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Are Attorney Proffers Fair Game on Cross Examination?

By Evan T. Barr
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The cooperation process in most federal white collar criminal cases starts with an attorney proffer. Typically counsel for a potential witness meets with the prosecutors, either in person or telephonically, to provide a preview of what the lawyer "hypothetically" anticipates his or her client would say about the conduct at issue.

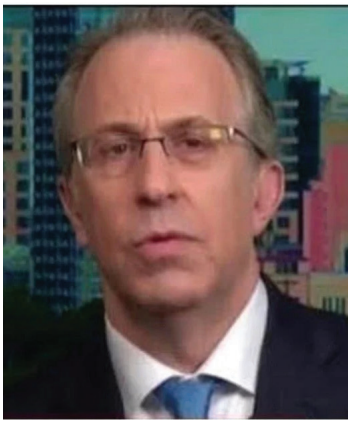
In some exigent situations, the government may ask for an attorney proffer to be provided even though defense counsel has not necessarily had an opportunity to fully debrief the client.

Even under normal circumstances, the attorney proffer usually is made well before counsel has seen and considered all of the relevant evidence in the case. Not surprisingly, as a result, there can be discrepancies between the attorney proffer and the testimony that the client ultimately may give pursuant to, for example, a formal cooperation or non-pros agreement with the government.

In those instances, to ensure compliance with disclosure obligations, various federal prosecutors around the country have adopted the practice of producing to the defense any notes or reports of interview memorializing attorney proffers made on behalf of a government trial witness.

Defense counsel at trial may try to use this material as fodder for cross-examination of a government witness, especially given the likelihood of discrepancies, even though it may seem unfair to confront a witness with a statement made outside their presence.

Furthermore, if the witness is either unable or unwilling to acknowledge an inconsistent statement purportedly made on his or her behalf in an attorney proffer, the lawyer who made the original proffer may even be hauled into court to testify.



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This article will explore the law in the Second Circuit on the use of attorney proffers under these circumstances and discuss how counsel can minimize the risk of becoming, in effect, a witness against your own client.

'Triumph Capital'

United States v. Triumph Capital Group, Inc., 544 F.3d 149 (2d Cir. 2008) has been cited for the proposition that a defendant may use an attorney proffer that differs from the witness's testimony at trial to support the defendant's version of the facts and to impeach the witness's credibility, and also call the attorney for the witness if the witness does not acknowledge the facts on cross.

Triumph Capital involved Charles Spadoni, a politically-active lawyer convicted in a scheme to pay bribes to Paul Silvester, the Connecticut State Treasurer, to influence state pension investments. Silvester pled guilty and agreed to testify against Spadoni.

Following his conviction, Spadoni claimed the prosecution had suppressed exculpatory *Brady* material. Specifically, after trial, Spadoni's counsel obtained notes that Silvester had handwritten for his attorney (which were later typewritten verbatim) to assist in plea negotiations. Silvester's attorney conveyed the substance of the notes in an attorney proffer to the government.

The notes included a version of Silvester's interactions with Spadoni that differed from Silvester's trial testimony, and suggested Spadoni lacked corrupt intent. In response to the *Brady* motion, the government produced for the first time notes taken by FBI Special Agent Charles Urso during the attorney proffer.

The government argued it had never possessed Silvester's notes and that the information in the agent's notes of the proffer was neither exculpatory nor impeachment material. The district court denied the *Brady* motion.

On appeal, the Second Circuit held that Spadoni was entitled to a new trial based on the suppression of *Brady* and *Giglio* material. The court held that the government had possessed Agent Urso's notes and that they supported an alternate version of the Spadoni-Silvester interactions that would have undermined the government's theory.

The court concluded that "Spadoni could have used the proffer notes not merely to support his version of his conversation with Silvester, but also to impeach Silvester's credibility. While the notes did not record Silvester's words, Spadoni could have attributed them to him through cross-examining Silvester, questioning Agent Urso, and if necessary calling Silvester's attorney."

The court went on to note that "Spadoni could have argued that Silvester initially authorized his attorney to tell the truth, which inculpated others and exculpated Spadoni, but that once he began to cooperate with the government he fabricated a new, inculpatory version of his dealings with Spadoni to enhance the value of his cooperation and his expected reward."

Judge Cabranes's View

Triumph Capital sent a strong and perhaps helpful message regarding the government's disclosure obligations but unfortunately it also ignored the rules of evidence. Under a fair reading of Federal Rule of Evidence 613, a cooperating witness can only be impeached by his own prior inconsistent statements, and not with those of his attorney. This point had been clearly established more than a decade before *Triumph Capital* in a well-reasoned opinion by then-Chief district Judge Jose Cabranes, who now sits on the Second Circuit.

In *United States v. Cuevas Pimentel*, 815 F. Supp. 81 (D. Conn. 1993), the court confronted the issue of whether a defendant in a criminal trial could impeach a government witness's testimony by introducing evidence of prior statements made by that witness's attorney.

Defendant Cuevas was charged in a narcotics conspiracy along with two other defendants, including Espinosa. At a detention hearing, Espinosa's lawyer told the court that (1) Espinosa had played a minor role in the alleged drug transaction; (2) Espinosa was not in the state of Connecticut at the time the deal occurred; and (3) that Espinosa denied being a drug dealer. Espinosa subsequently pled guilty to the charges, however, and agreed to testify for the government against Cuevas, acknowledging that he had actually played a significant role and implicating Cuevas in the drug transaction.

Counsel for Cuevas advised he planned to impeach Espinosa's testimony by introducing transcripts of his attorney's remarks at the detention hearing. The government moved to exclude on the grounds, among others, that statements of an attorney could not be used to impeach a client's testimony. Cuevas also asserted that the attorney's statements were admissible as admissions of a party-opponent under Rule 801(d)(2).

Judge Cabranes held that neither Federal Rule of Evidence 613(b) nor Federal Rule of Evidence 801(d)(2) permitted the use of statements made by the attorney for a government witness to impeach the witness' testimony.

Judge Cabranes explained that Rule 613 made no provision for the attribution of statements of others to a witness; accordingly, it did not permit an attorney's statements to be introduced prior inconsistent statements of the attorney's client. Second, Judge Cabranes held that Rule 801(d)(2) did not permit the use of the attorney statements in question because Rule 801(d)(2) allows admissions to be introduced only against parties, not against all witnesses.

Cuevas Pimentel thus makes clear defense counsel should not be allowed to use statements made by counsel for the witness during an attorney proffer to impeach the witness and that such statements are not admissible under Rule 801(d)(2). *See also SEC v. Arrowood*, No. 14-CV-0082, 2014 U.S. Dist. LEXIS 68669,

*2-3 (N.D. Ga. May 19, 2014) (following *Cuevas Pimentel*).

Although *Triumph Capital*, as a Second Circuit opinion, carries greater weight than the far better-reasoned lower court ruling in *Cuevas-Pimentel,* there are several ways in which it might nevertheless be distinguished.

First, the attorney proffer information at issue in *Triumph Capital* involved notes of a verbatim handwritten statement by the cooperating witness that was later typed up and conveyed by his attorney to the government. Most attorney proffers, by contrast, are a less precise mix of legal advocacy and synthesis of facts derived from client debriefings. For that reason, among others, they generally do not lend themselves to proper impeachment of a witness.

Second, nothing in *Triumph Capital* suggests that defense counsel should be permitted to impeach a cooperating witness using an excerpt from a dialogue that occurred outside his presence between counsel for the witness and the prosecution team.

Third, *Triumph Capital* mostly focused on the impact that suppressed *Brady* information might have had at trial. While the court suggested, by way of illustration, one possible such use at trial, the panel had no occasion to reach or even consider the question of whether such evidence could properly be used or admitted under Rule 613 or Rule 801(d)(2), respectively, in contrast with Judge Cabranes's specific holdings in *Cuevas Pimentel*.

Put differently, even if attorney proffer statements cannot properly and fairly be used on cross, the disclosure of potential inconsistencies arising from an attorney proffer is still valuable and important to trial counsel in formulating a defense and exploring avenues for further investigation.

Lawyer Testifying Against Client

The dicta in *Triumph Capital*—about Silvester's attorney taking the stand if necessary — also creates the troubling prospect of a lawyer being called to testify against his or her witness client. If a purportedly prior material inconsistent statement as contained in attorney proffer may be used for impeachment purposes, it follows that in the event the witness either cannot recall the statement or denies having made it the first place, then trial counsel would (at least theoretically) have the ability to subpoena the witness's lawyer to contradict the client. A trial judge might be willing to entertain such testimony provided it had a significant potential to impact the outcome.

Faced with that situation, counsel for the witness should promptly move to quash. Compelling a lawyer to testify against a witness-client obviously poses a direct threat to the integrity of the attorney-client relationship especially where the matter for which the lawyer was engaged may not yet be concluded and the witness-client still has exposure.

The subpoena would improperly divert the lawyer's time and attention away from his client, potentially infringe on the attorney-client privilege, generate an atmosphere of lingering distrust between them, and probably lead to the lawyer having to withdraw from the representation as a result.

Moreover, from a policy perspective, allowing zealous defense counsel to explore the substance of meetings and conversations between lawyers and the government could chill and inhibit counsels' ability to their job effectively on behalf of a would-be cooperator without the threat of harassment or distraction.

For these reasons, all options other than forcing the lawyer to take the stand should be exhausted before such a scenario is contemplated, and even then it should only occur in the most extraordinary circumstances.

Conclusion

To avoid problems down the line, counsel for the potential cooperator should take care, especially at the inception of a case, to emphasize to the government that any attorney proffer (a) is intended to be a high-level preview as opposed to a definitive or verbatim account; (b) may include a mix of legal and factual analysis; and (c) presumably is being made prior to counsel having had an opportunity to review all of the relevant evidence. Such a disclaimer will help set realistic expectations and ideally provide counsel with sufficient flexibility to address subsequent developments in the case.

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