "U.S.S.G.") is not mandatory, the Guidelines are advisory and the Court is required to consider any applicable Guidelines provisions as well as other factors enumerated in 18 U.S.C. § 3553(a) to arrive at an appropriate sentence in this case. The Office will advise the Court and the Probation Department of information relevant to sentencing, including criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant's sentence. The Office estimates the likely adjusted offense level under the Guidelines to be level 10, which is predicated on the following Guidelines calculation:

   Base Offense Level (2T4.1(C))  
   Total:  

If the defendant clearly demonstrates acceptance of responsibility, through allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a), resulting in an adjusted offense level of 8 and a range of imprisonment of 0-6 months, assuming that the defendant falls within Criminal History Category I. The defendant
stipulates to the above Guidelines calculation. The defendant agrees to make restitution payments in the amount of $5,100 to the United States government according to instructions to be provided by the Office.

3. The Guidelines estimate set forth in paragraph 2 is not binding on the Office, the Probation Department or the Court. If the Guidelines offense level advocated by the Office, or determined by the Probation Department or the Court, is, for any reason, including an error in the estimate, different from the estimate, the defendant will not be entitled to withdraw the plea and the government will not be deemed to have breached this agreement.

4. The defendant agrees not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C. § 2255 or any other provision, the conviction or sentence in the event that the Court imposes a term of imprisonment of 6 months or below. This waiver is binding without regard to the sentencing analysis used by the Court. The defendant waives all defenses based on the statute of limitations and venue with respect to any prosecution that is not time-barred on the date that this agreement is signed in the event that (a) the defendant's conviction is later vacated for any reason, (b) the defendant violates this agreement, or (c) the defendant's plea is later withdrawn. The defendant waives any right to additional disclosure from the government in connection
with the guilty plea. The defendant agrees that with respect to all charges referred to in paragraphs 1 and 5(a) he is not a "prevailing party" within the meaning of the "Hyde Amendment," 18 U.S.C. § 3006A note, and will not file any claim under that law. The defendant agrees to pay the special assessment by check payable to the Clerk of the Court at or before sentencing.

5. The Office agrees that:

a. no further criminal charges will be brought against the defendant for smuggling tobacco products into the United States on or about and between January 1, 2004 and May 13, 2007, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 et seq.;

and, based upon information now known to the Office, it will

b. take no position concerning where within the Guidelines range determined by the Court the sentence should fall; and

c. make no motion for an upward departure under the Sentencing Guidelines.

If information relevant to sentencing, as determined by the Office, becomes known to the Office after the date of this agreement, the Office will not be bound by paragraphs 5(b) and 5(c). Should it be judged by the Office that the defendant has violated any provision of this agreement, the defendant will not be released from his plea of guilty but this Office will be released from its obligations
under this agreement, including but not limited to the provisions of paragraph 5 (a)-(c).

6. This agreement does not bind any federal, state, or local prosecuting authority other than the Office, and does not prohibit the Office from initiating or prosecuting any civil or administrative proceedings directly or indirectly involving the defendant.

7. Apart from any written proffer agreements, if applicable, no promises, agreements or conditions have been entered into by the parties other than those set forth in this agreement and none will be entered into unless memorialized in writing and signed by all parties. Apart from any written proffer agreements, if applicable, this agreement supersedes all prior promises,
agreements or conditions between the parties. To become effective, this agreement must be signed by all signatories listed below.

Dated: Brooklyn, New York
July 16, 2013

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

By: 

Assistant United States Attorney

Approved by:

Supervising Assistant U.S. Attorney

I have read the entire agreement and discussed it with my attorney. I understand all of its terms and am entering into it knowingly and voluntarily.

Defendant

Approved by:

Counsel to Defendant
BY ELECTRONIC MAIL

Theodore Green, Esq.
Green & Willstatter
200 Mamaroneck Avenue, Suite 403
White Plains, NY 10601

Re: United States v.
Cr.

Dear Mr. Green:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from " " the defendant, to a three-count criminal information (the "Information").

Count One charges the defendant with conspiracy to distribute 280 grams and more of , 100 grams and more of , 500 grams and more of , and a quantity of , from at least in or about to and including in or about in violation of Title 21, United States Code, Section 846. This charge carries a maximum sentence of life imprisonment and a mandatory minimum sentence of ten years of imprisonment; a maximum fine, pursuant to Title 21, United States Code, Section 841(b)(1)(A), and Title 18, United States Code, Section 3571, of the greatest of $10,000,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; a maximum term of supervised release of life and a mandatory minimum term of five years of supervised release; and a mandatory $100 special assessment.

Count Two charges the defendant with conspiracy to distribute MDMA from at least in or about 2010 through at least in or about 2011, in violation of Title 21, United States Code, Section 846. In addition, pursuant to Title 21, United States Code, Section 851, a prior felony information is being filed as a result of the defendant’s conviction in County Court for a Class C Felony, for which he received a sentence of imprisonment. At the time of his guilty plea, the defendant agrees to affirm this prior conviction.

Because of the filing of the prior felony information, Count Two carries a maximum term of imprisonment of 30 years; a maximum lifetime term of supervised release; a mandatory
minimum term of supervised release of 6 years; a maximum fine, pursuant to Title 21, United States Code, Section 841(b)(1)(C), and Title 18, United States Code, Section 3571, of $2,000,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a $100 mandatory special assessment.

Count Three charges the defendant with conspiracy to distribute 280 grams and more of crack cocaine and more than one kilogram of heroin, from at least in or about __________, in violation of Title 21, United States Code, Section 846. Because of the filing of the above-referenced prior felony information, Count Three carries a maximum sentence of life imprisonment and a mandatory minimum sentence of twenty years of imprisonment; a maximum term of supervised release of life and a mandatory minimum term of ten years of supervised release; a maximum fine, pursuant to Title 21, United States Code, Section 841(b)(1)(A), and Title 18, United States Code, Section 3571, of the greatest of $20,000,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense; and a mandatory $100 special assessment.

The total maximum sentence of incarceration on all counts is life imprisonment, plus a mandatory minimum sentence of 20 years' imprisonment.

It is further understood that the defendant shall make restitution in an amount to be specified by the Court in accordance with 18 U.S.C. §§ 3663, 3663A, and 3664. This amount shall be paid according to a plan established by the Court.

In addition to the foregoing, the defendant admits to the forfeiture allegations in the Information, and agrees to forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461, and 21 U.S.C. § 853, any and all property constituting or obtained as a result of the violations alleged in Counts One, Two, and Three of the Information (the "Proceeds"), including but not limited to a sum in United States currency representing the amount of proceeds obtained as a result of those offenses. The defendant further agrees to execute all documentation necessary to effect the forfeiture of the Proceeds and their transfer to the United States; and that he will not assist a third party in asserting a claim to the Proceeds in an ancillary proceeding. It is further understood that, in the event that the United States files a civil or administrative action pursuant to Title 21, United States Code, Section 881, and/or Title 18, United States Code, Section 981 seeking to forfeit the Proceeds, the defendant will not file a claim with the Court or otherwise contest such a civil forfeiture action and will not assist a third party in asserting any such claim. It is further understood that the defendant will not file or assist anyone in filing a petition for remission or mitigation with the Department of Justice concerning the Proceeds.

It is understood that the defendant (a) shall truthfully and completely disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, which information can be used for any purpose; (b) shall cooperate fully with this Office, the Federal Bureau of Investigation, the Police Department, and any other law enforcement agency designated by this Office; (c) shall attend all meetings at which this Office requests his presence; (d) shall provide to this Office, upon request, any document, record, or other tangible evidence relating to matters about which this
Theodore Green, Esq.

Office or any designated law enforcement agency inquires of him; (e) shall truthfully testify before the grand jury and at any trial and other court proceeding with respect to any matters about which this Office may request his testimony; (f) shall bring to this Office’s attention all crimes which he has committed, and all administrative, civil, or criminal proceedings, investigations, or prosecutions in which he has been or is a subject, target, party, or witness; and, (g) shall commit no further crimes whatsoever. Moreover, any assistance the defendant may provide to federal criminal investigators shall be pursuant to the specific instructions and control of this Office and designated investigators.

It is understood that this Office cannot, and does not, agree not to prosecute the defendant for criminal tax violations. However, if the defendant fully complies with the understandings specified in this Agreement, no testimony or other information given by him (or any other information directly or indirectly derived therefrom) will be used against him in any criminal tax prosecution. Moreover, if the defendant fully complies with the understandings specified in this Agreement, he will not be further prosecuted criminally by this Office for any crimes, except for criminal tax violations, related to (1) his participation in a conspiracy to distribute 280 grams and more , 100 grams and more of , 500 grams and more of , and quantities of , from at least in or about up to and including in or about , as charged in Count One of the Information; (2) his participation in a conspiracy to distribute from at least in or about through at least in or about , as charged in Count Two of the Information; (3) his participation in a conspiracy to distribute 280 grams and more and more than 1 kilogram of , from at least in or about up to and including in or about , as charged in Count Three of the Information; (4) his participation in for which there is no federal jurisdiction and for which the statute of limitations has expired; and (5) his ownership of in or around , for which the statute of limitations has expired. This Agreement does not provide any protection against prosecution for any crimes except as set forth above, including any acts of violence.

It is understood that all of the conduct set forth in subsections (4) and (5) of the preceding paragraph constitutes either relevant conduct, pursuant to United States Sentencing Guidelines (“U.S.S.G.”) Section 1B1.3, or other conduct of the defendant, pursuant to U.S.S.G. § 1B1.4, that the Court may consider at the time of sentencing.

It is understood that the defendant’s truthful cooperation with this Office is likely to reveal activities of individuals who might use violence, force, and intimidation against the defendant, his family, and loved ones. Should the defendant’s cooperation present a significant risk of physical harm, this Office, upon the written request of the defendant, will take steps that it determines to be reasonable and necessary to attempt to ensure his safety and that of his family and loved ones. These steps may include application to the Witness Security Program of the United States Marshal’s Service, whereby the defendant, his family, and loved ones, if approved, could be relocated under a new identity. It is understood, however, that the Witness Security Program is under the direction and control of the United States Marshal’s Service and of the Office of Enforcement Operations of the Department of Justice, not of this Office.
It is understood that in the event that it is determined that the defendant has committed any further crimes, given false, incomplete, or misleading testimony or information, or otherwise violated any provision of this Agreement, (a) all statements made by the defendant to this Office or other designated law enforcement agents, and any testimony given by the defendant before a grand jury or other tribunal, whether prior to or subsequent to the signing of this Agreement, and any leads from such statements or testimony shall be admissible in evidence in any criminal proceeding brought against the defendant; and (b) the defendant shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, Jencks Act material, exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to Giglio v. United States, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.
This Agreement supersedes any prior understandings, promises, or conditions between this Office and . No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

By:  
ILAN GRAFF/SARAH KRISOFF
Assistant United States Attorney
(914) 993-1967/(212) 637-2232

APPROVED:

LORIN L. REISNER
Chief, Criminal Division

AGREED AND CONSENTED TO:

DATE

APPROVED:

THEODORE GREEN, Esq.
Attorney for

DATE
BY ELECTRONIC MAIL

Richard Willstatter, Esq.
Green & Willstatter
200 Mamaroneck Ave, Suite 605
White Plains, NY 10601

Alexandra V. Tseitlin, Esq.
345 Seventh Avenue, 21st, Floor
New York, NY 10001

Re: United States v.

Dear Mr. Willstatter and Ms. Tseitlin:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York (“this Office”) will accept a guilty plea from (“the defendant”) to the above-referenced Superseding Information (the “Information”). Count One charges the defendant with conspiracy to commit mail fraud and health care fraud, in violation of Title 18, United States Code, Section 371, and carries a maximum term of imprisonment of five years, a maximum term of supervised release of three years, a maximum fine, pursuant to Title 18, United States Code, Section 3571, of the greatest of $250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, and a $100 mandatory special assessment.

In consideration of the defendant’s plea to the above offense, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations as to which this Office cannot, and does not, make any agreement) for (i) his participation in a conspiracy to commit mail fraud and health care fraud through his involvement at as charged in Count One of the Information, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 et seq. The defendant also agrees to release any and all pending or outstanding claims against insurance companies related to as set forth in Exhibit A. In addition, at the time of sentencing, the Government will
move to dismiss any open Count(s) against the defendant. The defendant agrees that with respect
to any and all dismissed charges he is not a “prevailing party” within the meaning of the “Hyde
Amendment,” Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegations with respect to Count One of the
Information and agrees to forfeit to the United States, pursuant to Title 18, United States Code,
Sections 982(a)(7) and 981(a)(1)(C) and Title 21, United States Code, Section 2461(c) a sum of
money equal to $399,743.27 in United States currency, representing the amount of gross proceeds
obtained from Count One (the “Money Judgment”). The defendant agrees to forfeit all right, title,
and interest in the funds seized from the five accounts listed in the forfeiture allegations with respect
to Count One of the Information (the “Seized Funds”). The Seized Funds shall be credited to the
Money Judgment upon their final forfeiture. It is further understood that any forfeiture of the
defendant’s assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment,
or any other penalty the Court may impose upon him in addition to forfeiture. The defendant
consents to the entry of the Consent Order of Forfeiture annexed hereto as Exhibit B and agrees that
the Consent Order of Forfeiture shall be final as to the defendant at the time it is ordered by the
Court.

The defendant further agrees to make restitution in an amount of $399,743.27, in accordance
with 18 U.S.C. §§3663, 3663A, and 3664. The restitution amount shall be paid according to a plan
established by the Court. The parties agree, however, that the existence of a payment plan set by the
Court will not bar Governmental collection efforts against any of the defendant’s available assets.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines
(“U.S.S.G.” or “Guidelines”) Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

The Sentencing Guidelines in effect as of November 1, 2012, apply to this case.

1. The Sentencing Guideline applicable to the offense charged in Count One is

2. Pursuant to U.S.S.G. § 2B1.1(b)(1)(G), because the intended loss from the
offense is more than $200,000 but less than $400,000, the offense level is increased by 12 levels.

3. Pursuant to U.S.S.G. § 2B1.1(b)(2)(A), because the offense involved
10 or more victims, the offense level is increased by 2 levels.
4. Pursuant to U.S.S.G. § 3B1.2(b), because the defendant was a minor participant in the offense, the offense level is decreased by 2 levels.

5. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, an additional one-level reduction is warranted, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 15.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has no criminal history points. Accordingly, the Criminal History Category is I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant’s stipulated Guidelines range is 18 to 24 months (the “Stipulated Guidelines Range”). In addition, after determining the defendant’s ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 15, the applicable fine range is $4,000 to $40,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party suggest that the Probation Office consider such a departure or adjustment under the Guidelines, or suggest that the Court sua sponte consider any such departure or adjustment.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Office consider a sentence outside of the Stipulated Guidelines Range, and suggest that the Court sua sponte consider a sentence outside of the Stipulated Guidelines Range, based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).
Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant’s criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, see U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, see U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section
3582(c), of any sentence within or below the Stipulated Guidelines Range of 18 to 24 months’ imprisonment and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant’s sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any restitution or forfeiture amount that is less than or equal to $399,743.27, and the Government agrees not to appeal any restitution or forfeiture amount that is greater than or equal to $399,743.27.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, Jencks Act material, exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to Giglio v. United States, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

It is further agreed that should the conviction following the defendant’s plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.
Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

By:

Daniel S. Goldman
Nicholas L. McQuaid
Carolina A. Fornos
Assistant United States Attorneys
(212) 637-2289/1049/2740

PROOFED:

Karl Metzner
Chief, Organized Crime

AGREED AND CONSENTED TO:

____________________________
DATE

APPROVED:

____________________________
DATE

Richard Willstatter, Esq.
Attorney for
PROFFER AGREEMENT

With respect to the meeting of (“Client”) and his attorney, Theodore Green, Esq., with Assistant United States Attorney to be held at the Office of the United States Attorney for the Southern District of New York on , 2013 (“the meeting”), the following understandings exist:

(1) THIS IS NOT A COOPERATION AGREEMENT. The Client has agreed to provide the Government with information, and to respond to questions, so that the Government may evaluate Client’s information and responses in making prosecutive decisions. By receiving Client’s proffer, the Government does not agree to make a motion on the Client’s behalf or to enter into a cooperation agreement, plea agreement, immunity or non-prosecution agreement. The Government makes no representation about the likelihood that any such agreement will be reached in connection with this proffer.

(2) In any prosecution brought against Client by this Office, except as provided below the Government will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except (a) in a prosecution for false statements, obstruction of justice or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting; or (b) if, at any time following the meeting, Client becomes a fugitive from justice.

(3) Notwithstanding item (2) above: (a) the Government may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution of Client by the Government; (b) in any prosecution brought against Client, the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should Client testify; and (c) the Government may also use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised sua sponte by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.

(4) The Client understands and agrees that in the event the Client seeks to qualify for a reduction in sentence under Title 18, United States Code, Section 3553(f) or United States Sentencing Guidelines, Sections 2D1.1(b)(16) or 5C1.2, the Office may offer in evidence, in connection with the sentencing, statements made by the Client at the meeting and all evidence obtained directly or indirectly therefrom.

(5) To the extent that the Government is entitled under this Agreement to offer in evidence any statements made by Client or leads obtained therefrom, Client shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

07.17.2012
(6) If this Office receives a request from another prosecutor’s office for access to information obtained pursuant to this Proffer Agreement, this Office may furnish such information but will do so only on the condition that the requesting office honor the provisions of this Agreement.

(7) It is further understood that this Agreement is limited to the statements made by Client at the meeting and does not apply to any oral, written or recorded statements made by Client at any other time. No understandings, promises, agreements and/or conditions have been entered into with respect to the meeting other than those set forth in this Agreement and none will be entered into unless in writing and signed by all parties.

(8) The understandings set forth in paragraphs 1 through 7 above extend to the continuation of this meeting on the dates that appear below.

(9) Client and Attorney acknowledge that they have fully discussed and understand every paragraph and clause in this Agreement and the consequences thereof.


PREET BHARARA
United States Attorney for the Southern District of New York

by:

Assistant United States Attorney

Witness

Dates of Continuation

Initials of counsel, Client, AUSA, witness

07.17.2012
Caveat Profferor*

Defense lawyers usually try to suppress their clients’ statements, not surrender them. But sometimes, bringing one’s client in to the prosecutor’s den may be the best strategy. It can lead to no charges, reduced charges, or a cooperation agreement. It can, however, also solidify a prosecutor’s resolve to indict, provide fodder for additional investigation and damaging trial rebuttal evidence, or, as Martha Stewart painfully learned, lead to charges of false statements and obstruction.

Whether a client should talk to a prosecutor in what is commonly known as a “proffer,” is, of course, a fact-specific decision, and so the first step is to bone up rigorously on all available facts from all available sources. It is also a decision that must be made in light of the case-law interpreting proffer agreements – the written contracts prosecutors require clients and their lawyers to sign before a proffer may proceed – and the somewhat ambiguous legal framework that governs the permissible uses of proffer statements in the absence of any proffer agreement. An ill-prepared or ill-advised proffer can have devastating consequences. Sometimes, it is better to go to war by holding one’s peace.¹

What are proffers?

Defense lawyers are constantly presenting or “proffering” their clients’ versions of events to prosecutors – in telephone conversations, e-mails, and fleeting conversations in courthouse corridors. A “proffer,” however, generally means a formal interview of the client under the terms of a written “proffer agreement,” held at the prosecutor’s office, and attended by the prosecutor, the case agent(s), and the defense lawyer. Since it often occurs early in the representation, before the lawyer fully knows the client or the facts, it is a risky endeavor. The prosecutor may bombard the client with all sorts of questions the defense lawyer didn’t even know to ask, much less prepare the client to answer. The obvious fear is that the client will be charged not with the alleged crime, but with the cover-up (as illustrated in the Martha Stewart case) or both (as we saw recently in the much publicized prosecution of Frederic Bourke for violations of the Foreign Corrupt Practices Act²). But there are other perils too, stemming from less obvious but often equally damaging uses of the proffer statements that are permitted under the proffer agreement.

What is a “Queen for a Day” agreement?

A proffer or “Queen for a Day” agreement is the contract a prosecutor usually requires the client and defense lawyer to sign at the beginning of a proffer. Beginning by protesting (perhaps too much) that it is NOT a cooperation agreement, its main purpose is to lay out the permissible uses of the client’s proffer statements. Typically, it provides that a client’s statements cannot be used against her as direct evidence at trial, but they can be used in three other situations – as leads to other evidence, to cross-examine her if she testifies or to rebut any evidence or arguments offered on her behalf at any stage in a

¹ Since proffers occur most commonly at the federal level, this article focuses on federal law.
criminal prosecution, or as evidence in a prosecution for perjury, false statements or obstruction. If the client has alerted the prosecutor in advance that she is making an innocence proffer, she may be required to sign an agreement stating that there are no limitations on the uses of her statements, or she may be offered no agreement at all.3

How enforceable is it?

A proffer agreement is a contract, and, as such, it is interpreted under general principles of contract construction.4 Criminal defense lawyers do not often have occasion to dust off their contract law treatises, but these principles include such nuggets as: give a contract its plain meaning, interpret it as a whole, avoid an interpretation that would render any provision superfluous, only go outside the four corners of the agreement in cases of ambiguity, and – a key one in the proffer context – interpret ambiguities against the drafter.5 A court will only set aside a proffer agreement where it is clear that it was entered into unknowingly or involuntarily, which is to say, hardly ever.6 The Second Circuit has expressly rejected the argument that a client’s assent to the provisions in a proffer agreement is necessarily involuntary in light of the government’s superior bargaining power.7

How does a proffer agreement hurt the client?

One of the purposes of a proffer agreement is to secure a waiver of the client’s rights under Federal Rule of Evidence 410. Designed to ensure robust plea negotiations, this rule provides that except for some limited exceptions, “plea discussions” with a prosecutor may not be used against the client at a later stage in the criminal prosecution.8

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4 See United States v. Barrow, 400 F.3d 109, 117-18 (2d Cir. 2005).
5 See United States v. Torres, 2008 WL 2977884 (S.D.N.Y, August 4, 2008) (“because proffer agreements are unique contracts in which special due process concerns for fairness and adequacy of procedural safeguards obtain, the Court resolves any ambiguities in the agreement against the Government”) (citations and internal quotation marks omitted).
6 See United States v. Velez, 354 F.3d 190, 196 (2d Cir.2004) (before deeming provisions in proffer agreement unenforceable, “the trial judge must find 'some affirmative indication that the agreement was entered into unknowingly or involuntarily’”) (quoting United States v. Mezzanatto, 513 U.S. 196, 210 (1995)).
7 See Velez, 400 F.3d at 196 (“to the extent there is a disparity between the parties’ bargaining positions, it is likely attributable to the Government’s evidence of the defendant’s guilt”).
8 Federal Rule of Evidence 410 provides that “evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: . . . (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” Rule 410 contains the following two exceptions: “such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same . . . plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.” See also Federal Rule of Criminal Procedure 11(f) (“[t]he admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410”).
By supplanting this rule, the proffer agreement allows the prosecutor to use proffer statements in ways that can hobble the client’s defense at trial. In fact, in *United States v. Barrow*, the Second Circuit held that under the broad waiver provision outlined above (which permits the prosecutor to rebut not just facts presented but arguments made on behalf of a client at trial), the prosecutor may introduce at trial *omissions* from proffer statements and proffer statements that *implicitly* contradict the defense lawyer’s arguments to the jury.9 In *Barrow*, for example, where the defendant did not testify, the Court upheld the admission of the defendant’s proffer statement that he routinely sold drugs at the address charged in the indictment for the purpose of “rebutting” a defense of mistaken identity and police fabrication. In short, statements made at a proffer can cripple what might have been a viable trial strategy.

**When does a proffer agreement help the client?**

Surprisingly, despite the waivers contained in a proffer agreement, there may be times when you really want one. Rule 410 applies to “plea discussions.” Several circuits have interpreted that phrase to require “an actual subjective expectation to negotiate a plea at the time of the discussion,” which was “reasonable given the totality of the objective circumstances.”10 This definition potentially excludes a range of proffers from Rule 410 protection, including proffers where the client is being interviewed simply as a witness to a crime, where the client is seeking to persuade the prosecutor not to indict, or where the client maintains actual innocence.11 While the Second Circuit has not directly addressed this issue, it has held that “plea bargaining implies an offer to plead guilty upon condition,” which “must, in some way, express the hope that a concession to reduce the punishment will come to pass.”12

Much academic ink could be spilled on the propriety of the distinction between protestations of innocence and plea bargaining (the one is often a prelude to the other, as the Second Circuit has acknowledged13), but the bottom line is that if you know your client is making a mere witness proffer or an innocence proffer, you should not assume that the statements are protected under Rule 410. One savvy defense attorney took this issue by the horns by explicitly invoking the protections of Rule 410 at the outset of a proffer where no proffer agreement was forthcoming. The prosecutor present said nothing in response, and a district judge later held that his silence essentially estopped the government from arguing that the proffer did not come within the ambit of Rule 410.14 But prosecutors may not always be so acquiescent. Moreover, at least one court has held

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9 See *Barrow*, 400 F.3d at 121-22.
10 *United States v. Guerrero*, 847 F.2d 1363, 1367-68 (9th Cir.1988) (quoting *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir.1978) (en banc)).
11 See, e.g., *United States v. Edelmann*, 458 F.3d 791 (8th Cir.2006) (there were no plea discussions where, *inter alia*, defendant sought to avoid indictment altogether, rather than to plead); see also Strassberg and Cristovici, *To Proffer or Not to Proffer? That is the Question*, New York Law Journal (June 2009).
12 *United States v. Levy*, 578 F.2d 896, 901 (2d Cir.1978) (addressing the scope of a previous version of Fed.R.Crim.P. 11, which governed the admissibility of “statements made in connection with, and relevant to,” an offer to plead guilty).
that Rule 410 does not protect false proffers,\textsuperscript{15} so even if you get past the hurdle of arguing that the proffer in question should get Rule 410 protection, you may not be able to surmount the claim that the client lost it by lying.

**Is it better to proceed by attorney proffer?**

Given all the downsides of client proffers, the question arises whether it is best for the client to present her version of events through her lawyer in an “attorney proffer,” which is similar to the client proffer, but without either the client or a proffer agreement. Attorney proffers can, however, open their own cans of worms. For one thing, mediating the client’s words through a professional saps them of their raw power. But more importantly, the lawyer’s words may be treated as the client’s own statements.\textsuperscript{16} Bernard Kerik learned this to his chagrin, when his lawyer’s proffer on his behalf to state prosecutors and investigators – that Kerik’s apartment renovations only cost $50,000 and not $255,000, and were paid for by Kerik himself, not individuals doing business with the City of New York – became one of the bases of federal public corruption charges.

To add insult to injury, the prosecutors in the federal case then successfully moved to have another of Kerik’s lawyers (his counsel of record on the federal case) disqualified based on the fact that he too had been authorized to convey the allegedly misleading statements to state prosecutors and investigators, although he had not in fact personally conveyed any. Disqualification was appropriate, the court held, because this lawyer may be called as a government witness at the trial, or, through his advocacy as trial counsel, may be an unsworn witness before the jury on Mr. Kerik’s behalf.\textsuperscript{17} To Kerik’s argument that the statements he made to his lawyers were privileged and therefore inadmissible at trial, the court held that they lost their privileged status when communicated to third parties, and, in any event, even if they were privileged, they would be admissible under the crime-fraud exception.\textsuperscript{18}

Yes, attorney proffers can lead to criminal charges, loss of one’s counsel of choice, and loss of the protections of the attorney-client privilege.

\textsuperscript{15} See *United States v. Kerik*, 531 F.Supp.2d 610, 618 (S.D.N.Y. 2008). An alternative view is that Rule 410 protects false proffers except those that come within its limited exception (i.e. statements that are the basis of perjury or false statement charges and were made under oath, on the record, and in the presence of counsel).

\textsuperscript{16} See *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981).

\textsuperscript{17} See *Kerik*, 531 F.Supp.2d at 614-16.

\textsuperscript{18} Id. at 617; see also *United States v. Doe*, 82 Fed.Appx. 250 (2d Cir. 2003); Murray, *Proffer at Your Peril*, White Collar Crime Reporter, August 2005.
So why proffer at all?

While there are many reasons to be wary of proffering, let’s not lose sight of the fact that it’s often a risk worth taking. Of the cases referred to them for prosecution, federal prosecutors decline one in three, and far more in white collar cases.\(^{19}\) Of the cases they do prosecute, 95% end in a guilty plea\(^{20}\) – indicative of the government’s “awesome” bargaining power.\(^{21}\) Against these statistics, the opportunity to frame or influence the investigation, to engender doubt or sympathy, to secure an early cooperation deal, or to intimidate with the specter of dismissal or an acquittal, is not to be rejected lightly. Each case is unique, not just as to the facts, but also the personalities involved and the moment in time. Only hindsight can accurately answer the question of whether or not to proffer. But if there’s one truism to be gleaned from reading the cases where proffers came back to bite, it’s that one can never underestimate the importance of knowledge. Of the law, to be sure, but especially of all the available facts – and not just the ones your client shares with you.

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\(^{21}\) United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996).