Fair Play and Criminal Justice: Drafting Proffer Agreements in Light of Total Waiver of Rule 410

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I. INTRODUCTION

Justice Jackson once mused that “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” While this may have been true at the time, when the primary concern of a criminal defendant was the right to a fair trial, the evolution of plea

2. The Supreme Court first held that plea bargaining is constitutional in 1970. See Brady v. United States, 397 U.S. 742, 751 (1970). See generally Lucian E. Dervan, Bargained Justice: Plea-
bargaining has radically altered the calculus of when to allow a criminal defendant to talk to the prosecution. Though there are no exact figures for how many cases are resolved through plea bargaining, current estimates of both state and federal cases hover between 90 and 95%.3 Prosecutors and defense counsel have adapted to this changing landscape and each continues to use plea-bargaining rules and procedures in order to gain an advantage over the other.4 One such tool—proffer agreements—requires careful study to understand its uses and dangers.

In recent years, proffer statements and agreements have caused particular controversy.5 Prosecutors routinely require criminal defendants to admit their roles and knowledge of a crime through a proffer statement before the prosecution will offer a plea agreement.6 While these statements are normally inadmissible per Rule 410 of the Federal Rules of Evidence,7 prosecutors increasingly require criminal defendants to sign a proffer agreement waiving the protection.8 If the defendant breaches the proffer agreement, the prosecutor will then be allowed to admit the defendant’s statements as evidence against the defendant.9 While the United States Supreme Court has only ruled on waiver for impeachment purposes,10 the South Carolina Supreme Court and several federal courts of appeals have gone further by allowing for total waiver, which allows a prosecutor to admit a defendant’s proffer statements in the prosecution’s case-in-chief.11 While total waiver may be a permanent, constitutional addition to plea-
bargaining procedures, it carries a high potential for abuse, which can cause cascading, uncorrectable errors.

Proffer agreements, like plea agreements, exist in the nexus of contract and criminal law.\textsuperscript{12} On the one hand, general contract principles guide proffer agreements’ drafting;\textsuperscript{13} on the other hand, controversies are adjudicated under the rules and guise of criminal procedure.\textsuperscript{14} As a result, drafting proffer agreements requires both knowledge of contract law and a precision that may be unusual for criminal practitioners. Imprecise drafting may create controversy as to how a court should construe the proffer agreement’s terms. One need look no further than the agreement at issue in \textit{State v. Wills}\textsuperscript{15} to see that drafting problems can raise grave due process concerns.\textsuperscript{16}

This Note argues that proffer agreements must be drafted with extreme care—more than is apparent in the relevant case law—to prevent compounding constitutional violations. Because proffer agreements operate with few constitutional safeguards—fewer than criminal trials or even plea agreements—a constitutional violation caused by a poorly drafted proffer agreement is difficult to correct and will cause far-reaching issues for the criminal justice system. Part II of this Note explains the purpose and background of proffer agreements, including drafting issues that arose in the 2014 South Carolina Supreme Court case \textit{State v. Wills}. Part III provides and applies the general contract and criminal procedure principles that govern proffer agreements. Lastly, Part IV provides a model proffer agreement and thoughts about its proper use and application.

\textsuperscript{12} See United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (“In the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts.”); \textit{State v. Compton}, 366 S.C. 671, 677, 623 S.E.2d 661, 664 (2005) (“It is generally recognized that immunity agreements and plea agreements are to be construed in accordance with general contract principles.”).

\textsuperscript{13} See, e.g., \textit{Wills}, 409 S.C. at 191–92, 762 S.E.2d at 7 (Beatty, J., dissenting) (“Using principles of contract law as a guide, it is necessary to consider the effect of a breach of the proffer agreement and decide the resultant remedy, i.e., the extent to which the State may utilize statements made by a defendant pursuant to a proffer agreement.”).

\textsuperscript{14} See \textit{Harvey}, 791 F.2d at 300 (“[B]oth constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.”).

\textsuperscript{15} 409 S.C. 183, 762 S.E.2d 3 (2014).

\textsuperscript{16} See \textit{id.} at 204, 762 S.E.2d at 14 (Beatty, J., dissenting) (quoting \textit{Mezzanatto}, 513 U.S. at 217 (Souter, J., dissenting)); \textit{cf. Zabel & Benjamin, supra} note 5 (noting the disparate bargaining power of the government and criminal defendants).
II. THE USES AND PROBLEMATIC HISTORY OF INTERPRETING PROFFER AGREEMENTS

A. The Evolution of Proffer Agreements and Waiver

Proffer agreements, sometimes called “queen for a day” agreements, are a common tool of negotiating in the plea-bargaining process. A proffer agreement is “an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a ‘proffer session.’” Proffer agreements define parties’ rights and obligations, such as the prosecution’s ability to use the defendant’s statements or the defendant’s obligation to be truthful. While proffer agreements may be used to protect the defendant’s rights, the prosecution may also use them to gain an advantage during plea bargaining.

Proffer agreements typically contain a waiver clause because of Rule 410 of the both the Federal and South Carolina Rules of Evidence. Rule 410 of the South Carolina Rules of Evidence makes inadmissible “any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.” The South Carolina Rules of Evidence parallel the Federal Rules of Evidence. Although the drafters of Rule 410 of the Federal Rules of Evidence may have intended for the rule to be a permanent fixture of criminal procedure, the United States Supreme Court held, in the landmark case United States v.

17. Zabel & Benjamin, supra note 5.
19. Id.
20. Sec, e.g., Wills, 409 S.C. at 187–88, 762 S.E.2d at 5 (Beatty, J., dissenting) (quoting the proffer agreement at issue in the case).
21. ARTHUR & HUNTER, supra note 18 (“[Proffer agreements are] intended to protect . . . defendant[s] against the use of [their] statements, particularly in those situations in which . . . defendant[s] ha[ve] revealed incriminating information and the proffer session does not mature into a plea agreement or other form of cooperation agreement.”).
22. See Zabel & Benjamin, supra note 5 (noting that proffer agreements effectively preclude a defendant from raising any defenses inconsistent with the defendant’s proffer statements).
25. See United States v. Mezzanotto, 513 U.S. 196, 214 (1995) (Souter, J., dissenting) (“Congress must have understood that the judicial system’s interest in candid plea discussions would be threatened by recognizing waivers under Rule[ ] 410 . . . ”); see also 3 ABA STANDARDS FOR CRIMINAL JUSTICE § 14-3.4 cmt. at 14-90 (2d ed. 1980) (stating that a rule contrary to Rule 410 “would discourage plea negotiations and agreements, for defendants would have to be constantly concerned whether, in light of their plea negotiation activities, they could successfully defend on the merits if a plea ultimately was not entered”). Rule 410 of the South Carolina Rules of Evidence is modeled on the federal rule. See 4 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 23:4 (7th ed. 2014), available at Westlaw JONESEVID.
Mezzanatto, 26 that parties could agree to waive the rule’s protections. 27 The Court reasoned that “[a]bsent some ‘overriding procedural consideration that prevents enforcement of the contract,’” an agreement to waive a rule of evidence is sufficient to allow waiver. 28 Similarly, the Court held that because Congress did not make any provision forbidding waiver, it intended to allow waiver, just as rules of criminal procedure may be waived. 29 However, the waiver in Mezzanatto was only a partial one, allowing the prosecution to use proffer statements for impeachment purposes. 30 Therefore, the Court did not address whether total waiver, which allows the prosecution to use a proffer statement in its case-in-chief, was allowed. 31 However, the Court cryptically stated that “[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the federal courts.’” 32 Whether this statement was intended to mean that the Court did not believe total waiver was constitutional or to warn against rash action by the lower courts, it slowed the total waiver’s advance, if only temporarily. 33

Subsequently, many states have followed the holding in Mezzanatto and allow defendants to waive Rule 410 for impeachment purposes. 34 However, several courts, including the South Carolina Supreme Court and five federal

27. Id. at 210.
28. Id. at 202 (quoting 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5039, at 207–08 (1977)).
29. Id. at 201. Only where specific language indicates Congress’s intent to prevent or limit waiver will the courts not find a presumption of waivability. Id.; cf. Crosby v. United States, 506 U.S. 255, 258–59 (1993) (concluding that specific language stating when criminal defendants can waive their right to be present at trial under Rule 43 of the Federal Rules of Criminal Procedure precluded waiver under other circumstances); Smith v. United States, 360 U.S. 1, 9 (1959) (concluding that Rule 7(a) of the Federal Rules of Criminal Procedure only allows a defendant to waive grand jury indictment in certain circumstances). The presumption of waivability has also been applied to rules of evidence. Cf. Note, Contracts to Alter the Rules of Evidence, 46 HARV. L. REV. 138, 139 (1932) (noting the importance of “[c]ontracts to alter or ‘waive’ rules of evidence”).
30. See Mezzanatto, 513 U.S. at 211 (Ginsburg, J., concurring).
31. See id.
32. Id. at 204 (majority opinion) (alteration in original).
33. The first total waiver case was decided in 1998. See United States v. Burch, 156 F.3d 1315, 1322 (D.C. Cir. 1998).
circuit courts of appeals, have gone further by allowing for total waiver of Rule 410.35 Although their reasons vary, the federal courts rely primarily upon an extension of Mezzanatto’s reasoning;36 because Congress did not forbid waiver, and the courts have not found anything in Rule 410 that makes waiver fundamentally unfair, parties may voluntarily waive the rule without violating due process.37

South Carolina courts followed a similar yet fundamentally different approach by couching their analyses in contractual terms.38 The South Carolina Supreme Court adopted the standard used in plea agreements, holding that the court will enforce any “unambiguous contract according to its terms, regardless of the contract’s wisdom or folly, or the parties’ failure to guard their rights carefully.”39 While similar to the federal courts in result, South Carolina’s approach differs fundamentally by focusing on the parties’ intent, rather than the legislative intent behind Rule 410.40 Therefore, while the analysis in this Note is likely to be applicable to most state and federal courts, it is most applicable to South Carolina, where the courts have focused on the contractual nature of proffer agreements.41

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35. See cases cited supra note 11.
36. See United States v. Mitchell, 633 F.3d 997, 1006 (10th Cir. 2011) (“Our conclusion brings us in line with the other circuits that have considered and extended Mezzanatto’s reasoning to permit case-in-chief waivers of Rule 410’s protections.”).
37. See Mezzanatto, 513 U.S. at 201.
40. Compare id. (relying on the intent of the parties to the agreement), with Mezzanatto, 513 U.S. at 201 (relying on congressional intent).
41. South Carolina plea agreements and proffer agreements, similar to federal plea and proffer agreements, are construed in accordance with general contract principles. See United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (“In the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts.”): Compton, 366 S.C. at 677, 623 S.E.2d at 664 (“It is generally recognized that immunity agreements and plea agreements are to be construed in accordance with general contract principles.”). See generally Peter Westen & David Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 CALIF. L. REV. 471 (1978) (applying a similar analysis to that in this Note in the context of plea agreements). General contract principles are the “fundamental contractual principles that are generally accepted throughout American jurisdictions.” Arrow Elecs., Inc. v. Heemann, Inc., 500 F. Supp. 2d 648, 651 n.2 (W.D. Tex. 2005). To determine general contract principles, “courts often look to secondary sources such as the Restatement of Contracts and legal treatises.” Id. Because this Note is focused principally on South Carolina law, this Note will often rely upon statements of contract law adopted by the South Carolina Supreme Court and the South Carolina Court of Appeals.
B. Problems in Drafting Proffer Agreements as Illustrated by State v. Wills

Like any contract, proffer agreements may suffer from flaws that limit the agreements’ effectiveness or render them void. Proffer agreements may fail because of the duties of the parties, the circumstances under which a party has breached, the specified remedies that are unenforceable, or poorly drafted terms, such as when formation is incomplete. However, unlike most contracts, proffer agreements implicate serious due process concerns that may be difficult to detect and nearly impossible to unwind once committed.

Unlike a trial, or even a plea agreement, proffer agreements may have relatively undefined terms and requirements. The rules of criminal procedure and evidence determine much of what happens during a criminal trial. Where the rules are ambiguous or fail to address the situation, the courts often derive guidance from broad constitutional protections and precedent from similar issues. To some extent, the same is true for plea agreements. Over the past decades, courts have defined the terms that may be included in a plea agreement, when a plea agreement is concluded, and the remedies available for breach of a plea agreement.

The same cannot be said for proffer agreements; while the timing of a proffer agreement’s formation is not likely to cause an issue, other aspects, such as the terms that may be included, when a proffer agreement is concluded, and when breach occurs, are likely to be persistently controversial because of the slow pace at which the courts decide issues. These ambiguities create dangerous incentives for prosecutors. Today, if the courts are willing to ignore egregious

42. See infra Part III.C.
43. See infra Part III.D.
44. See ARTHUR & HUNTER, supra note 18 (citing United States v. Gillion, 704 F.3d 284 (4th Cir. 2012)) (describing the role of proffer agreements).
46. See United States v. Hasting, 461 U.S. 499, 505 (1983) (“[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.”).
47. See United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (noting that courts must keep in mind that “the defendant’s underlying ‘contract’ right is constitutionally based”).
48. See generally 2 CRIMINAL PRACTICE MANUAL § 45:17 (2014), available at Westlaw CRPMAN (noting that “[a]n infinite number of . . . concessions which may be of value to some defendants . . . can be created by imaginative counsel”).
50. See, e.g., Santobello v. New York, 404 U.S. 257, 263 (1971) (remanding to the state court to decide whether the appropriate remedy for the state’s breach of a plea agreement is specific performance of that agreement or allowing the defendant to withdraw his plea).
drafting errors,\textsuperscript{51} then prosecutors have incentive to insert nearly any provision—regardless of its potential consequences. The limited review available for challenging proffer agreements compounds this problem.

Proffer agreements, like plea agreements, receive only one hearing before a judge to determine their validity.\textsuperscript{52} Far from the detailed procedures available for adjudication and discovery of a typical commercial contract,\textsuperscript{53} the limited scope of review available for a proffer agreement means that a judge may rule based only on a single motion and response.\textsuperscript{54} The lack of evidentiary tools is compounded by a dearth of judicial guidance. Without either, drafting errors causing irreparable harm may result.

In Wills, the defendant was charged with accessory after the fact and obstruction of justice in relation to a murder.\textsuperscript{55} The defendant entered into a proffer agreement, in which he agreed to truthfully discuss his knowledge of the events in exchange for a favorable sentencing agreement.\textsuperscript{56} The defendant also agreed to submit to a polygraph examination.\textsuperscript{57} If the polygraph examination revealed that the defendant did not speak truthfully or was deceptive, the defendant agreed to waive the protection of Rule 410 and allow the prosecution to use his proffer statements for “any legal purpose.”\textsuperscript{58} Despite its relative simplicity, the agreement—broadly excerpted by the dissenting opinion\textsuperscript{59}—contained contradictions and drafting errors.

Specifically, the dissent noted that the proffer agreement stated that “[v]iolation of any term of this Proffer renders all terms null and void.”\textsuperscript{60} As the dissent concluded, nullifying the contract would be a rescission that returns the

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\item \textsuperscript{51} See, for example, State v. Wills, 409 S.C. 183, 197, 762 S.E.2d 3, 10 (2014) (Beatty, J., dissenting), where Justice Beatty concluded that the majority incorrectly held that the phrase “all terms null and void,” used to describe the remedy for breach, did not refer to rescission of “the entire agreement, including the waiver provision.”
\item \textsuperscript{52} See State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing Jackson v. Denno, 378 U.S. 368, 376–77 (1964)); see also Wills, 409 S.C. at 188–89, 762 S.E.2d at 6 (Beatty, J., dissenting) (citing Jackson, 378 U.S. 368) (describing the defendant’s objection to use of statements made following a proffer agreement).
\item \textsuperscript{53} The discovery rules available in civil litigation are more generous than those in criminal litigation. The South Carolina Rules of Civil Procedure Civil allow for depositions, S.C. R. Civ. P. 27–32; interrogatories, S.C. R. Civ. P. 33; and production of documents, S.C. R. Civ. P. 34, in civil litigation. Additionally, a jury trial may be requested in a contract dispute case. See S.C. R. Civ. P. 38. In contrast, South Carolina criminal courts do not have depositions, nor is there a clear method available to discover how a proffer agreement was created. See S.C. R. CRIM. P. 5.
\item \textsuperscript{54} See Wills, 409 S.C. at 188–89, 762 S.E.2d at 6 (Beatty, J., dissenting) (citing Jackson, 378 U.S. 368); Miller, 375 S.C. at 379, 652 S.E.2d at 448 (citing Jackson, 378 U.S. at 376–77).
\item \textsuperscript{55} Wills, 409 S.C. at 186, 762 S.E.2d at 4 (Beatty, J., dissenting).
\item \textsuperscript{56} Id. at 186–87, 762 S.E.2d at 4–5.
\item \textsuperscript{57} See id. at 187, 762 S.E.2d at 5.
\item \textsuperscript{58} See id.
\item \textsuperscript{59} See id. at 187–88, 762 S.E.2d at 5.
\item \textsuperscript{60} See id. at 197, 762 S.E.2d at 10.
\item \textsuperscript{61} Id. at 188, 762 S.E.2d at 5.
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parties to their original position and, therefore, voids the waiver of Rule 410.62 However, the prosecution likely intended to declare a breach, which would invoke the waiver clause.63 The dissent argued that this error created an ambiguity,64 one that could have been disastrous for the prosecution.

Similarly, the dissent noted that the method to determine breach—a polygraph examination demonstrating “deception,” as determined by the polygraph examiner65—was so vague that all the prosecution needed to declare breach was to generally allege deception.66 The dissent found this so abhorrent that it noted that any defense attorney agreeing to such terms “may be at risk for an allegation of ineffective assistance of counsel.”67

Although the dissent also discussed numerous other issues, including the wisdom of allowing total waiver of Rule 410,68 the drafting issues it identified were both simple and egregious. While it appears obvious that the prosecution intended to create “liquidated damages” that would revoke the prosecution’s promise to not seek further charges and allow the prosecution to use the defendant’s proffer statements in court,69 the misuse of “null and void” created unnecessary ambiguity.70 Similarly, while it is advantageous to the prosecution to use broad terms to determine breach, the terms chosen in this agreement were nebulous enough to raise ineffective-assistance-of-counsel concerns for the dissent.71 Here again, the prosecution likely could have drafted a sufficient agreement to the same effect without coming so close to a constitutional violation. Worst of all, neither the trial court, court of appeals, nor the supreme court succeeded in addressing these flaws in any substantive way, with the lone exception of Justice Beatty’s dissenting opinion. As a result, it appears that only careful drafting is sure to prevent harm.

62. Id. at 197, 762 S.E.2d at 10; see also 17A Am. Jur. 2d Contracts § 584 (2004) (citing E.T.C. Corp. v. Title Guarantee & Trust Co., 2 N.E.2d 284, 286 (N.Y. 1936)) (“Generally speaking, the effect of a rescission is to extinguish the contract and to annihilate it so effectually that, in contemplation of law, it has never had any existence, even for the purpose of being broken.”).
63. See Wills, 409 S.C. at 185, 762 S.E.2d at 4.
64. See Wills, 409 S.C. at 197, 762 S.E.2d at 10 (Beatty, J., dissenting).
65. Id. at 187, 762 S.E.2d at 5.
66. Id. at 197, 762 S.E.2d at 10.
67. Id. at 197 n.7, 762 S.E.2d at 10 n.7.
68. See id. at 204–05, 762 S.E.2d at 14.
69. See id. at 185, 762 S.E.2d at 4 (majority opinion).
70. The majority concluded that there was no ambiguity in this agreement. Id. However, the dissent’s statements to the contrary appear more persuasive. See id. at 197, 762 S.E.2d at 10 (Beatty, J., dissenting).
III. APPLICATION OF GENERAL CONTRACT PRINCIPLES TO PROFFER AGREEMENTS

As Wills illustrates, courts may turn to general contract principles to interpret proffer and plea agreements, but rarely provide context. While this is not usually problematic with commercial contracts, civil and criminal law are so different that it is necessary to review their goals and procedures to provide proper context. This Part provides contract principles and compares their application in civil and criminal law to illustrate where courts have used the principles correctly or, conversely, have taken them out of context.

A. Interpretation of Proffer Agreements

Like any contract, proffer agreements must be drafted with an eye to a court’s most likely interpretation of its terms. This is especially true for proffer agreements because even relatively clear language can be misinterpreted.72 Therefore, parties should be prepared to brief and address not only their interpretation of the agreement, but also the principles that the court should rely upon in its interpretation. With that purpose in mind, this Section addresses the rules of construction for proffer agreements and their application.

Courts liberally construe contracts to give effect to the parties’ intent because that intent is the court’s primary concern.73 Before any other action, the court will attempt to determine the parties’ intent from the language of the contract.74 To do so, the court must look to the language of the contract, and if it is “plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument’s force and effect.”75 Whether language is ambiguous is a question of law for the court.76

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72. See supra Part II.B.
An ambiguous contract is “one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.”\(^7\) Lastly, “[t]he court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties’ failure to guard their rights carefully.”\(^8\)

In proffer and plea agreements,\(^9\) ambiguity derives most often from two sources: the circumstances under which the prosecution must perform its promise\(^10\) and the remedies available for a criminal defendant’s breach.\(^11\) While these issues are discussed in greater detail later in this Note, one contract interpretation principle is of central importance to proffer agreements’ interpretation: \textit{contra proferentem}.

\textit{Contra proferentem} states:

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[A]mbiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.\(^12\)
\end{quote}

\textit{Contra proferentem} has been “steadfastly applied to plea agreements,”\(^13\) which likely necessitates application of the principle in the interpretation of proffer agreements.\(^14\) Additionally, \textit{contra proferentem} mirrors a similar

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\item \(^9\) Plea agreements are discussed in this Section because much, if not all, of the case law on point for proffer agreements is derived from plea agreement cases. See Alexander Sanders & John S. Nichols, TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS § 18:8 (5th ed. 2014) (citing S.C. R. EVID. 410; United States v. Mezzanatto, 513 U.S. 196 (1995); State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014); State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005)) (discussing proffer agreements and Rule 410 waiver in the context of statements made during plea negotiations). Indeed, proffer agreements are often made in the context of reaching a plea agreement. See id. (citing Compton, 366 S.C. at 679, 623 S.E.2d at 665). Therefore, this Section discusses the two together and contrasts plea and proffer agreements where the rules likely differ.
\item \(^10\) See infra Part III.B.1.
\item \(^11\) See infra Part III.D.
\item \(^12\) Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (alteration in original) (quoting 17A C.J.S. Contracts § 425 (2011)).
\item \(^13\) Wills, 409 S.C. at 196, 762 S.E.2d at 10 (Beatty, J., dissenting) (quoting United States v. Transfiguracion, 442 F.3d 1222, 1228 (9th Cir. 2006)).
\item \(^14\) See id. at 197, 762 S.E.2d at 10 (“As drafted by the State, section 7 of the proffer agreement states . . . .”).
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criminal law principle known as the rule of lenity, which requires ambiguities in the application of a statute to be resolved in favor of the criminal defendant.  

Contra proferentem likely applies in proffer agreement cases for numerous reasons. First, and most obvious, is that the government typically drafts the proffer agreement. Second, proffer agreements are adhesive, “offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Proffer agreements fit this description because “defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.” Third, and most importantly, the courts have already held that this is the accepted standard.

Because courts have applied contra proferentem so pointedly to plea agreements, prosecutors must take extreme care in drafting proffer agreements. Despite the court’s acceptance of the poorly drafted proffer agreement in Wills, the issues in that case could easily have swayed the court to rule differently. Therefore, the remainder of this Note often recommends more careful language to protect against different interpretations by other courts.

B. Principles of Contract Formation

Like all contracts, proffer agreements are subject to formation requirements. These requirements, while basic, are ultimately important to consider because they control how parties should approach proffer agreements and dictate the timing for entering a proffer agreement. Proffer agreements require offer, acceptance, and consideration. Proffer agreements are also subject to such formation defects as inadequate consideration, duress,

86. Wills, 409 S.C. at 196, 762 S.E.2d at 10 (Beatty, J., dissenting) (quoting Transfiguracion, 442 F.3d at 1228).
89. Mezzanatto, 513 U.S. at 216 (Souter, J., dissenting), quoted in Wills, 409 S.C. at 201, 762 S.E.2d at 12 (Beatty, J., dissenting).
90. See, e.g., Wills, 409 S.C. at 196–97, 762 S.E.2d at 10 (Beatty, J., dissenting) (alteration in original) (quoting Transfiguracion, 442 F.3d at 1228) (“Moreover, if a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made so that the government gets what it bargains for but nothing more.”).
91. See supra note 90 and accompanying text.
92. See supra Part II.B.
93. See FISHMAN & MCKENNA, supra note 25, § 23:26 (citing United States v. Williams, 510 F.3d 416, 421–22 (3d Cir. 2007); United States v. Nolan-Cooper, 155 F.3d 221, 236 (3d Cir. 1998)) (“A proffer agreement, like a plea bargain itself, is a contract, and therefore is interpreted in accord with general contract law principles.”).
94. See infra Parts III.B.1–3.
unconscionability, and due process violations. However, courts have not addressed many of the issues that arise by applying general contract principles to proffer agreements. This stands in stark contrast to plea agreements, which have had specific rules set by common law in order to ensure that they do not run afoul of due process. As a result, this Part addresses several issues apparent in proffer agreements’ timing and formation, and suggests steps to address those issues.

1. Offers

At the simplest level, the most basic issues of offer and acceptance affect the gaps in proffer agreement interpretation. As in a commercial contract, there is great power in being an offeree to a proffer agreement. Whether a party has the power of acceptance will greatly alter that party’s bargaining power and carries due process concerns for prosecutorial agreements. Therefore, determining the offeror is of grave importance to the fairness of a proffer agreement.

To be clear, there is no issue as to what constitutes an offer; an offer is the “manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” Additionally, an offer identifies the bargained-for exchange and gives the offeree the power of acceptance. Instead, the issue is which party is the offeror: whether the prosecutor must always be the offeror or if proffer agreements, unlike plea agreements, allow for either party to be the offeror.

Answering this question is of fundamental importance to prosecutors. If prosecutors always act as offeror, as in plea agreements, they would have an incentive to offer deals with less consideration in return for the defendant’s

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95. See infra Parts III.B.3–4.
96. See infra Part III.B.1.
97. See, e.g., SANDERS & NICHOLS, supra note 79, § 31:14 (citations omitted) (discussing inducements that do, and do not, run afoul of constitutional protections).
99. See infra notes 107–12 and accompanying text.
101. Prescott, 335 S.C. at 336, 516 S.E.2d at 926 (quoting Carolina Amusement Co., 313 S.C. at 220, 437 S.E.2d at 125); see also RESTATEMENT (SECOND) OF CONTRACTS § 29(1) (1981) (“The manifested intention of the offeror determines the person or persons in whom is created a power of acceptance.”).
103. See id. (citing Reed, 333 S.C. at 688, 511 S.E.2d at 402).
statement, and to require defendants to agree quickly.\textsuperscript{104} On the other hand, if defendants are capable of acting as offeror, prosecutors may have a strong incentive to negotiate more generous terms, but delay acceptance until the prosecution is sure that no further investigation will aide in negotiating. Although the courts have not specifically decided whether the prosecutor must be the offeror in a proffer agreement, it is likely that the same purpose and due process concerns applicable to plea agreements would require the prosecution to be the offeror in proffer agreements.

In a plea agreement, due process likely requires a criminal defendant to act as offeree because plea agreements are not complete until the defendant enters the plea before the court.\textsuperscript{105} This serves an evidentiary purpose, allowing the defendant’s plea in court to show that it was made voluntarily.\textsuperscript{106} Further, defendants may withdraw from a plea agreement any time before the plea is entered before the court.\textsuperscript{107} In contrast, prosecutors may not withdraw from the agreement if the criminal defendant has detrimentally relied upon the offer.\textsuperscript{108}

The same reasoning likely applies to proffer agreements. Proffer agreements share the same power disparity between prosecution and defendant as plea agreements.\textsuperscript{109} This typically raises due process concerns, especially where a defendant surrenders a right.\textsuperscript{110} Further, the agreements’ shared procedures make it effectively impossible to reverse precedent requiring the prosecution to be the offeror. The case law is simply too one-sided and there does not appear to be a great enough advantage available to argue that the defendant could be the offeror. Therefore, both prosecution and defense should assume that the prosecution will be the offeror and make clear that the criminal defendant is the one who must accept the agreement.

2. Nature of Acceptance

The nature of acceptance in a proffer agreement remains unsettled. Whether a proffer agreement is bilateral or unilateral may radically alter the proffer agreement’s timing; if proffer agreements are treated like plea agreements, which

\textsuperscript{104} Cf. Zabel & Benjamin, \textit{supra} note 5, at 4 (citing United States v. Duffy, 133 F. Supp. 2d 213, 217 (E.D.N.Y. 2001)) (noting the pressure defendants have to cooperate with the government, which first requires signing the government’s proffer agreement).

\textsuperscript{105} Reed, 333 S.C. at 685, 511 S.E.2d at 401 (quoting Mabry v. Johnson, 467 U.S. 504, 507–08 (1984)).

\textsuperscript{106} See Brady v. United States, 397 U.S. 742, 753 (1970) (quoting Bram v. United States, 168 U.S. 532, 542–43 (1897)).

\textsuperscript{107} Miller, 375 S.C. at 389, 652 S.E.2d at 454 (citing Reed, 333 S.C. at 688, 511 S.E.2d at 402).

\textsuperscript{108} Id. (citing Reed, 333 S.C. at 688, 511 S.E.2d at 402–03).

\textsuperscript{109} See Zabel & Benjamin, \textit{supra} note 5, at 4 (quoting Duffy, 133 F. Supp. 2d at 217).

\textsuperscript{110} See Brady, 397 U.S. at 748.
are unilateral, the performance provides evidence of the agreement and helps protect the defendant from entering the agreement without fully understanding its effect. However, a unilateral proffer agreement may allow a defendant to void a signed proffer agreement after obtaining some benefit. In contrast, if proffer agreements are treated as bilateral contracts, a prosecutor may be able to enforce a defendant’s agreement to confess his role in a crime, even if he subsequently refuses to do so. Given the vast differences in these characterizations, both parties should be aware of their application in plea and proffer agreements.

The reasons for making plea agreements unilateral, and why proffer agreements differ as a result, is relatively simple: plea agreements are set by more stringent constitutional protections and attendant court proceedings than proffer agreements. First, a court cannot force a defendant to plead guilty, so a promise to do so in a plea agreement cannot be enforced. Second, the plea agreement provides a definite event delineating when performance is complete because plea agreements may only be performed under the formal proceedings of the court.

In contrast, the same timing and due process arguments cannot be applied to proffer agreements so easily. First, a proffer statement does not need to be entered in the same way before the court to be enforceable. Additionally, proffer agreements do not share the same degree of finality as plea agreements, and therefore require less scrutiny. As a result, there may not be a

111. See Miller, 375 S.C. at 389, 652 S.E.2d at 454 (citing Reed, 333 S.C. at 686–87, 511 S.E.2d at 402); see also United States v. Papaleo, 853 F.2d 1, 19–20 (1st Cir. 1988) (holding that absent explicit promissory language, a plea agreement is only a unilateral offer until a defendant’s plea is accepted by the court). A unilateral contract is a contract for which only one party provides a promise and the other party may accept only by actual performance. BLACK’S LAW DICTIONARY 374 (9th ed. 2009). A bilateral contract, on the other hand, is a contract made by the exchange of mutual promises from both parties. BLACK’S LAW DICTIONARY 367 (9th ed. 2009).

112. Proffer and plea agreements are compared in this Section to illustrate where they differ and to illustrate where plea agreement case law may be incorrect for proffer agreements. Because there is currently very little case law specifically relating to proffer agreements, practitioners should be prepared to address this as an issue of first impression.


114. See supra notes 53–56 and accompanying text.


118. Compare Benjamin A. Naftalis, “Queen for a Day” Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 7 (2003) (describing the effects proffer agreements have had on the prosecutorial process), with Bailey v. MacDougall, 247 S.C. 1, 8, 145 S.E.2d 425, 428 (1965) (“A plea of guilty is a confession of guilt made in a formal manner and is equivalent to and as binding as a conviction after a trial on the merits.”).
specific moment where the parties can be certain that a proffer agreement has been completed. Proffer agreements could arguably be completed at the time of execution, at the time the defendant makes a proffer statement, when the prosecution makes an affirmative act to confirm the agreement, or even as late as the prosecution’s attempt to enter a proffered statement as evidence in court. Although the latter possibilities are less likely, the ambiguity leaves open the possibility that a court could hold them proper. For instance, one could argue that until the prosecution acts on the agreement, performance has not occurred and the defendant is free to withdraw.

If a proffer agreement must be unilateral, these ambiguities will make it difficult for prosecutors to enforce a proffer agreement. Take, for example, a criminal who signs a typical proffer agreement that requires the defendant to give an honest recitation of the defendant’s knowledge of a crime; if the defendant is determined to have been dishonest, the defendant will be in breach and the proffer statement may be used against the defendant at trial. If the agreement does not define what constitutes acceptance, the defendant could possibly withdraw from the agreement, even after delivering the proffer statement. This would allow a defendant who has been materially dishonest in a proffer statement to “withdraw” from an otherwise valid proffer agreement without penalty. While unlikely, this scenario demonstrates the potential harm to the prosecution in making proffer agreements with undefined terms.

However, treating proffer agreements as bilateral agreements is not a perfect solution either, as doing so shifts performance issues to the defense instead. For instance, a defendant may be bound even if the defendant has made no statement and decides to withdraw consent on advice of counsel. In such a scenario, it is not clear if the defendant could be compelled to make a proffer statement or if the defendant would be unable to negotiate further. While it seems unlikely that courts would require a defendant to make a proffer statement, it seems equally unlikely that a court would allow the defendant to withdraw from a bilateral agreement without consequence. As a result, parties might not choose to characterize a proffer agreement as bilateral. Until courts clarify this issue, there may be no clear answer. Therefore, both prosecution and defense should carefully define the nature of the agreement.

A good first step is for the prosecution to explicitly define what will constitute acceptance. Because courts interpret contracts to give meaning to the

119. At least one court has held that a proffer agreement is effective upon signing. See United States v. Washburn, 728 F.3d 775, 781 (8th Cir. 2013) (citing United States v. Miller, 295 F.3d 824, 827 (8th Cir. 2002)).


121. See Washburn, 728 F.3d at 780–81.

122. In Washburn, the court held that the defendant could not seek to further negotiate plea agreements after breaching. See id. at 782.
parties’ intent and plea or proffer agreements could possibly be drafted as bilateral contracts, a clause clearly making the agreement valid upon execution could provide more certainty, as well as a more favorable outcome for prosecutors. Even if proffer agreements cannot be drafted as purely bilateral contracts, the prosecution may improve its chances of enforcing a proffer agreement by requiring that the defendant make a brief recitation of his knowledge immediately after signing. Requiring the defendant to begin performance should satisfy the requirements of acceptance for a unilateral contract. These steps, if taken proactively, should avert any attack by the defense.

Defense counsel should assume that the moment the proffer agreement is signed the defendant will be bound by the agreement and required to deliver a proffer statement. Therefore, the defense should either clarify what will constitute acceptance or delay signing until the defense is certain of its decision. These steps would not give the defense an immense advantage, but would assure that the defendant will not be surprised by the prosecution’s actions.

3. Consideration

Of greater (and more realistic) concern than offer and acceptance is the proffer agreement with no real consideration. Because proffer agreements often give the prosecution discretion to determine whether the defendant has breached, the prosecution may offer illusory consideration in the agreement. Such a situation could void an otherwise valid agreement or prevent the defendant’s waiver from being effective.

Valuable consideration is a necessary element of any contract, including plea and proffer agreements. While consideration is generally a simple


124. See United States v. Papaleo, 853 F.2d 16, 19–20 (1st Cir. 1988) (emphasis added) (“Absent more explicit promissory language, we will not read the ambiguous language of the ‘agreement’ as containing bilateral promises such as to bind the government to a contract unenforceable against the other party.”).


126. See, e.g., State v. Wills, 409 S.C. 183, 187, 762 S.E.2d 3, 5 (2014) (Beatty, J., dissenting) (restating the proffer agreement at issue, which gives the state authority to determine whether breach has occurred).


concept, the floor of what constitutes consideration is difficult to define. In general, the forbearance of some right will be sufficient for the court to find consideration.\textsuperscript{130} Criminal defendants entering proffer agreements clearly satisfy this standard; waiver of Rule 410 is an obvious forbearance of value to the prosecution.\textsuperscript{131} Similarly, on the face of many proffer agreements, the prosecution offers some valuable consideration—promises not to bring additional charges,\textsuperscript{132} sentencing recommendations,\textsuperscript{133} or even a promise simply to begin plea bargaining.\textsuperscript{134} However, the conditions that prosecutors often require before their performance implicates the issue of whether the promise is illusory.\textsuperscript{135}

An illusory promise is one in which a promise is made in form only; the party making the promise is not actually promising to give up anything.\textsuperscript{136} As such, an illusory promise cannot serve as consideration.\textsuperscript{137} A common example is a situation where a promisor may choose whether to perform or not, based “solely on the condition of his whim.”\textsuperscript{138} It can be difficult to strictly define the circumstances under which a decision will be considered unjustified.\textsuperscript{139} An illustrative example of this point is a satisfaction clause, which conditions one party’s performance on the other party’s satisfaction with the first’s performance.\textsuperscript{140} Satisfaction clauses have been almost universally upheld,\textsuperscript{141} as courts have held that a party’s duty to act in good faith serves as the limitation on the promisor’s discretion.\textsuperscript{142} A breach of good faith could be difficult to prove, which may make it effectively impossible for a party to prove a promise is illusory.

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\textsuperscript{134} See Mezzanotto, 513 U.S. at 207.
\textsuperscript{135} See Wills, 409 S.C. at 205, 762 S.E.2d at 14 (Beatty, J. dissenting).
\textsuperscript{136} 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:7 (4th ed. 2008).
\textsuperscript{137} Id.
\textsuperscript{138} Id. (citing RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, illus. 1–2 (1981); RESTATEMENT (FIRST) OF CONTRACTS § 78 (1932)).
\textsuperscript{140} See 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 38:21 (4th ed. 2013) (citations omitted).
\textsuperscript{141} Id. (citations omitted).
\textsuperscript{142} Id. (citations omitted).
\end{small}
The dissent in *Wills* insinuates that certain practices, such as polygraphs, may make the prosecution’s promise illusory.\(^{143}\) While prosecutors have incentives to condition their promises on a defendant being truthful or passing a polygraph, numerous possible problems counsel against their use. First, vague conditional descriptions of prohibited conduct triggering breach, such as “deceptiveness,” make applying those standards difficult.\(^{144}\) Second, incentives exist for prosecutors not only to predicate breach on the prosecutor’s sole discretion, as the dissent in *Wills* suggested occurred,\(^ {145}\) but to ask questions designed to cause an honest defendant to appear deceptive.

Take, for example a situation where a criminal defendant is accused of robbing a bank. During a proffer session, the police investigator asks the defendant the time the defendant walked into the bank. The criminal defendant says about 12:30 but is, in fact, mistaken. Instead, the defendant walked in at 12:45. At this point, if the prosecutor is the sole judge of deceptiveness, the prosecutor may have sufficient cause to find that the defendant was deceptive and breached the agreement as a result. Although courts may be unwilling to accept such a small discrepancy, the trial court in *Wills* required no evidence beyond a polygraph examiner’s statement that the defendant was deceptive.\(^ {146}\) No evidence was presented as to how Wills was deceptive, nor did the prosecution explain how it determined he was being deceptive.\(^ {147}\)

While *Wills* lends support to a low threshold for evidence of breach, there are many reasons to believe that other courts may not be so accommodating and, instead, may require a higher threshold for evidence of breach. First, it should be noted that there was some issue in *Wills* as to whether Wills properly challenged the prosecution’s evidence.\(^ {148}\) Even if the challenge was made, it does not appear that the defense did much beyond preserve the challenge for the record.\(^ {149}\)

The alternative to these conditions of breach, in comparison, is relatively simple and leaves a prosecutor well protected, regardless of trial strategy. Prosecutors should state that “any material dishonesty, including material omissions, will be treated as a breach.” This minor tweak invokes the standards of breach available through general contract principles and provides a fair starting point for the prosecution and defense. Ironically, this language does not

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143. See State v. Wills, 409 S.C. 183, 197, 762 S.E.2d 3, 10 (2014) (Beatty, J., dissenting) (“In essence, the State rescinded the agreement and avoided its contractual obligations by merely alleging Petitioner’s statement was deceptive and nothing more.”).

144. While no apparent definition has been adopted for deception in criminal cases, the South Carolina Supreme Court adopted the tautological definition that “[a]n act is ‘deceptive’ when it has a tendency to deceive.” Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999) (citing Harris v. NCNB Nat’l Bank of N.C., 355 S.E.2d 838, 844 (N.C. Ct. App. 1987)).


146. See id. at 188, 205, 762 S.E.2d at 5, 14.

147. See id. at 188–89, 762 S.E.2d at 5–6.

148. See id. at 190–91, 762 S.E.2d at 7.

149. See id.
fully prevent a prosecutor from attempting to prove a breach with little evidence, but enables the defense to use relevant case law to challenge weak showings. It should be emphasized that remarkably little is needed to prove that a promise is not illusory, so this provision should do little to harm the prosecution while providing protection to defendants from illusory promises.

4. Voluntariness

Ultimately, questions about proffer agreements’ validity devolve into one of voluntariness. The procedure used to determine whether a proffer agreement is valid, the Denno hearing, is designed to determine if a statement was made voluntarily,150 and if the proffer agreement was entered involuntarily, it will be inadmissible.151 As a result, whether an agreement is voluntary is not only important to consider in its own right, but also as the means to make any challenge to a proffer agreement.

While general contract principles can provide sleek solutions for some formation issues, the requirement for voluntariness in criminal cases differs in many ways from the contract law requirement of a meeting of the minds. Plea and proffer agreements are governed by the Denno standard,152 which requires that a defendant’s statement to the prosecution be made “knowingly, intelligently, and voluntarily.”153 The courts have not adopted a definitive statement as to what is voluntary, but South Carolina courts have stated that they will consider the totality of the circumstances, including “background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or her parent; threats of violence; and promises of leniency.”154 Further, a statement may not be “extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] obtained by the exertion of improper influence.”155 Similarly, the United States Supreme Court has stated that “coercive police activity is a necessary predicate to the finding that a [statement] is not ‘voluntary,’”156 which is determined from the perspective of the defendant.157 In effect, the voluntariness standard is defined by what parties cannot do, rather than by what they can.

151. Cf. id. (indicating that convictions cannot be based on involuntary confessions).
152. See Jackson, 378 U.S. at 395–96.
155. Id. at 386, 652 S.E.2d at 452 (alterations in original) (quoting State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1989)).
This concept differs from the “meeting of the minds,” which contains affirmative requirements for parties’ conduct. The meeting of the minds required to form a contract

is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.

Therefore, rather than prohibiting only certain conduct, a meeting of the minds requires the parties to make their intentions known to all parties. However, the voluntariness and meeting of the minds standards are similar in what types of conduct are specifically prohibited.

Compare, for instance, duress and the Denno standard. Duress is defined as “coercion that puts a person in such fear that he is ‘bereft’ of the quality of mind essential to the making of a contract and the contract was thereby obtained as a result of this state of mind.” Similarly, “unconsciousness is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” While the Denno standard differs from duress in some ways, it reflects a high standard of protection for parties—at least on paper.

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159. Id. at 105, 382 S.E.2d at 894 (citing McClintock, 114 S.W.2d at 189).
160. Hyman v. Ford Motor Co., 142 F. Supp. 2d 735, 744 (D.S.C. 2001) (citing Phillips v. Baker, 284 S.C. 134, 137, 325 S.E.2d 533, 535 (1985); Cherry v. Shelby Mut. Plate Glass & Cas. Co., 191 S.C. 177, 183, 4 S.E.2d 123, 126 (1939); In re Nightingale’s Estate, 182 S.C. 527, 545, 189 S.E. 890, 897 (1937); see also RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”). See also Id. at 115, 382 S.E.2d at 900.
162. In Crane v. Kentucky, the United States Supreme Court held that circumstances of how a confession was obtained must be permitted to be introduced as evidence to the jury, even if it has already been ruled on at a Denno hearing, because “a defendant’s case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.” Crane v. Kentucky, 476 U.S. 683, 689 (1986). See generally Frederick Alexander et al., Project, Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985–1986, 75 GEO. L.J. 713, 824–25 (1987) (citations omitted) (discussing the admissibility of statements by criminal defendants). In Wills, the judge limited the defense to making only a reference to the confession occurring as part of a proffer agreement. See State v. Wills, 409 S.C. 183, 189, 762 S.E.2d 3, 6 (2014) (Beatty, J., dissenting).
In practice, neither the civil nor the criminal standard is enforced to such a rigid degree; in both criminal and civil actions, courts have essentially disregarded these safeguards and instead allow nearly any contract to be enforced, “regardless of the contract’s folly or wisdom.” Therefore, while both general contract principles and proffer agreements profess to have some requirement for meeting of the minds, the courts have granted wide discretion for enforcement of an agreement, regardless of any formation issue.

The difference between theoretical and practical protection is problematic for criminal cases. While the difference may be explained, if not excused, for commercial contracts, criminal law should reflect a greater concern. The United States Court of Appeals for the Fourth Circuit, in the widely cited opinion United States v. Harvey, stated that unlike contract law, a criminal defendant’s right to contract is “constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.” Rather than concerning itself with the needs of a free market, the criminal court instead focuses on the constitutional rights of the individual and, more broadly, maintaining public confidence in the fair administration of justice. Of course, these goals and protections do not bar or even radically limit a criminal defendant’s ability to waive the defendant’s rights or enter into a plea agreement, but they should act to provide some protection. However, these protections are only useful if they are adequately enforced.

The application of a contract standard, adopted by the South Carolina Supreme Court in Wills, allows the enforcement of a contract “regardless of the... wisdom” of a party’s consent to its enforcement, yet offers less protection than that addressed in Harvey. While there are times that general contract principles aid the courts in fleshing out a body of law, the South Carolina Supreme Court appears to have overstepped in its adoption of such a low standard for proffer and plea agreements.

In practice, the waiver and conditions allowed in Wills, while possibly able to survive challenges in the current South Carolina Supreme Court, may not survive similar challenges in the federal courts or, possibly, a different composition of the South Carolina Supreme Court. Irrespective of the courts’ inclination to change course, prosecutors can easily circumvent the issue by simply ensuring that defendants receive adequate notice of the proffer

163. See Grace M. Giesel, A Realistic Proposal for the Contract Duress Doctrine, 107 W. VA. L. REV. 443, 444 (2005) (“Even after the passage of half a century since Dawson’s observations, the duress doctrine remains largely unusable, though courts frequently attempt to use it.”).
165. 791 F.2d 294 (4th Cir. 1986).
166. Id. at 300.
169. See Harvey, 791 F.2d at 300 (recognizing that constitutional considerations affect contract analysis in criminal cases).
agreement’s contents and that the defendant is adequately represented. First, prosecutors should require defense counsel to sign the proffer agreement, in addition to the defendant, to make clear that the defense counsel has discussed the ramifications of the proffer agreement with the attorney’s client. Second, it is likely wise to require the defendant to handwrite a statement that makes clear the defendant has read the agreement, is aware of its terms, and is agreeing voluntarily. Third, rather than making better deals, it may actually be in the favor of prosecutors to require total waiver of Rule 410 as a condition to any plea bargaining.170 Finally, if a prosecutor assures that the same conditions required to waive constitutional rights are met, there will almost assuredly be no issue for the waiver of the procedural protection offered by Rule 410.171

For the defense, there is not much that should be done, but there is an opportunity for actual negotiation. First, as always, defense counsel should explain all of the terms and conditions to the attorney’s client. The defense counsel should be sure that the defendant is aware of the extreme consequences of breach. Second, if the prosecution requires the defendant to handwrite a statement, the defense should use this as an opportunity to alter the terms of the agreement. Rather than just allowing the defendant to write the statement, the defense counsel should take the opportunity to annotate any requested changes to the agreement. While there is no guarantee that the prosecution will agree to these terms, any opportunity to add to the contract is an ideal time to make alterations as well.

C. Determining Breach

When a contract is disputed, as breached proffer agreements commonly are, the method and process of determining breach often determines the outcome. Because the criminal system’s procedures are limited, it is vital for both defense and prosecution to know what terms determine breach and the procedures the court will use to make a finding.

1. Procedure

Denno hearings, which have become the default process for plea agreements,172 present procedural and substantive challenges in determining

171. See generally 16 C.J.S. Constitutional Law § 142 (2005) (citations omitted) (discussing the “high degree of proof” that “is required for the establishment of a waiver of constitutional rights”).
breach. Additionally, the South Carolina Supreme Court’s apparent blessing of polygraph examinations to determine breach renews the dispute over the proper role of polygraphs in criminal law.173

Jackson v. Denno created the procedures that have been used for statements made by defendants.174 Denno hearings are conducted to determine the voluntariness of a statement.175 As a byproduct, in proffer agreement cases, the court must also determine whether the conditions of a proffer agreement have been breached.176 While all Denno hearings share common basic elements, they vary in procedure from jurisdiction to jurisdiction.177 In South Carolina, the Denno hearing process is bifurcated.178 First, the judge conducts an evidentiary hearing outside of the presence of the jury, where the State must show by a preponderance of the evidence that the defendant voluntarily made the statement.179 When dealing with a proffer agreement, the State must also show that the proffer agreement is valid and enforceable.180 If the trial judge believes the agreement was enforceable and the statement was voluntary, then the statement is submitted to the jury, which must find beyond a reasonable doubt that the statement was voluntarily made.181

173. See, e.g., Wills, 409 S.C. at 204, 762 S.E.2d at 14 (Beatty, J., dissenting) (expressing concern about the State’s use of a polygraph examination to determine that the defendant was not truthful and had therefore breached the proffer agreement); Lorenzen v. State, 376 S.C. 521, 533, 657 S.E.2d 771, 778 (2008) (quoting State v. Council, 335 S.C. 1, 23–24, 515 S.E.2d 508, 519–20 (1999)) (expressing concerns over the reliability of polygraph examinations and doubts about the admissibility of polygraph examination results). See generally 6 FISHMAN & MCKENNA, supra note 25, § 41:6 (explaining that all states except New Mexico exclude polygraph examinations as evidence of truthfulness).


175. See supra Part III.B.4.

176. See Wills, 409 S.C. at 188–89, 762 S.E.2d at 5–6 (Beatty, J., dissenting).

177 See WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 30:2 (2d ed. 2014) (citations omitted), available at Westlaw SSAC.

178. See Miller, 375 S.C. at 379, 652 S.E.2d at 448 (citing Jackson, 378 U.S. at 376; State v. Washington, 296 S.C. 54, 56, 370 S.E.2d 611, 612 (1988)).

179. Id. at 379, 652 S.E.2d at 448 (citing Jackson, 378 U.S. at 376).

180. See Wills, 409 S.C. at 188-89, 762 S.E.2d at 6 (Beatty, J., dissenting).

181. See Miller, 375 S.C. at 379, 652 S.E.2d at 448 (citing Washington, 296 S.C. at 56, 370 S.E.2d at 612). One issue that has not been fully resolved is whether the proffer agreement should be sent to the jury as well. In Wills, the trial judge conducted a Denno hearing to determine that the defendant had signed a proffer agreement and that his statement was voluntary. Wills, 409 S.C. at 188–89, 762 S.E.2d at 6 (Beatty, J., dissenting). Though the jury was charged with determining whether the statement was made voluntarily, the judge barred any reference to the use of a polygraph examination. Id. at 189, 762 S.E.2d at 6. Additionally, the defense was allowed to explain to the jury that the statement was made as part of a proffer agreement. Id. at 189, 762 S.E.2d at 6. The exclusion of the means for proving breach meant that the trial judge alone determined whether the defendant breached. It is not clear whether the trial judge barred mention of the polygraph because the jury did not need to determine whether the defendant breached or because polygraphs cannot be admitted as evidence in a criminal trial. See State v. Wright, 322 S.C. 253, 255, 471 S.E.2d 700, 701 (1996) (citing State v. Copeland, 278 S.C. 572, 582, 300 S.E.2d 63, 69 (1982)).
2. **Substantive Findings**

There are many situations where a defendant may technically breach a proffer agreement but significantly fewer that should invoke the waiver clause of a proffer agreement. Whether a breach is minor or material determines what remedy, if any, should be granted.\(^\text{182}\) As the nature of a breach is a question of fact, rather than a binary question of law,\(^\text{183}\) both defense and prosecution should determine the actions that caused a breach and the evidence showing the nature of the breach.

To determine whether a defendant has breached a proffer agreement, the court must first determine whether the defendant's breach was minor or material.\(^\text{184}\) "A material breach is one that deprives the non-breaching party of the benefit of its bargain."\(^\text{185}\) However, "if a party's nonperformance . . . is innocent, does not thwart the purpose of the bargain, and is wholly dwarfed by that party's performance, the breaching party has substantially performed under the contract, and the non-breaching party is not entitled to rescission."\(^\text{186}\)

The materiality of a breach is a "question of degree."\(^\text{187}\) The Restatement (Second) of Contracts lists the following factors to determine whether a breach is material:

a. the extent to which the injured party will be deprived of the benefit which he reasonably expected;

b. the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

c. the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

d. the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

e. the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.\(^\text{188}\)

The court will apply these factors with the standard of objective reasonableness, rather than the parties' purely subjective beliefs.\(^\text{189}\)

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185. United States v. Davis, 393 F.3d 540, 546–47 (5th Cir. 2004) (citing United States v. Castaneda, 162 F.3d 832, 837 (5th Cir. 1998)).
186. *Id.* at 547 (alteration in original) (quoting *Castaneda*, 162 F.3d at 838).
189. LORD, *supra* note 184 (citing Gibson v. City of Cranston, 37 F.3d 731, 737 (1st Cir. 1994)).
To prove these factors, ordinarily a great deal of facts will be needed to address the circumstances and nature of a breach.\textsuperscript{190} While the prosecution in \textit{Wills} successfully proved breach with only general allegations of deceptiveness, general contract principles (as well as the dissenting opinion) counsel that prosecutors likely should show more.\textsuperscript{191} Instead, the prosecution should not only have to show that a defendant’s deception was material, but that it materially related to the purpose of the proffer agreement. Although similar, deception goes to the credibility of the defendant, while relevance goes to whether the deception harms the purpose of the proffer agreement.

To illustrate material deception, take the earlier example of a defendant deemed deceptive for stating that a burglary occurred at 12:30, rather than the real time of 12:45. While the difference in time may technically be a breach, it is likely not a material breach because such a small discrepancy in time is not likely to call the truthfulness of the defendant’s statement into question. Additionally, a clause focused on deceptiveness or truthfulness should contain an implicit requirement of knowledge or intent. If so, the prosecution in this hypothetical would need to show that the discrepancy in time was also made intentionally or knowingly.

Similarly, to illustrate material relevance, take the same defendant, who instead honestly and accurately recites all of the facts and circumstances of the burglary but lies about an unrelated relationship with a girlfriend. While the defendant in this example has been materially deceptive, the deception is not likely materially relevant to the purpose of the proffer agreement. In order to prove breach, the prosecution should have to show how the lie about the girlfriend thwarts the purpose of the proffer agreement.

These examples are illustrative of the fact that most proffer agreements defy general analysis because, in most cases, the facts of each case will ultimately be determinative. However, polygraph examinations are one exception that requires greater attention. It is not clear whether a polygraph should be used at all, given their inadmissibility in a criminal trial.\textsuperscript{192} The South Carolina Supreme Court has denied admissibility for polygraph examinations even in limited circumstances similar to a Denno hearing, such as a bifurcated sentencing phase.\textsuperscript{193} While a polygraph was used in \textit{Wills}, prosecutors should tread carefully before making a polygraph the sole method of determining breach. Because polygraphs are otherwise inadmissible in criminal trials, litigation on their use in proffer agreements may occur in the near future.

Going forward, prosecutors should be careful to limit the scope of proffer agreements to assure not only that it covers the information they wish to know, but also that it is sufficiently narrow to prevent a dispute about material

\textsuperscript{190} See id.
\textsuperscript{193} Copeland, 278 S.C. at 582, 300 S.E.2d at 69.
relevance. Similarly, prosecutors should carefully select a method to determine breach that will sufficiently show the material deception was made with knowledge or intent. While a polygraph may be able to satisfy these criteria, prosecutors should find other grounds than a polygraph to assure that a waiver will be effective.

For defense attorneys, keeping a polygraph out of the proffer agreement is critical. Additionally, if the prosecution alleges that a breach has occurred, the defense should focus on showing that any alleged deception or breach is neither material nor materially relevant.

D. Remedies for Breach

Of all the controversies in the application of proffer agreements, the remedy for a breach is the most important issue for prosecution and defense. Though the use of a total waiver of Rule 410 appears to be a permanent addition to the legal landscape, the circumstances under which the prosecution should be allowed to rescind the proffer agreement and when the prosecution should be allowed to admit proffered testimony as damages for breach should remain controversial.

Though born out of plea agreements, proffer agreements fundamentally differ in the remedies that most favor prosecutors. In plea agreements, rescission is likely the prosecution’s best remedy. Like any breach, rescission requires a material breach that is “so substantial and fundamental as to defeat the purpose of the contract.” Therefore, “a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties.” The purpose of rescission is to restore the parties to the status quo before the contract was entered. As a result, “[r]escission voids the contract ab initio, meaning that it is considered null from the beginning and treated as if it does not exist for any purpose.”

Rescission is the natural choice in plea agreements for numerous reasons. First, it allows the prosecution to continue prosecuting the defendant. Because

194. See generally Annotation, Right of Prosecutor to Withdraw from Plea Bargain Prior to Entry of Plea, 16 A.L.R. 4th 1089 (1982 & Supp. 2014) (discussing the ability of prosecutors to withdraw from plea agreements).


198. 17A AM. JUR. 2d Contracts § 584 (2004) (citing First Am. Title Ins. Co. v. Lawson, 827 A.2d 230, 237 (N.J. 2003)); see also State v. Wills, 409 S.C. 183, 199, 762 S.E.2d 3, 11 (2014) (Beatty, J., dissenting) (quoting 17A AM. JUR. 2d, supra) (arguing that the State and the defendant should be returned to the same position they were in before entering into a proffer agreement).

the prosecution cannot require a defendant to plead guilty, 200 rescission provides the best alternative. The same cannot be said for proffer agreements. In a proffer agreement, the prosecution should never ask for rescission because the status quo is the protections of Rule 410. 201 In a proffer agreement, the starting point of the parties is no waiver of Rule 410. Thus, a rescission will cancel the waiver of Rule 410, rather than give it effect. 202 Of course, that did not stop the prosecution in Wills from attempting to use rescission language. 203

Rather than return the parties to their initial positions, the prosecution in Wills attempted instead to partially rescind the contract, enforcing the criminal defendant’s promise while rescinding its own. 204 Regardless of the prosecution’s intent, partial rescission is almost universally forbidden. 205 This is because the “retention of only the benefits amounts to unjust enrichment and binds the parties to a contract they did not contemplate.” 206 Therefore, despite the prosecution’s creative wording, the remedy sought was not correctly described, and was unlawful as a result. Instead, the prosecution should have asked for the equivalent of liquidated damages.

Liquidated damages are an agreed-upon sum of money to be paid or a deposit to be forfeited in the event of a breach of the contract. 207 The amount should be a good faith estimate and proportionate to the probable loss. 208 If the amount exceeds this threshold, it will be an unenforceable penalty. 209 If a provision is a penalty, the recovery available is not measured by the sum stipulated, but the actual damages proven to have been sustained by the breach. 210

Viewed in a vacuum, the greatest concern for a prosecutor would be to assure that total waiver will not be viewed as a penalty clause. However, where courts have already allowed for total waiver, as South Carolina courts have, this is not likely to be a concern. Only in a state with a similar adaptation of general contract principles that has yet to address total waiver of Rule 410 is such an argument likely to be relevant. Therefore, rather than spending their time arguing for partial rescission or for the validity of total waiver, prosecutors should plainly describe the events that will constitute breach and specifically describe what type of waiver they will seek in that event. The waiver should avoid the use of the phrase “null and void” or other language typically used for

201. See Wills, 409 S.C. at 199, 762 S.E.2d at 11 (Beatty, J., dissenting).
202. See id. at 199, 762 S.E.2d at 11.
203. See id.
204. See id.
206. Id. (citing Simmons v. Cal. Inst. of Tech., 209 P.2d 581, 587 (Cal. 1949)).
207. See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 146 (1935).
208. See id.
209. See id.
rescission. Where prosecutors fail to do so, defense attorneys should vociferously argue that the words selected by the prosecution require rescission, rather than activation of the waiver clause.

IV. USE OF MODEL PROFFER AGREEMENT

Ultimately, a well-drafted proffer agreement is a simple document. To be effective, a proffer agreement needs only a skeleton of provisions to define the responsibilities of the parties and the possible outcomes for performance and breach. Though many issues might render a proffer agreement invalid, most can be prevented by proactive drafting. So long as the prosecution uses restraint and carefully considers the effect of its provisions, a proffer agreement should withstand any challenge to its validity. However, where the prosecution fails to do so, either out of zeal to obtain an advantage in negotiation or negligence in drafting, provisions may be struck or the entire proffer agreement may be held invalid. Because a ruling that a proffer agreement is invalid could jeopardize any chance at a successful prosecution, prosecutors should take care to prioritize drafting enforceable terms over all other concerns.

With these concerns in mind, this Note proposes a model proffer agreement that may be used as a basis for future proffer agreements. While the terms of this model may require alteration or substitution given the requirements of a case, the structure and language of this model provide a basic structure for future proffer agreements. Therefore, with the goal of creating a valid and enforceable agreement, the model proffer agreement appears below.

V. MODEL PROFFER AGREEMENT

[The Defendant] agrees to submit [himself/herself] to agent(s) of the State for the purpose of debriefing regarding [description of the matter] and all other matters materially bearing on this matter. [He/she] shall be completely truthful concerning [his/her] involvement in this matter and completely truthful concerning the involvement of all other individuals in this matter. [He/she] shall truthfully and completely answer all questions posed by agent(s) of the State bearing materially on this matter and shall provide without prompting all material information concerning this matter in a complete and truthful manner, even if such information is not elicited by agent(s) of the State by direct question. Any and all information provided by [name of defendant] under the terms of this proffer agreement may be recorded in any fashion at the election of the State.

[The Defendant] agrees that if [he/she] is materially dishonest about any material issue related to this matter that the Defendant will be in material breach of this proffer agreement.

If [the Defendant] becomes aware of any material issue relating to the truthfulness or accuracy of the material portions of [his/her] proffer statement,
[he/she] must provide a corrected statement to the State within [reasonable period of time]. Failure to do so shall constitute a material breach of this agreement.

Any material breach by [the Defendant] shall allow the State to use any statement made by [the Defendant] in [his/her] proffer for any legal purpose, including, but not limited to:

a. considerations for charging;
b. bond;
c. disposition of charges through plea or trial of [the Defendant];
d. impeachment of testimony;
e. rebuttal;
f. as a part of the State’s case-in-chief;
g. sentencing;
h. post-conviction relief; and
i. in any fashion, whether direct or collateral to this matter;

In return for [the Defendant’s] full compliance with all terms stated within this proffer agreement, the State shall allow [the Defendant] to [negotiate for a plea agreement/State’s promise].

[The Defendant] agrees and understands that this proffer agreement shall constitute a valid and binding agreement between the State and [the Defendant], effective upon the signing of this document.

[Handwritten clause] By signing this agreement, I, [written name], agree that I am fully aware the terms of this agreement, having [read it myself/discussed with my attorney/method of understanding] and knowingly, intelligently, and voluntarily agree to be bound by the terms of this agreement.

(signature of defendant) (date)
(signature of defense counsel) (date)

(signature of State representative) (date)
VI. CONCLUSION

Proffer agreements are documents that serve the simple purpose of encouraging an honest and frank dialogue between criminal defendants and the prosecution. Despite the simplicity of this purpose, the execution of a proper and enforceable plea agreement requires thought and care beyond what is often the norm. In most cases, proffer agreements contain simple and easily correctible mistakes. Where, however, prosecutors seek to use proffer agreements as a tool to ease prosecution, the mistakes made may be much more difficult to unwind and correct. While their motivation is understandable, the inherent power of the total waiver of Rule 410 should convince prosecutors to conservatively draft proffer agreements to ensure their enforceability. Where prosecutors fail to do so, they risk not only the enforceability of a proffer agreement, but also irreparable damage to the rights of criminal defendants and the integrity of the criminal justice system. And while Wills represents an enormous victory for the prosecution, prosecutors should not lose sight of fair play and seek to serve criminal justice in each step of the prosecution.