



WHAT IS A PROFFER?

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In a criminal investigation, a proffer is an opportunity for an individual to share information with law enforcement and/or the prosecutor. Although participating in a proffer can be helpful when seeking a resolution in white-collar cases, it requires careful consideration and guidance from an experienced attorney.

How Does a Proffer Session Work?

A proffer session allows individuals under investigation, often in white-collar crime cases, to share information that might be useful to the government's case. In return, these individuals may receive a chance at a more favorable deal or reduced charges. However, it is important to understand that participating in a proffer session does not guarantee a better outcome.

These sessions generally take place in a U.S. Attorney's Office or a similar setting. The target of the government's investigation, accompanied by their attorney, meets with the prosecutor and investigating agents. The session typically begins with the defense attorney giving an outline of the information the individual will provide, followed by questions from the prosecutor or agents.

What Protections Are Given for Participating in a Proffer?

Participation in a proffer session often includes certain protections for the



individual sharing information. These protections are outlined in the proffer agreement, which is a formal contract between the individual and the prosecuting authorities. Typically, these protections include:

- Use Immunity: In many cases, the information shared during a proffer session might not be used directly against the individual in court, depending on the specific terms of the proffer agreement. However, there may be exceptions, often detailed within the proffer agreement, rather than relying solely on Rule 410(b) of the Federal Rules of Evidence,¹ which mainly covers plea discussions.

Failure to meet the proffer agreement or providing conflicting information could allow prosecutors to use these statements during sentencing. Additionally, making false statements to federal agents may lead to prosecution.²

- Derivative Use Immunity: Prosecutors may agree not to use any evidence gathered from information shared during the proffer session against the individual in court, along with direct use immunity. This means that neither the details provided, nor any indirectly related evidence can be used against the individual.

¹ See Fed. R. Evid. 410(b) (permitting admission of a statement “in any proceeding in which another statement made...if in fairness the statements ought to be considered together; or in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present”).

² See 18 U.S. Code § 1001(a)(2) (stating that making any materially false, fictitious, or fraudulent statement or representation “in any matter within the jurisdiction of the executive... branch of the Government of the United States” shall be punishable by not more than 5 years of imprisonment).



- Attorney-Client Privilege: Most proffer agreements include terms that protect attorney-client privilege. This means that any communications during the proffer session between the client and their lawyer is kept confidential and cannot be shared with the prosecution.
- Limited Admissibility: If the individual later decides to go to trial, they may be able to prevent the prosecution from using evidence or statements made during the proffer session. However, exceptions could arise if the individual provides contradictory information or breaches the terms of the proffer agreement.
- Promise of Fair Treatment: The proffer agreement may include assurances from the prosecuting authorities that the individual will be treated fairly and in accordance with the law during the investigation and any related proceedings.
- Protection Against Retaliation: In some cases, the proffer agreement may include terms that protect the individual from retaliation or other negative consequences for participating in the proffer session.

These safeguards offered in a proffer session may vary depending on the jurisdiction and the terms agreed upon by the involved parties. For this reason, anyone considering a proffer session should thoroughly review the proffer agreement with their legal counsel to understand their rights and the protections available.

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