California LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

VOLUME 37 | ISSUE 3 DECEMBER 2024

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ATTORNEY PROFFERS POST-*MENENDEZ*: HOW TO MAKE THE RISK WORTH THE REWARD

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THE "REWARDS" ASSOCIATED WITH ATTORNEY PROFFERS

Defense attorney "proffers" and prosecutor "reverse proffers" — informal and often hypothetical discussions about the facts and law — are common and longstanding federal practices that bring focus to complex investigations and contribute to just results. Attorney proffers are especially important for any criminal defense lawyer who wishes to shape the trajectory of an investigation or prosecution. They can be useful as hypothetical previews of the defense case while insulating clients from cross examination and can cause prosecutors to rethink the wisdom of bringing certain charges. Such proffers can also promote candid communications and enhance trust between the parties, laying the groundwork for a range of favorable outcomes for a client in the crosshairs of a federal investigation, including: a beneficial cooperation agreement and credit under the United States Sentencing Guidelines; less serious charges; or perhaps a declination of charges altogether. However, as the recent high profile case of *U.S. v. Menendez* (S.D.N.Y. Sept. 21, 2023, 23-Cr-490 (SHS)) demonstrates, attorney proffers carry significant risks which must be carefully weighed.

THE *MENENDEZ* TRIAL

In 2023, Senator Robert Menendez (Menendez) and his wife Nadine Menendez (Nadine) were charged with participating in a years-long bribery scheme from 2018 to 2022 that used the senator's official position to the benefit, enrichment, and protection of three

New Jersey businessmen (Wael Hana, Jose Uribe, and Fred Daibes) and the Government of Egypt. In exchange, Menendez and his wife received hundreds of thousands of dollars in bribes from the businessmen including gold bars, cash, a luxury convertible, and mortgage payments. (See *U.S. Senator Robert Menendez, His Wife, and Three New Jersey Businessmen Charged with Bribery Offenses*, S.D.N.Y. U.S. Attorney's Office, Sept. 22, 2023 <www.justice.gov/usao-sdny/pr/us-senator-robert-menendez-his-wife-and-three-new-jersey-businessmen-charged-bribery>.)

Prior to an indictment being filed, Menendez's former lawyer, Abbe Lowell, met with the U.S. Attorney's Office to discuss the facts of the case while the investigation was ongoing. Relying on statements made by Menendez, defense counsel made certain representations to the DOJ regarding the nature and timing of the payments received by Nadine. After the preindictment presentation on September 11, 2023, Menendez was indicted on bribery and corruption charges, and a few months later in March 2024, prosecutors filed a superseding indictment against Menendez adding obstruction and related conspiracy charges stemming from the statements made by counsel during the preindictment presentation that Menendez allegedly knew to be false.

At trial, prosecutors introduced specific slides from the preindictment PowerPoint presentation as evidence of the obstruction of justice charge. These slides focused on information related to the payments made to Nadine, Menendez's knowledge of the payments, and Menendez's purported repayment of certain payments Nadine received.

On July 16, 2024, Menendez was found guilty of all charges.

WHY FEDERAL LAW DIDN'T PROTECT THE *MENENDEZ* PROFFER

As frequently happens, the attorney proffer in the *Menendez* case was accompanied by a slide deck, titled "Senator Robert Menendez, Presentation to U.S. Attorney's Office, Southern District of New York." (Presentation to U.S. Attorney's Office, Southern District of New York, *United States v. Menendez* (S.D.N.Y. June 14, 2024, 23-Cr-490 (SHS)) (ECF No. 468-1) (Presentation).) The Presentation detailed a series of bank transactions that spoke to the timing of allegedly corrupt payments to Nadine and to Menendez's subsequent efforts to repay said payments. Menendez's counsel also marked specific transactions using an asterisk, indicating that Menendez "was not aware of [the transaction] until th[e] investigation began."

Like the Presentation in *Menendez*, defense counsel commonly seek protection of proffer communications under Federal Rules of Evidence, rule 408. Rule 408 prohibits "conduct or a statement made during compromise negotiations about the claim" from being admitted as evidence "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." Before entering preindictment conversations, defense attorneys will regularly enter "408 Agreements" with the government and designate any exhibits accordingly (prosecutors often do the same for their "reverse proffers"). Here, Menendez's counsel included a footer marking the slide deck as "made under Federal Rule of Evidence 408."

Despite the rule 408 designation in the slide deck's footer, neither Menendez's counsel nor attorneys for the government addressed rule 408 in their letter briefing before the court. Instead, both parties focused exclusively on whether the slide deck could be admitted pursuant to rule 403 which "exclude[s] relevant evidence if its probative value is substantially outweighed by a danger of … unfair prejudice." However, this raises a simple question. Why?

At first blush, rule 408 might appear to offer unqualified confidentiality and inadmissibility for any statement or exhibit presented during a preindictment proffer session. Not so. In fact, rule 408 contains two limits on the rule's scope, making far more evidence admissible than would seem likely given the ubiquity of preindictment conversations between attorneys and government investigators.

First, rule 408(b) provides a nonexhaustive list of "other purposes" for which statements and exhibits made during settlement negotiations may be admitted. This includes but is not limited to: (1) "proving a witness's bias or prejudice"; (2) "negating a contention of undue delay"; or (3) "proving an effort to obstruct a criminal investigation or prosecution."

Second, rule 408(a)(2) provides that while "conduct or a statement made during compromise negotiations about the claim" ordinarily may not be admitted, this provision does not apply "when offered in a criminal

case and when the negotiations relate[] to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." This limitation arose when, in 2006 and at the request of the U.S. Department of Justice, the Advisory Committee and Congress amended rule 408 to admit any statement made during regulatory or quasi-criminal investigations that does not constitute an "offer, promise, [or] acceptance[]." (See Letter from Jerry E. Smith to David F. Levi (May 15, 2004) <www.uscourts.gov/sites/default/files/fr_import/EV5-2004.pdf ["This position is taken in deference to the Justice Department's arguments that such statements can be critical evidence of guilt."] >.) As the 2006 Advisory Committee Notes explain, "[w]here an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected." (Advisory Com.'s note to Rule 408, 2006 amend.) The Committee further advised that an individual involved in enforcement proceedings might be able to "protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government." (*Ibid.*)

Accordingly, Menendez could not avail himself of rule 408's limited protections. A central component of the superseding indictment against Menendez included a claim by DOJ that the slides themselves contained false information supporting an obstruction of justice charge against Menendez. (Superseding Indictment, *United States v. Menendez* (S.D.N.Y. Mar. 5, 2024, 23-Cr-490-SHS (ECF No. 238 at pp. 63-64).) The court explained that a proffer works as a statement from an attorney on behalf of their client, and that this relationship is understood as that of "agent and principal." In turn, "when certain statements are made that in 'all probability had to have been confirmed by the defendant,' [citation], the jury is permitted to infer the client's role in an attorney's statement." (*United States v. Menendez* (S.D.N.Y. June 17, 2024) 23-Cr-490(SHS) (ECF No. 473) (Order).) Here, the asterisk designation that "Menendez was not aware" of specific payments to (and on behalf of) Nadine "until the investigation began" spoke to Menendez's state of mind and precisely *when* he learned of the allegedly corrupt bank transactions. As Menendez's counsel would have no way to know this information without Menendez's input, if admitted, a jury would be entitled to consider: (1) whether these designations could be imputed to Menendez; and (2) whether those statements obstructed the government's investigation into Menendez and his wife's dealings.

Thus, the trial court allowed the government to introduce the PowerPoint presentation and explicitly concluded that rule 403 was not implicated because the probative value of the slides, even presented through a government paralegal, was not substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. (Order, at p. 2.)

PRE-*MENENDEZ* AUTHORITY ON THE ADMISSIBILITY OF ATTORNEY PROFFERS AND OTHER STATEMENTS OF COUNSEL

The court's ruling in *Menendez* leaves the admissibility of attorney proffers in limbo. In fact, courts have "rarely litigated" the issue. (*United States v. Valencia* (2d Cir. 1987) 826 F.2d 169, 170; *cf. United States v. Gregory* (4th Cir. 1989) 871 F.2d 1239, 1242, cert. den., 493 U.S. 1020 (1990).) However, a review of the limited case law on this question and related cases involving the admissibility of attorney statements in other litigation contexts offers helpful guidance on precautions attorneys can take when talking with the government.

First, in *Valencia*, the court decided whether statements made by defense counsel during informal conversations with a prosecutor may be admitted against a criminal defendant as admissions by an agent. The court acknowledged that the use of counsel's statements could implicate a defendant's interests in retaining counsel, inhibit discussions between counsel and the prosecutor, and could risk impairing a defendant's privilege against self-incrimination. (*Valencia*, *supra*, 826 F.2d at pp. 171-174.) In addition, the court analyzed rule 410, which prohibits the admission of statements made during plea discussions. The court noted that "[t]hough the statements were not made during the course of plea negotiations and therefore were not automatically excludable under Fed. R. Evid. 410 … a statement by defense counsel protesting a client's innocence may often be the prelude to plea negotiations" (*Valencia*, at p. 173.) The court also added that because the statements were "not offered to show admission of an element of the case," the government's "claim to the statements [was] not strong." (*Ibid.*) Accordingly, the court found that the district court did not abuse its discretion in excluding the statements. (*Id.* at p. 174.)

Second, in *United States v. Ahmed* (D.Mass. Aug. 3, 2006, No. 05-10057-RCL) 2006 WL 3210037, the court considered the admissibility of a factual stipulation entered into by the parties that contained

statements from defense counsel's preindictment proffer and a chart of information presented to the government during the proffer meeting. After the meeting, and as a result of the information presented, Ahmed was indicted for obstruction of justice. (*Id.* at p. *2.) The court held that the chart was admissible because rule 410 did not apply (as the preindictment meeting was a "preliminary" discussion and not made during the course of plea negotiations) and noted that *Valencia* was distinguishable because here, unlike in *Valencia*, the "chart and conversations at issue were not part of informal discussions," but instead part of a "specific meeting set up where the defendant, through his counsel, elected to make a formal presentation of facts which had been gathered specifically by the defense for the purpose of presenting evidence to the government." (*Valencia*, at p. *4.) Accordingly, the court ruled that the stipulation was admissible. (*Id.* at pp. **1, 5.)

OTHER RELEVANT AUTHORITY ON ADMISSIBILITY OF ATTORNEY STATEMENTS

In the Ninth Circuit, there are few cases that speak to the risks of the attorney proffer similar to *Valencia*, *Ahmed*, or *Menendez*. However, two cases, in particular — *United States v. Flores* and *United States v. Wells* — illustrate potential pitfalls of an attorney's pretrial statements and provide guidance for how judges might balance the importance of trial as a truth-finding exercise against a criminal defendant's rights.

First, in *United States v. Flores*, the Ninth Circuit held that it was not error to admit an administrative claim letter sent by defendant's attorney in which defendant's ownership of a gun was admitted. (*United States v. Flores* (9th Cir. 1982) 679 F.2d 173, 174, overruled on other grounds by Illinois v. Gates (1983) 462 U.S. 213.) In this case, Flores's attorney sent an administrative claim letter to the City of San Jose alleging that the police had violated Flores's rights by illegally searching his apartment and wrongfully seizing his guns. (*Flores*, *supra*, 679 F.2d at p. 177.) The letter clearly admitted Flores's possession of the guns, and the district court denied Flores's motion to exclude the letter from evidence at his trial for being a convicted felon in possession of firearms. (*Ibid.*) The Ninth Circuit affirmed the district court's holding — admitting the administrative claims letter, in part, because "the letter was voluntarily mailed by Flores and his attorney at their election." (*Id.* at p. 178.)

Second, in *United States v. Wells* (S.D.Cal. July 5, 1994, No. 94-0191-R) 1994 WL 421471, the district court considered the extent to which an attorney's statements regarding his or her clients' conduct in a prior, unrelated proceeding can be imputed onto a criminal defendant. During defendant's criminal case, the government requested that the court take judicial notice of a variety of records including statements by Wells's former counsel in an earlier briefing submitted to the district court that admitted that the defendant violated the court's asset freeze. (*Id.* at pp. *3, *10.) The court, using its discretion, weighed a variety of facts and rejected the government's request. (*Id.* at pp. *10-*11.) First, the court noted the defendant's statements were taken out of context. (*Id.* at p. *11.) Second, the statements were made by attorneys that no longer represented Wells, and nothing in the record suggested that Wells approved or even saw the brief. (*Ibid.*) And third, the court did not think a defendant should be "faulted for his attorneys' failure to foresee the possibility that the tools of their advocacy might later be used against [him] in criminal proceedings filed almost one year later." (*Ibid.*)

In addition to these cases in the Ninth Circuit, courts across the country have attempted to weigh the context and nature of attorney statements before determining the admissibility of those statements against their clients. (See, e.g., *United States v. Pappas* (D.N.H. 1992) 806 F.Supp. 1, 6 [where attorney's statements were made pursuant to a power of attorney and not in an informal setting, defendants' rights would not be violated by the admission of their representatives' statements]; *United States v. Vito* (E.D.Pa. July 22, 1998, No. 88-137) 1988 WL 78031, at p. *2 [where defendant authorized his attorneys to meet with the IRS to explain his position during an investigation, attorneys' statements are admissible under rule 801(d)(2)(D) and finding that the scope of authority is not limited to written powers of attorney where the conduct of the defendant authorizing the meeting establishes an implied agency with counsel].) Thus, in any scenario in which an attorneys' statements are being used in subsequent proceedings, defendants can expect courts to consider several factors including the scope of agency between defendant and counsel, defendant's explicit knowledge as to the facts being presented, and of course, the constraints of the Federal Rules of Evidence.

KEY TAKEAWAYS

As these cases demonstrate, attorney proffers or other statements made during other critical proceedings within a case can easily find their way into the matter at hand in ways that are harmful to a client. Defense lawyers must always remember that they are their clients' agents and can easily bind them, with the Federal Rules of Evidence offering only limited protections (and exceptions) that can be a trap for the unwary. Remember to make clear that any presentation defense counsel makes is based upon facts as currently understood, as well as the necessarily limited facts to which defense counsel has access. Consider asking the prosecutor in advance to treat the communications as confidential. Also consider utilizing hypothetical scenarios to explore potential outcomes and be cautious about any written work product shared with the government. Most importantly, assess whether the potential benefits — a non (or deferred) prosecution agreement, reduced charges, or cooperation credit — are even worth engagement in the first place.

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