

White Collar Defense Issues For Government Proffer Sessions

By **Elena Quattrone** (September 8, 2022)

Stephen Bannon, the former adviser to President Donald Trump, was convicted in July after a brief deliberation by jury on misdemeanor contempt charges in violation of Title 2 of the U.S. Code, Section 192, for failing to comply with a subpoena from the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol.[1]



Elena Quattrone

The subpoena, issued to Bannon's former lawyer, Robert Costello, on Sept. 23, 2021, requested that Bannon produce 17 categories of records and testify about actions leading up the attack.

Bannon resisted the subpoena, arguing that requested information was protected from disclosure by executive privilege, and leading to his conviction for contempt of Congress.

During the government's case-in-chief, federal prosecutors called Federal Bureau of Investigation Special Agent Stephen Hart to testify about a meeting that Costello held with prosecutors in early November 2021 — a proffer meeting — in which Costello reportedly attempted to convince prosecutors that Bannon's sole reason for not complying with the subpoena was the issue of executive privilege.

Bannon was indicted just days after the proffer session, and was eventually tried and convicted.

Proffer sessions occur routinely in criminal practice and are often used by a person of interest to achieve cooperation in a government investigation, or to convince a prosecutor not to pursue criminal charges.

Agreeing to participate in a proffer session is risky, and there are several important factors attorneys should consider before they or their clients agree to participate in a proffer session with the government.

What Is a Proffer?

In its simplest form, a proffer is a meeting between prosecutors and defense during an ongoing government investigation.

Proffer sessions can involve a person of interest represented by counsel — a client proffer — or in Bannon's case, an attorney who speaks on behalf of a client — an attorney proffer.

Government investigations often rely on interviews of individuals to collect information in furtherance of an investigation.

Whether the government considers the person of interest a participant in unlawful conduct or a mere bystander, an invitation to meet with an assistant U.S. attorney or other prosecutors can be perilous due to the high risks they present.

The prosecutor is meeting with the person of interest in a proffer setting with the expectation that the person of interest will share information that will further an

investigation, and to understand how the person would testify if an enforcement action were brought.

Depending on what is shared during the meeting, and how a prosecutor views a particular person of interest, the statements shared can potentially expose the person of interest to risk of an enforcement proceeding or prosecution, or further build the government's case against the person.

But, if the prosecutor is satisfied with the information shared, the person of interest may convince the prosecutor not to bring criminal charges, or may result in an offer for a plea agreement or immunity agreement.

While proffer sessions are a common and recognized aspect of any white collar criminal defense practice, counsel must be familiar with navigating the implications for their clients should they decide to proffer with the government, and understand how best to protect their clients.

Enter the proffer, or queen-for-a-day, agreement.

The Proffer Agreement

Proffer agreements are contracts that set the terms of an interview with prosecutors, and, most importantly, how the government may use information that it learns during that interview.

A proffer agreement's content and structure may vary from jurisdiction to jurisdiction — indeed, some proffers may be more pro-government than others, and, in some cases, even extending to a defense attorney's statements made during the client or attorney proffer and attributing those statements to the client.

But a proffer agreement's key themes remain the same, and often are nonnegotiable.

For the proffering witness, the most important provision involves how the proffering witness's statements can be used.

A key feature of proffer agreements is that they prohibit the government's direct use of a witness's statements in the government's prosecution of that witness if the witness is later prosecuted.

The idea is that the government generally cannot call an agent in its case-in-chief to testify to what the witness said, with some notable exceptions.

If the proffering witness was dishonest or intentionally withheld relevant information during the proffer session, the proffer agreement would not shield the witness from prosecution for lying to federal agents.

Proffer agreements generally state that if the witness is determined to have made false statements or omitted relevant information during the proffer, the witness could face charges for obstruction of justice^[2] or making a false statement or declaration.^[3]

Moreover, if the witness later makes a statement or takes a position inconsistent with the statements made during the proffer, then the government could use the witness's statements to rebut that later, inconsistent statement or position.

For example, if the witness is later prosecuted and testifies — or even if the witness's lawyer makes an argument — that is inconsistent with her proffer statements, then the government may use the witness's proffer statements to impeach the witness and rebut her new position.

If the witness is later prosecuted, her testimony and arguments will be constrained to those made during the proffer, lest the witness be found to have breached the proffer agreement, which may free up the government to introduce the witness's prior inconsistent proffer statements.

While a witness's proffer statements might be off-limits in a later prosecution, the government can make derivative use of those statements, and any information it learns during the proffer.

The government will use proffer statements to pursue leads, subpoena records and interview others. Through those efforts, it may capture new and additional evidence that can be used against the proffering witness.

All information derived from the proffer is fair game for the government to further investigate and prosecute, but the witness's statements made during the proffer session itself generally cannot be used against that witness, unless those statements are later deemed untruthful or contradicted.

Factors to Consider

Proffer agreements are critical when meeting with the government, and attorneys should consider several factors before advising their clients to participate in such meetings:

What is the witness's status, and does that witness face enforcement risk?

Whether the government views an individual as a witness, subject or target — meaning a putative defendant — may inform the individual's willingness to cooperate with investigators, the topics discussed, and whether there is a need to address with the government other, more protective forms of immunity in exchange for information prior to the proffer.

What does the witness know about the conduct being investigated?

Perhaps the witness holds a particular role, or vantage point that is especially important or helpful to the government on certain issues, and only this witness has that knowledge. If so, then there may be opportunity to broach the possibility for more protective forms of immunity or cooperation credit down the line.

Will the witness be perceived as truthful during the proffer session?

To tell the truth seems like a simple instruction; however, the truth sometimes is in the eyes of the beholder. Memories fade, information can be omitted, or a witness statement might contradict that of another witness.

All of these things can lead to an appearance of untruthfulness and potential exposure, and all should inform defense strategy.

Care in telling the truth, not overstating, not speculating, and using documentary evidence

to refresh memory are all crucial aspects of preparing for a proffer. In short, detailed preparation is essential to avoid any semblance of untruthfulness.

Will an attorney proffer suffice?

In preparing for a proffer session, a witness and her attorney may wish to seek an attorney proffer, as in Bannon's case, instead of an in-person or client proffer.

An attorney proffer is a meeting between the government and defense counsel only, where the attorney effectively presents hypotheticals of what a witness would say if they were to meet with the government.

An attorney proffer may be a better option to evaluate whether the witness should proffer, should seek some more protective form of immunity, or should enter a plea with or without cooperation.

Done correctly, attorney proffers can be an important tool to foster an information exchange with the government, gauge the government's reaction, correct misimpressions, and possibly further negotiations about a witness's treatment in the investigation.

However, attorney proffers may present their own concerns. A proffer agreement is normally not entered into when an attorney proffers with the government, and there is a risk that the government may later try to attribute the attorney's statements to the client.

Just as with a client proffer, great care must be taken in deciding whether an attorney proffer is the best option, and only experienced counsel should undertake such a meeting.

How will the proffer session be memorialized?

Audio or video recordings of a proffer session are typically not permitted, and memorialization of the information shared in a proffer session is typically limited to the notes taken by the attendees: for the government, most often, an investigatory agent whose notes will be prepared into a single memorandum summarizing the interview, such as a 302 memorandum — named for the FBI's interview report form FD-302.

Human error, the passage of time between a proffer session and the finalizing of an interview memorandum, and failing to capture exculpatory information in writing may lead to inaccuracies in memorandums of interview that could have detrimental effects on a person of interest if later charged.

Such issues were of focus in the recent case *U.S. v. Meek*, in the U.S. District for the Southern District of Indiana, where the accuracy of a witness's interview statements made during a proffer session captured in a 302 memorandum were in question.

That witness was charged three months after the proffer session, but, in an unusual circumstance, the government ultimately decided to dismiss its case with prejudice "in the interest of justice," after the defense accused prosecutors of omitting exculpatory information from the 302 memorandum.

A case like *U.S. v. Meek* reminds attorneys that if their clients agree to proffer with the government, the attorney should be prepared to memorialize their own recollection of what occurs, and what information is shared during the proffer session so as to combat any potential material inaccuracies that may arise if later criminal charges are brought.

Conclusion

Any meeting with a government official has its risks, but those risks can be mitigated by evaluating whether a proffer agreement, or some more protective form of immunity, is appropriate before meeting with a representative of the U.S. Department of Justice or other prosecutors.

If you represent a client who receives a request to meet with the U.S. attorney's office or to be interviewed by a federal agent, a proffer agreement can and should be requested before the decision is made to attend that meeting.

But understanding the limits of its protections is key and should always be considered before a decision is made to participate in a proffer session with the government.

And if the goal of proffering is to convince a prosecutor not to indict, as in the case with Bannon, there are no guarantees that proffering will eliminate the risk of being charged.

Elena M. Quattrone is an associate at Epstein Becker Green.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] <https://docs.house.gov/meetings/IJ/IJ00/20211019/114156/HMTG-117-IJ00-20211019-SD001.pdf>.

[2] 18 U.S.C. § 1503.

[3] 18 U.S.C. §§ 1001, 1623.