

Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements after *Mezzanatto*

BY DAVID P. LEONARD

You are a prosecutor. A new case file has been placed on your desk. The defendant is in custody, charged with first-degree murder. A quick review of the file shows that the case is not open-and-shut. There were no eyewitnesses to the killing. But the defendant's rap sheet reveals a number of arrests and a couple of assault and battery convictions, and a note in the file states that the police suspect that the defendant is an "enforcer" who works for the biggest drug supplier in the city. In addition, it appears that the victim worked for another supplier who wanted to take over the territory. You suspect the defendant killed the victim on his boss's orders, but at this point it's only a suspicion. You could take the case to trial, but you also see this as an opportunity to take down the defendant's boss and make a real dent in the city's drug traffic. You begin to think about how to approach the defendant.

Now imagine you are a public defender assigned to the same case. You've met with the defendant and you've seen his rap sheet. You know the prosecution's case will be largely circumstantial, but you also believe that in the current climate of fear, it will be hard to find jurors willing to take seriously the prosecutor's burden to prove guilt beyond a reasonable doubt. Your client seems to understand his situation and might be willing to go for a deal: He will provide a sworn statement giving details of his boss's operations in exchange for a plea to second-degree murder and a recommended sentence on the light side. You begin to consider how to represent the defendant in an upcoming meeting with the prosecutor.

Federal Rule of Evidence 410

Whether prosecutor or public defender, you know the drill. The prosecutor won't talk about a deal unless the defendant agrees to waive certain rights under Federal Rule of Evidence 410 or its state counterparts. In simple terms, Rule 410 makes several types of evidence inadmissible against the defendant who makes a plea or participates in discussions aimed at reaching a plea bargain:

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- (1) Guilty pleas and pleas of nolo contendere;
- (2) Statements made in a hearing to enter a plea; and
- (3) Statements made in the course of plea bargaining with a prosecutor (or his or her agent).

(The rule withdraws the protections for statements made in plea hearings or plea bargaining under certain circumstances.)

The protections afforded by Rule 410 are crucial to both the government and the accused. Both sides know that settlement is a necessity in the criminal justice system. In fact, the system cannot function unless only a small percentage of cases are tried. Rule 410 gives both parties an incentive to plea bargain. Accused persons, or those on whom an investigation has focused (for convenience, we'll refer to these persons as "defendants") know they can speak freely with prosecutors, and even admit participation in the crime or offer to plead guilty, without fear that their words will be used against them if the discussions fail to yield a plea bargain or if any agreement that is reached falls apart. The government benefits from the rule because it can avoid having to try too many cases.

If you're the prosecutor, however, you have a problem with Rule 410: Except under very limited circumstances, it does not impose a cost upon the liar. It is even arguable that the circumstances of plea negotiations *encourage* lying in certain crucial ways. First, to improve the chances of pleading guilty to a much-reduced charge and obtaining a recommendation for a lenient sentence, defendants have an incentive to minimize their role in the crime, even if they played a more central part. Second, to entice the prosecutor into a deal, defendants might significantly overstate the roles of others, particularly any "kingpin" in whom the prosecutor has shown interest.

Defendants see things very differently, however. Whether guilty or innocent, defendants recognize that the rule provides the only protection against adverse use of any accidental slip or inconsistency, however minor, in what they say during the negotiations. Absent the rule's protection, in fact, one might well expect defense attorneys to urge their clients to say little or nothing during plea negotiations, and, in particular, to avoid any admission of wrongdoing. One never knows in advance whether plea negotiations will succeed, and if the rule did not protect statements made during the talks, and if no agreement was reached, a defendant's own words almost certainly would doom him or her at trial.

In addition, the rule helps to provide some balance to a system that, aside from placing a heavy burden of proof on the prosecution, is largely controlled by the government from grand jury through trial.

Given the inherent conflicts brought about by Rule 410, it should be no surprise that prosecutors have developed a tool to make lying during negotiations costly: the waiver agreement. In our hypothetical case, the prosecutor enters the room where the defendant and his attorney are waiting, and, before saying anything about the case, places a document in front of defendant. In relevant part, it states that in the event the case goes to trial, “the government may use statement made by defendant, whether oral or written and including defendant’s formal proffer, to rebut any evidence offered or elicited, or factual assertions made, by or behalf of defendant at any stage of the case.” (Cf. *United States v. Barrow*, 400 F.3d 109, 116 (2d Cir. 2005).) What should a defendant do? The Supreme Court has made one thing clear: Such agreements, if entered into “voluntarily,” are enforceable.

Mezzanatto and Its Progeny

In *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Supreme Court considered and rejected several attacks on the enforceability of waiver agreements. First, Mezzanatto claimed that Evidence Rule 410 and Federal Rule of Criminal Procedure 11(e)(6) create a “guarantee [to] fair procedure” that cannot be waived because the rights involved are so fundamental to the reliability of the fact-finding process that their waiver would irreparably discredit the federal courts. Consistent with the concern of prosecutors that the plea rule encourages lying, the Court responded that enforcement of waiver agreements would in fact enhance, not impede, truth determination. (*Id.* at 206.) Second, Mezzanatto argued that waiver is fundamentally inconsistent with the policy of the rules to encourage voluntary settlement. Because the prospect of waiver might cause defendants to hesitate before entering into plea negotiations, enforcement of waiver agreements would impede the process. The Court rejected the premise of this argument as well. (*Id.* at 206-07.) Finally, Mezzanatto argued that waiver agreements invite prosecutorial overreaching and abuse. In particular, he pointed to the disparity of bargaining power between a criminal defendant and the prosecutor, stating that agreements reached in such circumstances are “inherently unfair and coercive.” The Court did not reject the premise that unequal bargaining power exists, but stated that the dilemma faced by defendants in this setting “is indistinguishable from any of a number of difficult choices that criminal defendants face every day.” (*Id.*) The mere potential for abuse “is an insufficient basis for foreclosing negotiation altogether” and the proper way to deal with prosecutorial overreaching is through “case-by-case inquiries into whether waiver agree-

ments are the product of fraud or coercion.” (*Id.*)

At the end of his opinion for the Court, Justice Thomas hinted that *any* protections afforded by Rule 410 could be waived: “We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.” (*Id.* at 210.) Three justices put some distance between themselves and this dictum by joining in a concurring opinion. (*Id.* at 211, Ginsburg, J., joined by O’Connor, J., and Breyer, J.) There were also two dissenters (Justices Souter and Stevens). In *Halbert v. Michigan*, 545 U.S. 605 (2005), the Supreme Court found at least some limit to waiver, holding that a criminal defendant did not waive his constitutional right to appointed counsel on a first-level appeal when he pleaded *nolo contendere* to the criminal charges. Even the dissenters in *Halbert* recognized that some rights are “so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts,” though they would not have applied that principle to the right to appointed counsel on a discretionary appeal from a guilty plea. (*Id.* at 637-38 (Thomas, J., dissenting) (quoting *Mezzanatto*, 513 U.S. at 204).)

Mezzanatto only dealt with voluntary agreements waiving the right not to have plea bargaining statements used against the defendant. At the same time, however, a majority of justices seemed willing to extend the ruling to at least some other rights accorded by the rule. And a number of federal courts have approved of agreements waiving other rights contained in Rule 410.

Some cases have dealt with the voluntariness issue. It seems clear that claims of involuntariness must be based on specific circumstances, and not on the general assertion that the choice of accepting a plea agreement or going to trial on the pending charges is inherently coercive. (*See United States v. Swick*, 262 F.3d 684, 686-87 (8th Cir. 2001) (“All defendants in plea negotiations struggle with the issue of whether to plead guilty or to take their chances at trial”.) Attempts to demonstrate involuntariness due to specific circumstances occasionally succeed. In *United States v. Young*, 73 F. Supp. 2d 1014, 1018-1019 (N.D. Iowa 1999), for example, the court invalidated a waiver because the defendant had not been told that, absent the agreement, his plea statements could not be used against him. In reaching this conclusion, the court applied the test of such cases as *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998), which held that valid waiver requires that the defendant be aware of both the right being abandoned and the consequences of abandonment. (*Id.* at 1021.) In this case, the waiver was invalid because neither the plea agreement nor the explanation of Young’s counsel was specific enough to apprise him of the rights he was abandoning and the consequences of

that decision.

Other courts have upheld waiver agreements against claims of involuntariness. For example, in *United States v. Parra*, 302 F. Supp. 2d 226 (S.D.N.Y. 2004), the court enforced the agreement because defendant's counsel translated it verbatim, specifically explained the provision at issue, and even provided an example. The court held that counsel "hardly could have done more to ensure that Parra understood the broad terms of the waiver in the Agreement." In *United States v. Sanders*, 341 F.3d 809 (8th Cir. 2003), the defendant and his counsel read the waiver agreement, the prosecutor generally explained its contents to him, and he signed the agreement. When the case went to trial, some of the defendant's statements were used against him at sentencing. On appeal, the defendant claimed he did not understand the extent of his waiver or its ramifications. Specifically, he claimed that the failure to explain the agreement "paragraph by paragraph" led to his belief that he was waiving rights only as to future prosecutions and not to the pending charges. The court held that to avoid enforcement of the agreement, he would have to show that his "will was overborne," and that his claim did not rise to that level. (*Id.* at 817. See also *United States v. Sa'ad El-Amin*, 268 F. Supp. 2d 639 (E.D. Va. 2003) (upholding language stating that if a defendant "fails to fulfill the obligations under this

ited, or factual assertions made, by or on behalf of [Duffy] at any stage of a criminal prosecution (including but not limited to detention hearing, trial, or sentencing)."

Another clause of the agreement specifically stated that the exclusionary provisions of Criminal Procedure Rule 11(e)(6) and Evidence Rule 410 did not apply to Duffy's proffer. Duffy's proffer included his admission to participation in a securities fraud conspiracy. The government, however, refused Duffy's offer to plead guilty to a misdemeanor. At trial, Duffy argued that the portion of the waiver agreement set forth in quotes above was effectively a waiver of trial, an effect he did not know about when he signed the agreement. The government responded that the provision would only be effective if Duffy or his counsel made or solicited any statement that contradicted the proffer, including assertions made by counsel in the opening statement or in closing argument. The government conceded, however, that this provision did not leave Duffy with many options if he did not want to open the door to use of the proffer.

The trial court struck down this part of the waiver, distinguishing it from the agreement in *Mezzanatto*:

Unlike the waiver at issue in *Mezzanatto*, paragraph 2(C) cannot fairly be viewed merely as the waiver of an evidentiary rule. To the contrary, paragraph 2(C)

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plea agreement, the defendant shall assert no claim under [the Constitution, any statute, Evidence Rule 410, Criminal Procedure Rule 11(e)(6)] or any other federal rule, *that defendant's statements pursuant to this agreement or any leads derived therefrom, should be suppressed or are inadmissible*" (emphasis added); phrase "pursuant to this agreement" allowed admission of statements made both after the agreement was signed and other statements made as part of the plea agreement process.)

The experience of the Second Circuit in dealing with waivers is particularly instructive. In *United States v. Duffy*, 133 F. Supp. 2d 213 (E.D.N.Y. 2001), a securities fraud case, Duffy wanted to negotiate a cooperation agreement, but the prosecutor, following standard procedure, would not enter into such an agreement until Duffy made a factual proffer and described how he would assist the government. Before the proffer session, Duffy signed a "standard," non-negotiable proffer agreement that stated that the government would have the right to use Duffy's statements (1) to obtain leads to other evidence; (2) as substantive evidence during Duffy's cross-examination should he testify; and (3) "as substantive evidence to rebut any evidence offered or elic-

implicates Duffy's Sixth Amendment rights to make a defense and to have the effective assistance of counsel in making that defense. While paragraph 2(C) does not require Duffy's attorney to sit silently at trial, it does prevent him from making any sort of *meaningful* defense. Practically speaking, all that Duffy's counsel can do is to argue reasonable doubt. He can assert that the government's witnesses did not see Duffy doing anything illegal or that those witnesses simply should not be believed. However, any affirmative theory of factual innocence, including, for example, any argument that there was no conspiracy or that Duffy had no part in it, would permit the government to offer Duffy's proffer.

(*Id.* at 216.)

Other federal trial courts in the Second Circuit reached different conclusions. For example, the court in *United States v. Gomez*, 210 F. Supp. 2d 465 (S.D.N.Y. 2002), explicitly rejected *Duffy* insofar as it holds inadmissible as a matter of law an agreement that proffer statements may be used against the defendant to rebut any arguments or evidence offered on the defendant's behalf, whether or not

the defendant testifies. The court held valid an agreement providing that the government could not use in its case-in-chief or at sentencing any statements made by the defendant during the meeting, but that “the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should Client testify, or to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised sua sponte by the District Court) at any stage of the criminal prosecution (including bail, trial, and sentencing), should any prosecution of Client be undertaken.” The case went to trial, and though the defendant did not testify, the court read the agreement as permitting the government to use the defendant’s statements for the purposes of impeachment, including rebuttal of arguments made by counsel at trial that are inconsistent with the statements. (*Id.* at 469.) In fact, the court viewed fairness in this situation as favoring upholding rather than invalidating the agreement “as long as a defendant enters into a proffer agreement knowingly and voluntarily and the terms of the proffer agreement are clear and unambiguous.” (*Id.* at 475.) The court also declined to follow the *Duffy* court’s claim that upholding the agreement would effectively deny the defendant the opportunity to present a defense:

Defense counsel are able to put on a meaningful defense without opening the door to the admission of proffer statements. As in this case, defense counsel are certainly able to challenge the credibility of the Government’s witnesses and the weight and sufficiency of the Government’s evidence. . . . Moreover, the Government has not suggested that a claim that a defendant is factually innocent, by itself, would open the door to admission of the proffer statements.

Finally, in the end enforcement of a proffer agreement does not preclude defense counsel from taking a position or presenting evidence inconsistent with a defendant’s proffer statements. She may do so. But if she does, however, it is only fair that the Government then be permitted to present the defendant’s own words in rebuttal. In addition, it is difficult to conceive of a good faith basis for an argument by counsel that contradicts her client’s own statements made when the client had great incentive to tell the truth.

(*Id.* at 476.)

The court also held that the agreement was “clear and unambiguous” and that the defendant was represented by experienced counsel when he signed it. (*Id.*)

In *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004), the Court of Appeals for the Second Circuit disapproved of *Duffy* when it held enforceable an agreement essentially

identical to the one at issue in *Gomez*. The court held that if the agreement is unenforceable, the defendant will have a reduced incentive to be truthful. The court then wrote that “invalidating a waiver provision like the one before us would clearly interfere with plea bargaining and cooperation efforts—in direct contravention of the criminal justice system’s legitimate goal of encouraging plea bargaining in appropriate circumstances. . . .” And though the court did not “lightly dismiss the observation in *Duffy* that the Government holds significant bargaining power in arranging proffer sessions and securing a waiver provision as a prerequisite for a defendant’s participation,” any such disparity “is likely attributable to the Government’s evidence of the defendant’s guilt.” (354 F.3d at 195-96.) Defendants are still free to present evidence at trial that is inconsistent with their proffer, even though the consequence is that the government will then have the opportunity to rebut the defendants’ evidence with their “own words.” (*Id.* at 196.)

Trial courts in the Second Circuit have concluded that the government’s right to use a defendant’s proffer statement pursuant to a waiver agreement may be triggered by factual assertions made in defense counsel’s opening statement. In *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005), for example, the defendant was charged and convicted of possession with intent to distribute heroin and cocaine. During the opening statement, defense counsel identified another person as the perpetrator of the crime. The court held that “[t]he mere fact that a defendant pleads not guilty and stands trial is not a factual assertion that triggers the proffer agreement waiver,” *id.* at 118, nor is the waiver triggered when counsel’s argument attempts to show why the evidence is insufficient to support a conviction. (*Id.* at 118-19.) However, factual assertions such as those made in this case opened the door to the government’s introduction of inconsistent proffer statements. (*Id.* at 119-20.)

Some courts have held that in the presence of an otherwise valid waiver, the prosecution may impeach evidence presented by a defendant even if that evidence is elicited during examination of witnesses other than the defendant. For example, in *United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998), the defendant did not testify but elicited favorable testimony inconsistent with his proffer during cross-examination of friendly government witnesses, and the defendant’s counsel based portions of the argument on the evidence obtained in that matter. The court held that “evidence is evidence,” and that the trial court acted properly in allowing the prosecutor to introduce the defendant’s own statements to impeach. (*Id.* at 1025.) The court held that if one may present a factual position through arguments of counsel, “it is easy to see how a position can be ‘presented’ by evidence developed on cross-examination and elaborated by counsel. When the prosecution’s witnesses are inclined to accommodate the defense, as many were in this case, de-

veloping one's position through cross-examination is especially attractive." (*Id.* See also *United States v. Rebbe*, 314 F.3d 402, 407 (9th Cir. 2002) (where the waiver was worded broadly to permit the government to "'rebut any evidence, argument or representations' offered by defendant or on his behalf in connection with the trial," the trial court properly permitted the prosecution to introduce defendant's proffer statements to rebut inconsistent evidence presented by defendant's witnesses and elicited on cross-examination of government witnesses; the government did not seek to introduce such evidence during its case-in-chief).)

Courts have reached different conclusions about whether the government may use a waiver agreement to introduce the defendant's proffer statements during its case-in-chief. Some courts have permitted the practice. For example, in *United States v. Burch*, 156 F.3d 1315 (D.C. Cir. 1998), the defendant signed an agreement calling for him to assist law enforcement and waiving Rule 410 rights with regard to his statements. The discussions ultimately broke down and the case went to trial. The trial court held that statements the defendant had made during the hearing to enter the plea and at a later debriefing with drug enforcement authorities would be admissible as part of the prosecution's case-in-chief. On appeal, the defendant argued that this was error, but the court held that none of the principles or policies on which *Mezzanatto* relied would require different treatment of statements offered to rebut or impeach, on the one hand, or statements offered as part of the prosecution's affirmative case, on the other. (*Id.* at 1321-22.) Similarly, in *United States v. Marcos-Quiroga*, 2007 WL 1724898 (N.D. Iowa 2007), the court held enforceable an agreement that provided, in part:

[I]f the defendant violates any term or condition of this plea agreement, in any respect, the entire agreement will be deemed to have been breached and may be rendered null and void by the United States. The defendant understands, however, that the government may elect to proceed with the guilty plea and sentencing. These decisions shall be in the sole discretion of the United States. If the defendant does breach this agreement, he faces the following consequences: (1) all testimony and other information he has provided at any time to attorneys, employees or law enforcement officers of the government, to the court, or to the federal grand jury, may and will be used against him in any prosecution or proceeding. . . .

The court held that the agreement allowed the government to use the defendant's statements in its case-in-chief as well as to impeach. Some state courts have reached the same conclusion. (See, e.g., *People v. Stevens*, 610 N.W.2d 881 (Mich. 2000); *State v. Miller*, 1997 WL 674673 (Ohio App. 1997) (unpublished opinion).)

There is authority reaching the opposite conclusion as to substantive use of a defendant's statements. (See, e.g., *United States v. Ford*, 2005 WL 1129497 (D.N.J. 2005) (not reported in F. Supp. 2d) (waiver allowing prosecutor to cross-examine defendant and to rebut evidence or argument offered on his behalf did not give government the right to use defendant's proffer statements if defense counsel merely argues innocence or points to gaps in the government's evidence; the statement would become admissible only if defendant presents evidence inconsistent with his proffer statement, and thus the statement may not be used during the government's case-in-chief); *State v. Pitt*, 891 A.2d 312 (Md. 2006) (court read *Mezzanatto* as approving only impeachment use of defendant's statements).)

Back to the Question: What Should a Defendant Do?

Regardless of one's views about the wisdom of the Supreme Court's decision in *Mezzanatto*, and regardless of whether the defendant is innocent or guilty, it is difficult to dispute that the prosecutor's demand for waiver as a condition for plea negotiations puts the defendant in a difficult position. If he or she refuses to speak with the prosecutor on those terms, the defendant will likely have to go to trial on the maximum charge the prosecutor believes the evidence will support. If the defendant agrees to the prosecutor's terms but, despite subsequent negotiations, the parties are unable to reach a plea agreement, the defendant risks having everything he or she says reviewed with a fine-toothed comb for the slightest inconsistency with any testimony offered at trial.

It is at this point that a criminal defendant will rely heavily on the advice of the defense attorney. First, the attorney should make sure that the client knows the options. In this hypothetical situation, those options include accepting the prosecutor's terms, trying to negotiate somewhat more favorable terms, or forgoing discussions altogether and proceeding to trial. The attorney must also help the client identify and assess the likely consequences of each alternative and the relative advantages and disadvantages of each. Some of these, such as the likelihood of a bad outcome at trial, are easy to identify but must still be weighed. Other relevant considerations, such as the indirect consequences of a conviction (reputational harm, effects on employment, and so forth) are more subtle and might not cross the defendant's mind at this stressful time. Ultimately, of course, it is the client's decision, but the attorney's role is crucial. A "waiver" is not a waiver if it is not made with understanding.

Defense counsel can do more than this, however. For example, if meaningful negotiation seems possible and the circumstances permit, the defense attorney might be able to persuade the prosecutor of the value of the client's testimony in the trial of a codefendant or other alleged perpetrator. Recall that in the hypothetical proposed at the beginning of this arti-

cle, the prosecutor sees a possible opportunity to go after the “kingpin” who allegedly was the defendant’s boss. For that reason, the defendant’s testimony might seem particularly valuable to the prosecutor. But to help a defendant in a situation such as this, defense counsel must be prepared. Counsel should learn exactly what the client would state when called as a witness, and should be prepared to lay out that proposed testimony for the prosecutor, in detail. From the prosecutor’s perspective two convictions are better than one, and the more the prosecutor knows about how the client’s testimony will assist his or her case, the more likely the prosecutor will be to soften the terms of the offered plea bargain. In such discussions, defense counsel should focus on the prosecutor’s prior demands for waiver of Rule 410 rights and seek to limit the types of such waivers or at least reduce their reach.

Even if the courts continue to interpret *Mezzanatto* so as to permit broad waivers of Rule 410 rights, there is ample room for defense counsel to insert language in the agreement that clarifies the scope of those waivers, particularly by specifying the conduct that will trigger the waiver. Courts apply general principles of contract law to the interpretation of plea agreements. (See, e.g., *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1212-13 (10th Cir. 2008) (“In interpreting a plea agreement, we rely on general principles of contract law . . . and therefore ‘look to the express language in the agreement to identify both the nature of the government’s promise and the defendant’s reasonable understanding of this promise at the time of the entry of the guilty plea,’” quoting *United States v. VanDam*, 493 F.3d 1194, 1199 (10th Cir. 2007).) Those principles generally lead courts to construe ambiguities against the drafter, *id.* at 1213, but defense counsel must not rely on a court to rule in the defendant’s favor about the meaning of a particular term merely because the prosecution drafted it. It is far better to anticipate possible ambiguity and seek as much clarification as possible.

For example, recall that in *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005), the court held that a waiver provision was triggered by factual assertions defense counsel made in the opening statement. Had the plea agreement made clear that statements of counsel inconsistent with the defendant’s proffer statement would trigger the waiver, counsel would not have made those assertions. Defense counsel also should scrutinize proposed plea agreement language carefully to anticipate possible ambiguity. As discussed above, the plea agreement in *United States v. Duffy*, 133 F. Supp. 2d 213 (E.D.N.Y. 2001), stated that the government would have the right to use Duffy’s statements “as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [Duffy] at any stage of a criminal prosecution. . . .” Are statements made by defense counsel in the presence of the jury, even though not “evidence,” among the types of “factual assertions” contemplated by the

government lawyer who drafted the nonnegotiable agreement? Most likely yes, but clarifying that issue during plea negotiations is far better than having to argue later, after having jeopardized the defendant’s case, that the language is ambiguous.

In situations where the plea agreement requires the defendant’s cooperation and testimony, defense counsel should think ahead to the possibility that the prosecutor later will question the truthfulness or value of the defendant’s proffer or testimony and, claiming that defendant has breached the agreement, seek to have the charges reinstated. In anticipation of such an occurrence, defense counsel should try to include in the plea agreement an explicit acknowledgment that the court and not the prosecutor has the ultimate authority to determine whether either party has breached the agreement and to determine the consequences of that breach.

Occasionally, it might be possible for defense counsel to force the prosecutor’s hand more strenuously. For example, suppose the prosecution makes certain broad waivers a precondition of any negotiation, and defense counsel has reason to believe the trial judge will find the precondition unreasonable. In those cases, the threat of a motion to compel the prosecutor to drop those demands might be sufficient to break the logjam. Indeed, as argued in another article in this issue of *Criminal Justice* (see “Criminal Justice Matters” column), the failure of defense counsel to seek trial court intervention in the face of prosecutorial refusal to negotiate can constitute ineffective assistance.

In short, even in the face of *Mezzanatto*, there is much a defense attorney can do to protect the client’s interests. Difficult as it might be for overburdened criminal defense attorneys to do so, it is important to assess the appropriate steps according to the circumstances of each case. As busy as they are, prosecutors as well need to be flexible about the terms of plea agreements and consider the advisability of alterations in otherwise “standard language” to fit the circumstances of the case.

The realities of day-to-day practice in our nation’s criminal courts do not give either defense attorneys or prosecutors a great deal of time for what might seem merely “preliminary” matters such as whether to enter into plea negotiations and whether there should be preconditions for negotiation. Case-loads are huge and attorneys are severely pressed for time. If the Supreme Court had decided in *Mezzanatto* that rights accorded by Rule 410 could not be waived, the costs of merely holding plea discussions would be minimal in most cases and there would not be a need for extensive client counseling on that question. After *Mezzanatto*, however, the landscape of plea negotiations is littered with land mines, and the defense attorney must uncover for the client as many of these as possible. From the moment the prosecutor hands the client the waiver agreement and a pen, the defense attorney’s role as counselor must take center stage. ■