



OECD International Academy for Tax Crime Investigation

Investigative Techniques for the Effective Use of Banking Information



Filter Teams and Discovery

James I. Pearce

U.S. Department of Justice

What is a filter team?

- Designed to shield prosecution team from exposure to certain off-limits material
- Comprises lawyers, agents, or both
- No overlap with prosecution team

What Are Some of the Benefits?

- Respects rights of defendants and third parties
- Minimizes suppression exposure
- Ensures compliance with applicable ethical obligations
- Demonstrates the government's good faith to the court

When Should You Use a Filter Team?

- Government takes possession of evidence that may include material protected by recognized common law or constitutional privilege
- Which privileges/rights?
 - Attorney-client communications (including joint defense agreements)
 - Spousal communications
 - compelled statements (U.S. Const., 5th Amendment)
 - Others: Priest-penitent, psychotherapist, Speech or Debate*

When Should You Use a Filter Team?

- Search warrant productions
 - In particular, e-mail productions
- Subpoena Returns
- Inspector General investigative files
- Wiretap interceptions
- Voluntary interviews

Some Best Practices

- Prosecution team should provide filter team with necessary facts about the investigation
 - Names/identifiers for known lawyers and spouses
- Keep communication one-way
- Keep reviewed material segregated if filter team concludes privilege applies
- Keep a good record of what the filter team reviews, what decisions are made, and what is produced to prosecution team
- Engage counsel for potential privilege holder (if possible)

Filter Team Discovery Issues

- Is the prosecution team responsible for material in the possession of the filter team?
 - Answer: YES
- Types of discoverable material held by the filter team:
 - Statement of a defendant and evidence that is material to the preparation of the defense
 - Material that impeaches witnesses
 - Exculpatory materials

Filter Team Discovery

Privilege Holder = Single Defendant

- Prosecution team produces cleared material to defendant
- Filter team produces segregated material to defendant
- Filter team negotiates/litigates privilege as to contested material

Filter Team Discovery

Privilege Holder = One of Multiple Defendants

- Prosecution team produces cleared material to all defendants
- Filter team produces segregated material to privilege holder only
- Filter team negotiates/litigates privilege as to contested material
- If non-privilege holder defendants assert discovery right as to segregated material, engage the court

Filter Team Discovery

- Transparency is key
- Engage the court early and often
- Avoid having to make decisions that require choosing between respecting an individual's privilege interests and a defendant's discovery rights
 - This is the court's job, not the government's
- Make a good record – it can be years between filtering and indictment
- Recognize that process is necessarily dynamic

Common Filter Problems

- Materials never reviewed
- Materials never produced
- Inadvertent spillover
- No record maintained

Discovery Related to the Filter Process Itself

- What if a defendant wants to challenge the way the filter process was conducted?
- What does the government possess that may be discoverable?
 - Internal memoranda regarding filter process and inadvertent spillover
 - For electronic filtering, a treasure trove of data

A Few Final Thoughts

- Always know the capabilities of your reviewing software and be prepared to litigate disclosure
- Same discovery issues may arise in connection with other filter-like scenarios (e.g., wiretap pertinent/non-pertinent designations, search warrant execution/responsiveness designations)
- There tends to be little case law in this area, so courts facing these questions are likely to rule based on their sense of fairness
 - In other words: RESULTS MAY VARY



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Four Scenarios

James I. Pearce

U.S. Department of Justice

Bob's Boats: Scenario 1

- Your team has determined that evidence of criminal activity is likely to be found at the lawyers' (i.e., solicitors') office in Delaware. Assume your team includes investigators based in the United States so you don't need any international process for obtaining this evidence.
- Questions:
 - What steps might you take to obtain that evidence?
 - What steps might you take after you obtain that evidence?
 - What potential problems might you face, and how might you overcome them?

Bob's Boats: Scenario 2

- Your team has determined that further evidence of criminal activity is likely to be found in a set of financial institutions based in Canada. You have also determined that two individuals, a Canadian government official and a private citizen who works in a bank, are likely to provide useful statements.
- Questions:
 - What steps can you take to obtain this evidence?
 - What potential problems might you face?
 - How might you overcome those problems?

Bob's Boats: Scenario 3

- Your investigation has shifted focus to Malcolm Ireland. You suspect he may know more about Bob's Boats than he has told you. You also suspect his reputation is not as spotless as Ireland claims. A financial analysis shows unexplained wire transfers going out of his account every month.
- Questions:
 - What options do you have with respect to Malcolm?
 - What problems or obstacles are you likely to face?
 - How might you overcome those problems and obstacles?

Bob's Boats: Scenario 4

- Based on discussions with Malcolm Ireland, your team suspects that a lawyer working for the Panamanian revenue authority has been soliciting and receiving kickbacks in exchange for reducing tax liabilities for Robert's Rigs, a sole proprietorship owned by Robert Rockville that does business with Bob's Boats.
- Questions:
 - What next steps might you take?
 - What kind of evidence will advance the investigation, and how can you obtain it?
 - What problems might you face, and how might you overcome them?

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Investigative Tools for Corruption Cases

JAMES I. PEARCE
U.S. DEPARTMENT OF JUSTICE





The Investigative Plan

ALL GOOD PLANS CHANGE

Assess the Case

▶ Identify Conduct That May Be Criminal

- What conduct are we investigating?
- Is the conduct a crime?
- What statutes does the conduct violate?
- When did the conduct occur? → *Ongoing vs. historical; risk assessment; statute of limitations*

▶ Identify Subjects and Witnesses

- Who was involved in the conduct under investigation?
- Who may have information or witnessed relevant conduct?
- What is the potential criminal liability of these people?
- Who is the most culpable person?

Assess the Information Deficit

- What do we know?
- What don't we know?
- What do we need to know?
- When do we need to know it?
- Where can we get the information we need?
 - Records
 - Witnesses
 - The subjects themselves

The Initial Investigation

- ▶ **Initial Data Collection – What can we learn quickly without turning heads?**
 - Public records
 - Low risk process
 - Surveillance
- ▶ **Covert versus Overt**
 - Who knows about the investigation?
 - Are there opportunities to be proactive?
 - Are there public safety or other considerations?
- ▶ **Resource Assessment**



Surveillance –
You don't
know what
you don't
know.

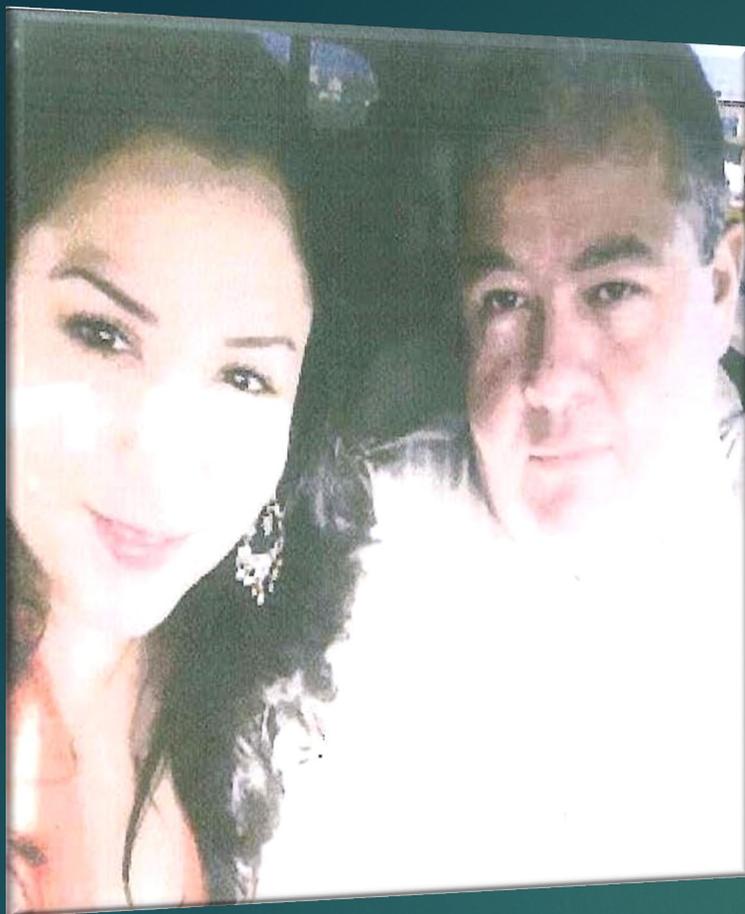
Surveillance

Old house



New House





Social Media

Photographs obtained from witnesses and social media can corroborate simple details – like the existence of a friendship or romance, a certain lifestyle, or an event.



Executing the Investigative Plan

NEVER STOP REASSESSING

Common Investigative Tools

- ▶ Covert/Proactive Steps
- ▶ Subject Interviews
- ▶ Witness Interviews
- ▶ Record Collection (Corroboration)
- ▶ Plan Now for Trial
 - Investigate Defenses
 - Discovery
 - Statutes for Indictment

Covert Investigative Techniques



- ▶ Pen registers and wiretaps
- ▶ Recorded conversations with cooperators/victims
- ▶ Use of undercover agents
- ▶ Surveillance
- ▶ MLATs



Covert/Proactive Investigative Activity

- Record the modus operandi as proof of guilt; don't try to change it to fit the investigation.
- Have your overt plan in place when you start covert activity.

Subject Interviews

▶ Early interview

- ▶ Subjects want to talk
- ▶ Gives us something to investigate
- ▶ Narrow issues
- ▶ Early insight into defenses
- ▶ Lock in OR address
reasonable explanation by eliminating it or shifting directions

▶ Delaying interview

- ▶ Investigation overt
- ▶ Time to coordinate stories
- ▶ Chilling effect
- ▶ No element of surprise
- ▶ Less chance to investigate defenses
- ▶ Wasted time investigating stuff that does not matter

▶ Myths

- ▶ I need to know all the answers to the questions.
- ▶ They might lie to me, and I won't know any better.
- ▶ The purpose of the interview is to get a confession.
- ▶ There is no second interview.

Recording Subject Interviews

Surreptitious

- ▶ Informational advantage to agent, both during and after
- ▶ No chilling or upstaging effect on subject
- ▶ May aid later investigative steps/interviews

vs.

Overt

- ▶ Transparency
- ▶ Credibility

Witnesses

- ▶ Identified
- ▶ Corroborated
- ▶ Accountable
 - ▶ For the truth
 - ▶ For their conduct
- ▶ Locked-in
 - ▶ To their truthful testimony
 - ▶ To the meaning and accuracy of their recordings (if applies)
- ▶ Motives/Impeach
 - ▶ Payments
 - ▶ Texts/voicemails

Case 1:12-cr-00587 Document 8 Filed in TXSD on 07/18/12 Page 1 of 24

UN Sealed 10-5-12
Public and unofficial staff access to this instrument are prohibited by court order.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA) Crim. No.:
)
vs.)
)
JOSE P. CANTU,)
)
Defendant.)

PLEA AGREEMENT

The United States of America, by and through the undersigned attorney, Integrity Section, Criminal Division, United States Department of Justice, and the defendant JOSE P. CANTU, personally and through his undersigned counsel, hereby stipulate that, had this case gone to trial, the United States could have proven, through competent evidence, the following facts beyond a reasonable doubt:

DEFENDANT'S ACCEPTANCE

I have read this agreement in its entirety and disclose to me that no additional promises or representations have been made to me by any official of the United States in connection with this matter. I understand the crimes to which I have agreed and the maximum penalties for those offenses and Sentencing Guideline penalties to them. I am satisfied with the legal representation provided to me by my attorney and I have sufficient time to meet and discuss my case. We have discussed the charges, my defenses I might have, the terms of this Plea Agreement and whether I am entering into this Agreement freely, voluntarily, and knowingly because I understand the crimes to which I am pleading guilty, and I believe this Agreement is in my best interest.

Date: 6/20/2012

Jose P. Cantu
JOSE P. CANTU
Defendant

Case 1:12-cr-00587 Document 8 Filed in TXSD on 07/18/12 Page 19 of 24

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United States District Court
Southern District of Texas
FILED

JUL 18 2012

David J. Bradley, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA,) Crim. No.:
)
v.)
)
JOSE P. CANTU,)
)
Defendant.)

FACTUAL BASIS FOR GUILTY PLEA

The United States of America, by and through the undersigned attorneys for the Public Integrity Section, Criminal Division, United States Department of Justice, and the defendant JOSE P. CANTU, personally and through his undersigned counsel, hereby stipulate that, had this case gone to trial, the United States could have proven, through competent evidence, the following facts beyond a reasonable doubt:

**THE DEFENDANT JOSE P. CANTU,
HIS CO-CONSPIRATORS,
AND CONFIDENTIAL HUMAN SOURCES**

Substantial Assistance

14. The defendant agrees to cooperate fully with the United States by:

a. providing truthful and complete information and testimony, and producing documents, records and other evidence, when called upon by the United States, whether in interviews, before a grand jury, or at any trial or other court proceeding;

Corroborating Records

Bank records

Cell phone records

Border crossing records

Timesheets

Contracts – Tenders – Bids

Photographs

Emails

Log on/log off

Social media

Objects

Corroborating Records

Spend time on analysis

The FRITS E. LAWAETZ
LEGISLATIVE CONFERENCE ROOM



1 First Bank
Virgin Islands

DEPOSIT CHECKING
STATEMENT SAVINGS
MAXIMIZER SAVINGS

18,000.00

18,000.00

FOR CREDIT TO THE ACCOUNT - PRINT FULL ACCOUNT TITLE (NAME)
Trust Acct. Law Office Natalie Nelson 10-14-09

09893 First Bank
726

OCT 14 2009

DEPOSIT CHECKING
BANK COPY

693

LEGISLATURE O

TELLER: VI41995

S SESS SESS DEV.
T NUM SEQ SEQ

E 0010 9999 0058
-SEAL 00- TRANS.
0011 0060 0060
TRANS.

E 0011 9999 0062
-SEAL 00- TRANS.
0012 0064 0064
TRANS.

E 0012 9999 0066
-SEAL 00- TRANS.
0013 0068 0068
TRANS.

E 0013 9999 0069
-SEAL 00- TRANS.

Date 10-14-2009 Account 7121002273 Amount 18000

693

1FIRSTBANK
SUNNY ISLE BRANCH
ST. CROIX, VI

101-7285-2216

10/14/2009

PAY TO THE ORDER OF Clerk of the Court - District Court

Eighteen Thousand and 00/100

Clerk of the Court - District Court

MEMO Case No. 05-CV-90 -James vs. Victoria, House, Inc.

18,000.00

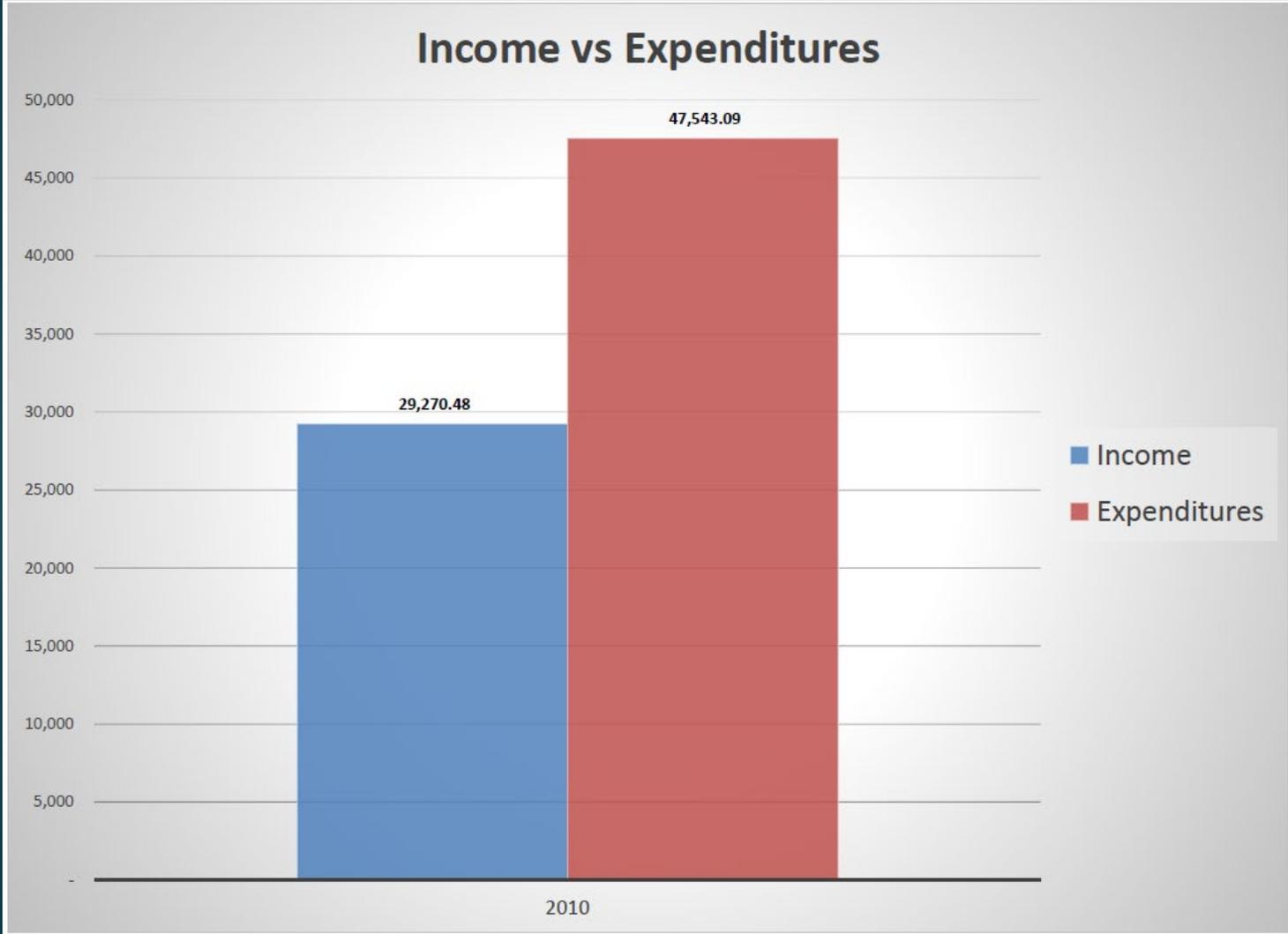
07261003421370 16

000693 221672851 7121002273

Date 10-15-2009 Account 7121002273 Amount 18000.00 Serial 693 Sequence 6012610 TR 221672851 TranCode 0 DBCR D

Corroborating Records

Spend time on analysis



The FRITS E. LAWAEZ
LEGISLATIVE CONFERENCE ROOM



Former Virgin Islands Senator Wayne James

Final Investigative Tips



- ▶ Investigate defenses
- ▶ Do not take identification for granted
- ▶ Multiple agencies – multiple policies
- ▶ Plan for discovery early

1. Revisit your evidence.
2. Don't stop investigating.





Questions?

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Obtaining evidence (including electronic evidence) from other countries



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James I. Pearce
U.S. Department of Justice

-
- Part I: General considerations.
 - Part II: Electronic evidence.
 - Part III: Other special issues.
-

Part I: General Considerations:

To understand the system is to master the system:

- ❑ A 20th Century mechanism adapting to life in the 21st Century.
 - ❑ Know when and when not to use it.
 - ❑ Know how long it takes.
 - ❑ There are multiple channels, one of which may be better than others.
-

What can you obtain with an MLAT:

- Certified bank, electronic, and business records
 - Witness testimony
 - Seizure and forfeiture of assets
-

Some questions to be asking:

- Does the request needed to be translated?
- What assistance is possible?
- How long does it take? (Often several month or more)
- Who will execute the MLAT? (A judge? Justice Ministry? Law enforcement?)
- Can we contact witnesses directly?
- Can we preserve evidence?

Given the limitations of the system, consider whether it is possible to avoid an MLAT request or letter rogatory.

- (i) Voluntary witness testimony: possibly at an embassy; only works in certain countries.
- (ii) Use of other arrangements, such as other agencies, financial intelligence units, financial or securities regulators, etc.
- (iii) Foreign attachés and Legats are an invaluable asset.

Understand (1) through which officials the request travels; (2) how to avoid objections and ensure request ends up in the right hands.

- (i) Is there a particular foreign law enforcement component in interest in the foreign country to which the request should be referred?
- (ii) National law enforcement attachés can guide you.
- (iii) Draft request to include reference to the foreign law-enforcement component referred to above; show nexus between your investigation and evidence sought; include a home country point of contact if possible to deal with unforeseen problems after transmission;

Understanding the System (Continued)

- (iv) KISS: keep it simple, stupid!: draft your request so that the translators get it right; avoid legal jargon.

 - (v) Be attentive the assistance requested, procedures to be used, and need for procedures sections
-

Tips on drafting requests

Some frequent, but avoidable problems:

- ❑ confidentiality (should be prominently mentioned in most cases).
 - ❑ urgency (where necessary, this should be very visible in request).
 - ❑ clarity regarding legal authority, particularly in the absence of a bilateral MLAT
 - ❑ Be realistic given amount of time available; ask for too much and you may get nothing in time!
 - ❑ Certification of records – Can be difficult in some places; ask if you should seek in uncertified form first.
-

Part II: Electronic evidence

- Foreign Service Providers (FSP)
 - Seek Preservation
 - MLAT to seize computer in foreign country?
-

The Need to Freeze - Preservation



Part II: Electronic evidence - Preservation

- ❑ FSP generally not required by foreign law to maintain for specific period of time.
 - ❑ Many FSPs delete on regular basis (in the EU they are required to do so).
 - ❑ Some will voluntarily preserve (note expiry date).
 - ❑ Is the FSP law-enforcement Friendly? Contact law-enforcement Attaché or Foreign law enforcement.
-

- **Part II: Electronic evidence – Type of Data Available Tips**

Does company have law-enforcement Guide?



■ Examples:



[PARTNERS](#)

[CAREERS](#)

[HELP](#)

[DOWNLOAD >](#)

Law Enforcement Resource Center

Welcome!

Guide for Law Enforcement

Navigating Kik for Law Enforcement Video

Emergency Disclosure Request

Preservation Request

Contact us

- **Part II: Electronic evidence – Type of Data Available Tips**

- Country standards may differ
 - Example: demonstrate “reasonable grounds to believe that an offense has been committed; and that evidence of the commission of the offense or information that may reveal the whereabouts of a person who is suspected of having committed the offence, will be found in Canada.” (for all evidence)
 - Europe tends to be more a relevance standard.
-

Part III: Some other special issues

Video-conferencing:

- Depositions: Best for prosecutor to be on site in foreign country; defense attorney may also insist on going, but under U.S. law, a defendant need not travel under specified circumstances. Foreign authorities don't normally have these limitations in incoming requests.
 - Also an excellent way to confer with foreign colleagues running a parallel investigation.
-

Securing witness testimony

- ❑ May or may not be necessary to send an MLAT; find out earlier *and don't wait until the last minute!*
 - ❑ Make sure foreign witness understands what to do and has help when arriving in the if needed.
 - ❑ Sometimes you may also be looking for a third country in which to conduct a witness interview.
-

OBTAINING EVIDENCE FROM ABROAD: TAKEAWAYS

- KISS (Keep it simple), and when in doubt.
 - Electronic Evidence:
 - Preservation Request. Note expiry date.
 - FSP law-enforcement Friendly? Domestic possibility? Consider speaking to Attaché.
-

Questions or comments?





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Approaching a culpable individual: proffers and reverse proffers

JAMES I. PEARCE
U.S. DEPARTMENT OF JUSTICE

Potential Approaches

- ▶ Proffer Agreement
- ▶ Reverse Proffer
- ▶ Note:
 - ▶ Both approaches can result in “flipping” an individual and lead to his or her cooperation in the investigation and prosecution.

What is a proffer agreement

- ▶ A proffer agreement is an agreement between an individual and the government under which:
 - ▶ The individual agrees to provide complete, truthful, and honest statements about all matters, including his or her involvement in criminal conduct.
 - ▶ The government agrees not to prosecute the individual based **only** on the statements provided during a proffer interview (or interviews) **as long as** the individual is truthful.

Why use a proffer agreement?

- Your investigation has identified an individual who possesses some useful evidence and is potentially criminally liable, but that individual refuses to speak with investigators or prosecutors.
 - Note: In U.S. law, issuing a grand jury subpoena may be an option.
- Your evidence against the individual is weak, but you suspect the individual can provide evidence against others that will be very valuable to the investigation.
- Your evidence indicates that the individual plays a small role in a larger criminal venture.
- The individual has retained an attorney who demands the protection of a proffer agreement.

When not to use a proffer agreement

- If the individual you are approaching is the target, i.e., the suspect, you usually do not want to provide any protections to the individual.
 - Note that, absent advance agreement, prosecuting someone who has entered a proffer agreement is rare, though possible.
- If you don't think the individual is likely to provide truthful or useful information, there is no good reason to provide a proffer agreement.
- If the individual or his/her attorney does not request a proffer agreement, there is no obligation to provide one. But informing an individual of a potential proffer agreement may result in cooperation.

Proffer agreement principles

- ▶ I. Do not make a promise or offer a proffer agreement to an individual without consulting the prosecutor.
- ▶ II. The proffer agreement should be in writing and signed by the individual who provides statements and evidence under the terms of the proffer agreement and by the prosecutor.
 - ▶ This avoids later challenges that the terms of the agreement have been changed.
- ▶ III. Make sure the individual providing statements and evidence understands the terms of the proffer agreement before the interview begins.
 - ▶ It is often beneficial for the individual to have an attorney.

Example proffer agreement



U.S. Department of Justice
Criminal Division

Public Integrity Section

Washington, D.C. 20530

PROFFER AGREEMENT

The United States of America, represented by its undersigned attorney, and [REDACTED] enter into this proffer agreement with respect to a proffer to be made by [REDACTED] to agents and attorneys of the United States concerning [REDACTED] knowledge about matters that are the subject of the instant criminal investigation.

1. [REDACTED] will answer honestly, truthfully and completely all questions posed to him by agents and attorneys of the United States.
2. By discussing these matters and by accepting [REDACTED]'s proffer, the United States does not intend in any way to agree to, or represent that it will, confer immunity upon [REDACTED] for any possible federal criminal acts committed by him, nor has the United States made any representation or agreement about the disposition of any federal criminal charges which might be filed against him.
3. Should any prosecution be brought against [REDACTED] by the United States, the United States will not offer in evidence in its case-in-chief against [REDACTED], or at sentencing of [REDACTED], any statements made by [REDACTED] pursuant to this proffer agreement, except in a prosecution for false statements, obstruction of justice in the current investigation, or perjury, or as noted in paragraph 5.
4. The United States can use information derived from statements by [REDACTED] under the proffer agreement directly or indirectly for the purpose of obtaining leads to other evidence, which evidence may be used by the United States against [REDACTED] in any prosecution of him.
5. Should any prosecution of [REDACTED] be undertaken, the United States may use [REDACTED]'s statements as substantive evidence for the purpose of cross-examination of him should [REDACTED] testify at any phase of trial or sentencing. The United States may also use [REDACTED]'s statements as substantive evidence to rebut any evidence, factual assertions, or arguments offered by or on behalf of [REDACTED] at any phase of trial or sentencing.
6. The provisions of Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure do not apply to any statements made by [REDACTED] or any evidence derived from those statements, and [REDACTED] waives any right to challenge the admissibility of such evidence under either of these rules.

Dated: Nov. 9, 2018

FOR THE UNITED STATES

James I. Pearce
Victor R. Salgado
Trial Attorneys
Public Integrity Section
Criminal Division
U.S. Department of Justice

FOR THE DEFENSE

Counsel for [REDACTED]

Proffer Agreement: The introduction

The United States of America, represented by its undersigned attorney, and [REDACTED] enter into this proffer agreement with respect to a proffer to be made by [REDACTED] to agents and attorneys of the United States concerning [REDACTED] knowledge about matters that are the subject of the instant criminal investigation.

- Note that the proffer agreement applies to “agents and attorneys” from the government.

Proffer Agreement: The individual must provide full and truthful statements

1. [REDACTED] will answer honestly, truthfully and completely all questions posed to him by agents and attorneys of the United States.

- If the witness fails to provide honest testimony, truthful testimony, or complete testimony, the protections under the proffer agreement do **not** apply.
- If you're not getting honest, truthful, and complete answers, stop the interview.

Proffer Agreement: The individual does not get immunity

2. By discussing these matters and by accepting [REDACTED]'s proffer, the United States does not intend in any way to agree to, or represent that it will, confer immunity upon [REDACTED] for any possible federal criminal acts committed by him, nor has the United States made any representation or agreement about the disposition of any federal criminal charges which might be filed against him.

- Proffer agreement does **not** provide immunity to the individual.

Proffer Agreement: If you tell the truth, your words will not be used against YOU

3. Should any prosecution be brought against [REDACTED] by the United States, the United States will not offer in evidence in its case-in-chief against [REDACTED], or at sentencing of [REDACTED], any statements made by [REDACTED] pursuant to this proffer agreement, except in a prosecution for false statements, obstruction of justice in the current investigation, or perjury, or as noted in paragraph 5.

- By promising the individual that the government will not use his truthful statements against him at his trial or at the sentencing phase, that individual is protected from self-incrimination.
- Lies or obstructive statements are not protected.

Proffer Agreement: No protection from investigation based on statements

4. The United States can use information derived from statements by [REDACTED] under the proffer agreement directly or indirectly for the purpose of obtaining leads to other evidence, which evidence may be used by the United States against [REDACTED] in any prosecution of him.

- The proffer agreement protects the individual from the use of his words against him, but not against further investigation based on those words.
 - For example, if an individual says during the proffer agreement that he opened a bank account at Delta Bank under a different name and deposited proceeds of crime into that account, you may (and should) obtain that bank account information.

Proffer Agreement: When an individual's proffer statements may be used.

5. Should any prosecution of [REDACTED] be undertaken, the United States may use [REDACTED]'s statements as substantive evidence for the purpose of cross-examination of him should [REDACTED] testify at any phase of trial or sentencing. The United States may also use [REDACTED]'s statements as substantive evidence to rebut any evidence, factual assertions, or arguments offered by or on behalf of [REDACTED] at any phase of trial or sentencing.

- The proffer agreement's protections do not apply if the individual testifies at trial or sentencing.
- The proffer agreement also does not apply if the individual offers any evidence inconsistent with his or her statements during the proffer interview.

Proffer Agreement: Interview under a proffer agreement is not a plea negotiation

6. The provisions of Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure do not apply to any statements made by [REDACTED] or any evidence derived from those statements, and [REDACTED] waives any right to challenge the admissibility of such evidence under either of these rules.

- Under U.S. law, any statement an individual makes about his conduct as part of plea negotiations cannot be used against him at a later trial. This rule promotes candor in plea negotiations.
 - Not all jurisdictions have this rule.
- That same rule does **not** apply to statements made as part of proffer agreement. In other words, an individual cannot use statements in a proffer agreement to shield himself from future prosecution.

What is a reverse proffer?

- A reverse proffer is an opportunity for agents and/or prosecutors to lay out for a target the information and evidence implicating or showing that target's participation in criminal activity.

Why use a reverse proffer?

- Convince a target to enter a guilty plea.
- Determine whether a target has a non-criminal explanation for what appears to be criminal conduct.
- Gauge whether a target is likely to admit culpability and potentially cooperate or to deny the allegations.

Reverse proffer: potential problems

- Exposing information and intelligence to the target and those with whom the target communicates.
- Tipping your hand as to investigative strategy and prosecution theory.

Proffer or reverse proffer?

- What do you hope to accomplish?
 - Proffer typically elicits more information
 - Reverse proffer typically creates leverage
- How much do you know?
 - Proffer is better when you know less
- Where are you in the investigation?
 - Proffer is more effective early in the investigation.
 - Reverse proffer is effective when your investigation is winding down
- Do you anticipate prosecuting the person approached?
 - Yes → reverse proffer
 - No → proffer

Questions?