

The Pros and Cons of Client Proffer Letters: Should You Talk to the Government?

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by [Adriana Gardella](#) During white collar criminal investigations, federal prosecutors may try to use client proffer letters (also known as client proffer agreements) to get information from individuals who are under investigation, or from witnesses to the criminal conduct alleged. Although these agreements can sometimes benefit the subjects or targets of an investigation, they also carry great risks. Carlton Fields shareholder [Michael Pasano](#), a member of the firm's white collar crime and government investigations practice group, shared thoughts on the pros and cons of client proffer letters during a recent conversation that has been edited and condensed. **Q:** *What exactly is a client proffer letter?* **Mr. Pasano:** It's a written agreement drafted by the federal prosecutor that sets the ground rules for a conversation that will occur between the prosecutor and his or her agents, and the defendant or witness, accompanied by counsel. The defendant or witness will tell the Government what they know about any alleged crimes, with the supposed assurance that their words will not be used against them in certain contexts. The term 'client proffer' came about back when the meetings between a lawyer and the government excluded the client, and the lawyer would come in and 'proffer' what the client would say. **Q:** *How might a client proffer agreement benefit a witness or defendant?* **Mr. Pasano:** The reality is that 95-plus percent of people charged with federal crimes get convicted. It's a scary statistic, and it's largely because 90-plus percent of them resolve their cases by plea agreements. Additionally, the Government wins a large number of trials. If the Government charges someone with 20 counts and gets a conviction on one, that's a Government win because the penalties are likely to be severe even for one count. As a result, many lawyers who represent people charged with federal crimes are immediately in damage control mode. Most of the time the person charged will make a deal. Sometimes the person who makes the fastest deal gets the best one. Lawyers who have to make deals must sell the Government on their client's value and contrition. The client proffer agreement offers a vehicle to do that. It could pave the way for a better plea offer and a better resolution for the client. **Q:** *What are the drawbacks to entering into one of these agreements?* **Mr. Pasano:** First, you're telling the Government facts it doesn't necessarily know,

giving it a preview of what your client might say at trial. Second, you're exposing your client to pressure because, if the Government doesn't believe your client is being forthright, it can threaten to charge your client with false statements to government agents. So, an unsuccessful interview may create additional crimes with which your client could be charged. Third, you're severely limiting your client's ability to go to trial because the Government can use what the client said during the interview in various ways at trial. **Q:** *How, specifically, have these risks played out for defendants at trial?* **Mr.**

Pasano: Let's say the defendant makes a proffer and a deal doesn't result because the Government is stubborn and wants too much. Now the defendant goes to trial. During opening statements the defense lawyer describes the client as an innocent man. As a result, the Government successfully petitions the court to use everything the defendant said in the proffer agreement during its case in chief because the defense lawyer has opened the door and vitiated the protections of the proffer letter. Concerns also arise in connection with a defendant's ability to testify at trial. First, some defendants have rejected a Government deal, gone to trial, and been unable to testify because they're afraid they will be impeached with things they said during the proffer session. On the flip side, some defendants have testified and been impeached with what the Government says are inconsistencies. **Q:** *Has the defendant's testimony, in fact, been inconsistent?* **Mr. Pasano:**

An additional evil of the proffer session is that it isn't recorded. Instead, you have a Government agent taking notes. I am constantly reading Government agency reports of interviews I've attended where I know the person didn't say the things that the agent has written down. I don't think the agent is being dishonest, but people hear things differently. Sometimes proffer agreements produce reports of interviews that don't gel with what the defendant and his lawyer believe was said, and then they end up working to the client's disadvantage. **Q:** *What, if any, type of immunity does a proffer agreement offer?* **Mr. Pasano:**

Proffer agreements offer limited use immunity. It's worth taking a step back to discuss immunities. Back in the 1950s, if the Government wanted information from people, it offered them so-called transactional immunity, which meant you couldn't be prosecuted for the transaction that you provided information about. It also meant lots of murderers didn't get charged with murder. So, the Government began to offer use immunity. The broadest form of use immunity prevents both the direct and indirect use of the information the informant provides, meaning information that indicates the informant's guilt and information that could lead to the discovery of facts regarding the informant's guilt—such as the name of a previously unknown witness. But the Government soon realized the extent of its power, given sentencing guidelines and the pressure on people to make deals. So now the Government only offers direct immunity, and even narrows it to limited use immunity. That means that, these days, proffer agreements proceed with an offer of limited use immunity that only protects the exact things you say from being used against you as long as you tow the line that is defined in the agreement. Stray from that line, and your words can be used against you. Even if you tow the line, the leads from what you say and other supplemental or secondary sources of information can be used. So, ultimately, you don't get immunity. Still, sometimes lawyers approach the Government with hopes that their client will be impressive enough that the Government says, "You're right, I'm not going to prosecute that person." You've then secured the status of witness. **Q:** *How often does that happen?* **Mr. Pasano:** Not very often. Usually

the Government wants to talk to your client because it thinks your client has exposure. If the Government thinks your client has exposure, it's not planning to give the person a pass. Rather, it's hoping the client will plead to something minor. These days, with all the financial and health care crimes, there are conspiracy statutes that carry 20- and even 30-year penalties. If the client pleads to something minor, the government may cap his risk at a five-year sentence. **Q:** *Are you seeing any trends regarding the use of proffer agreements?* **Mr. Pasano:** We're seeing more and more of them because more people are recognizing the risks of going to trial. The penalties are severe. The ability to cap your risk at a lower level is a very big incentive to make a deal and, again, the first step toward making a deal is to arrange a proffer. **Q:** *What advice would you give a lawyer who is considering the merits of a proffer agreement?* **Mr. Pasano:** Generally, I disfavor walking clients into a proffer session, and am happiest representing those who want to go to trial. I am by nature untrusting of the Government and its agents. But clients, particularly in white collar cases, are often in denial, so it's very dangerous to take the client's sense of whether to talk to the government. Lawyers need to be really careful about how they advise their clients. If you're going to enter into a proffer agreement, you've got to—at a minimum—be sure your client will pass with flying colors. That means the lawyer has to take a lot of time with the client to make sure that the lawyer understands the client's version of events, and that the client articulates it believably. Sometimes lawyers are too quick to think proffer sessions aren't dangerous. While proffer sessions can be good things, you need to do your homework and be sure everything lines up. The stand-up client willing to roll the dice against great odds is becoming increasingly rare, so even a "trial dog" like me has to deal with proffer agreements.

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