ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Q&A with the Hon. William W. Bedsworth

By Ben P. Ammerman

[*Editorial Note: Justice Bedsworth has served as Associate Justice for the California Court of Appeal, 4th District, Div. 3 since 1997. After graduating from Boalt Hall in 1971, he joined the Orange County District Attorney's Office, during which he was elected twice to the Board of Directors of the Orange County Bar Association. He was elected to an open seat on the Orange County Superior Court in 1986 where he served until his appointment to the appellate court. Outside of his judicial career, Justice Bedsworth may be best known for his nationally-syndicated monthly humor column, "A Criminal Waste of Space," which appears locally in the Orange County Lawyer. Of interest to hockey fans, he recently retired from a 15 -year career as a National Hockey League goal judge.*]

Q: If you had one lesson or anecdote that you would share with young attorneys, what would that be?

A: This is a long answer using two stories. I was asked to be second chair on a murder case with Bob

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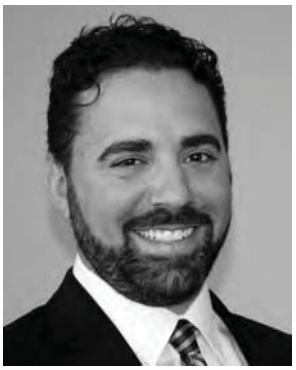
The Art of 998 Offers to Compromise

By Evan Rothman and Shannon C. Lamb



Every business litigator will inevitably grapple with offers to compromise pursuant to Code of Civil Procedure section 998 (hereinafter "Section 998"). Section 998 encourages settlement of litigated matters by providing a financial disincentive to reject a reasonable pre-trial offer. It provides a rubric for settlement offers that may significantly impact litigation -- whether or not the offer is ultimately accepted

Section 998 employs a "carrot and stick" approach whereby the legislature has incentivized parties to settle cases early on while penalizing parties who fail to accept reasonable settlement offers. The statute provides that "[t]he costs allowed under Section [] 1032 shall be withheld or augmented as provided in this section." This "cost shifting" can be a powerful tool in leveraging a case and can, if done correctly, allow a party to recoup the lion's share of its costs, including expert witness fees and, in certain circumstances, attorneys' fees.

It seems, however, that many attorneys have only a general understanding of statutory offers to compromise, which can prevent even experienced business litigators from taking full advantage of this highly effective litigation tool. This article discusses several aspects of Section 998 offers that have recently been litigated, and that can allow business litigators to use Sec-

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Keeping Internal Investigations Internal

By Kenneth M. Miller

A. THE COMPANY'S STRONG INTEREST IN COOPERATION

A company-sponsored investigation into facially supportable allegations of its own wrongdoing is generally in *the company's* interest. Such investigations are typically conducted by outside counsel. When the investigation uncovers evidence of potential criminal wrongdoing, the company is faced with the decision of whether to disclose this evidence to law enforcement, particularly the US Department of Justice (including the Department of Justice, the US Attorneys Office and the Federal Bureau of Investigation). This article discusses some basic concepts behind internal investigations of a company's own alleged misconduct, and then discusses hurdles to keeping the product of the investigation, including attorney work product and attorney-client communications, from being disclosed, especially to former employees identified as wrongdoers in the investigation.

Federal prosecutors reward companies that disclose their own wrongdoing. Here, "reward" is a relative term: it means less punishment. If the government never finds out about the wrongful conduct, then the government's reward is probably more punishment than the company would have received without disclosing its own misconduct.

Nonetheless, companies *do* have great incentive to seek such rewards. Companies can be convicted for the illegal acts of their directors, officers, employees, and agents where the conduct was within the scope of their duties and they were motivated (at least in part) to benefit the company. *See United States v. Potter,* 463 F.3d 9, 25 (1st Cir. 2006). That is a low bar because the company can be held criminally responsible for the acts of almost any employee. And a criminal conviction can have a huge impact on a company. For example, "Big Five" accounting firm Arthur Anderson was convicted of obstruction of justice. By

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Pre-Dispute Arbitration Agreements After Concepcion

By Michael A. Hood

I. INTRODUCTION

Businesses in California have been hit on all quarters by a spate of class actions, with consumer class actions challenging their business decisions from the outside, and wage and hour class actions attacking their employment practices from the inside. These class actions have significantly increased the costs of doing business in California, and have spawned a number of attempts by employers to reduce or limit their involvement in such suits. As occurred in an effort to eliminate the possibility of adverse jury verdicts in wrongful termination and similar suits 20 years ago after the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U. S. 20 (1991), many employers have attempted to address the class action problem by imposing arbitration agreements on consumers and employees both, and including in mandatory arbitration agreements express waivers of the consumer's or employee's right to pursue class actions. Prior to last year, such efforts met with limited success, as many state courts and legislatures, including in California, imposed restrictions on a business's ability to compel customers and employees to waive their rights to bring class actions.

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court changed the legal landscape regarding the enforceability of arbitration agreements with class action waivers. The Supreme Court held that the Federal Arbitration Act, 9 U.S.C. Sections 1, et seq. ("FAA"), preempts a California law that limited the enforceability of class-action waivers in such agreements. In the balance of this article, I will address the implications of the *Concepcion* decision for employers and others seeking to avoid class actions through arbitration agreements in which the right to engage in class or other representative actions is waived.

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Conclusion

Section 998 offers can be a useful and powerful tool in business litigation. A well thought out offer can significantly reduce a client's potential liability and can even help a savvy litigator snatch a small victory from the jaws of defeat.

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leading sports lawyers in the United States. Mr. Jacobs is an athlete's lawyer with a practice that focuses on the representation of athletes. Mr. Jacobs has represented professional athletes, Olympic athletes, and amateur athletes in disputes involving doping, endorsements, team selection issues and other matters. Mr. Jacobs' clients have included Floyd Landis, Tim Montgomery, Marion Jones and Tyler Hamilton. Mr. Jacobs is a former professional triathlete and former college athlete.

Jeffrey G. Benz: Mr. Benz is an arbitrator for the Court of Arbitration for Sport. Mr. Benz is the former General Counsel of the United States Olympic Committee and the AVP Pro Beach Volleyball Tour.

ABTL-OC is looking forward to this program exploring the intersection of sports and the law.

ABTL's 39th Annual Seminar will also take place in September; specifically, September 19-23, 2012, at the Grand Hyatt Kauai Resort & Spa. California's Chief Justice Tani Cantil-Sakauye will deliver the keynote address on Saturday, September 22. I hope that many ABTL-OC attorneys will plan to attend.

Thank you for your continued support of ABTL-OC. I look forward to seeing you at our 2012 events. Go USA!

♦*Melissa R. McCormick is a partner at Irell & Manella.*

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the time that conviction was overturned by the U.S. Supreme Court, the once mighty firm was no longer a viable business.

So there is a balancing that goes into the decision whether to self report. But once the decision to disclose is made, it is generally based on the idea that the company has criminal exposure and it wants to limit that exposure. By disclosing and resolving such issues, the company may obtain an express declination to prosecute, a deferred prosecution, or a significantly reduced penalty. For example, being permitted to plead guilty to a misdemeanor that does not require intentional conduct or otherwise preclude the company from doing business with the federal government can be the difference between life and death for a company.

Many companies, on the advice of their lawyers, sponsor internal investigations of alleged wrongdoing by their employees. But the companies and their lawyers should know that unlike a lot of traditional advice lawyers give, cooperation raises challenges to preservation of the attorney-client privilege and work product protection.

B. THE "INTERNAL" INVESTIGATION MAY NOT REMAIN CONFIDENTIAL

Once an internal investigation reveals potential criminal liability, counsel will often advise the disclosure of evidentiary material to the government, while maintaining work product and the attorney-client privilege over material they created. The US Department of Justice used to demand companies waive such privileges in order to obtain credit for their cooperation, but after a sustained uproar by the corporate criminal defense bar, the DOJ backed off. Now companies can obtain full cooperation credit while maintaining their privileges, provided they disclose the underlying, relevant facts to the government.

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1. When A Company Investigates With An Eye Towards Cooperation, Is the Product of its Investigation Even Confidential?

In order for the attorney-client privilege to apply, the communication sought to be protected must, among other things, be made in confidence. *United States v. Bergonzi*, 216 F.R.D. 487, 493 (N.D. Cal. 2003) (citing *In re Grand Jury Invest*., 974 F.2d 1068, 1071 (9th Cir. 1992)). Communications between a client and attorney made for the purpose of relaying information to a third party may never have been intended to be confidential. *Id.* at 493 (citing *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1204-05 (C.D. Cal. 1999)). For example, in *Bergonzi*, defendants were former corporate executives who sought production of the company's internal investigation report and underlying materials prepared by outside counsel (the "Report and Back-up Material"), including interview memoranda. *Id.* at 490. The defendants argued that the attorney-client privilege did not apply to the Report and Back-up Material because they were prepared for the government to obtain leniency and not to assist in providing legal advice, and the company waived any claim of privilege by voluntarily producing the materials to the government. *Id*. at 492.

The district court noted that it was undisputed that counsel was retained to gather relevant facts and to develop an effective legal strategy. But counsel agreed to turn the Report and Back-up Materials over to government investigators (pursuant to confidentiality agreements) before they were created. *Id*. at 493. The confidentiality agreements stated that the documents were created to provide "legal advice," were protected work product and protected by the attorney-client privilege, and that the company did not intend to waive protection "from further disclosure." *Id.* But they also made clear that the subpoenaed Report and Back-up Material would be disclosed to the government. *Id.* The confidentiality agreements also gave the government discretion to "determine that disclosure is otherwise required by federal law or in furtherance of [either entities'] discharge of its duties and responsibilities," and the company "consented to the disclosure of the documents to a federal grand jury as the [USAO] deem[ed] appropriate, and in any criminal prosecution that [resulted] from the [USAO's] investigation." *Id*. at 494.

Accordingly, the district court rejected the company's argument that it intended the Report and Back-up Material at issue to remain confidential. *Id*. at 493-94. "It is difficult for the Court to imagine how the communication between the company and [counsel] were confidential communications between attorney and client when [counsel] prepared the Report and Back-up Material after the company agreed to disclose the same to the Government." *Id*. at 494 n.7. "Such a disclosure conflicts with the underlying rationale behind the privilege, namely that the privilege encourages frank discussions between an attorney and his client." *Id.* Likewise, any work product protection was waived when the materials were disclosed to the government. *Id.* at 498.

Not all courts view the issue as that black and white. Some courts have applied a "selective waiver" doctrine; that is, a corporation can waive the privilege as to some adversaries (like the government), but still assert it as to others. *See generally Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1978) (en banc). However, most courts have rejected the selective waiver doctrine. *See, e.g. In re Pacific Pictures Corp.*, 2012 WL 1293534 at *4, __ F.3d. __ (9th Cir. 2012) (rejecting reasoning of *Diversified* and the selective waiver doctrine).

2. The Protected Status of Work Product Is Precarious When the Internal Investigation Leads to Criminal Charges

To the extent the investigation is "work product," at least one court has held that work product protection does not even apply. In *United States v. Graham*, 555 F. Supp. 2d 1046, 1051 (N.D. Cal. 2008), the district court rejected the United States Anti-Doping Agency's claim that its attorneys' interview notes and memoranda could be withheld from the defendant on work product grounds because the agency was not a party to the criminal case.

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Even where non-opinion work product is protected, it can usually be overcome upon a showing of substantial need and the inability to obtain equivalent information without undue hardship. *See Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981). Former employees will likely be able to show a "substantial need" for the interview memoranda of persons who will testify against them. "By their very nature, these statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time." *Cuthbertson*, 630 F.2d at 148. So work product protection may be overcome. (This raises a potential major difference between state and federal law. The U.S. Supreme Court has held that "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399. Conversely, California Appellate Courts have held that "statements or reports that merely reflect what an intended witness said [to an attorney] during an interview are not work product." *Roland v. Superior Court*, 124 Cal.App.4th 154, 158 (3rd Dist. 2004).)

In fact, even opinion (or "core") work product—the investigating attorney's thoughts and impressions—may be fair game "when mental impressions are *at issue* and the need for the material is compelling," *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (emphasis added). Where defendants claim they were unfairly targeted in a company's internal investigation, the "competency" of the investigation may be at issue. Because the Supreme Court has recognized the value to the defense of an attack upon the competency of a criminal investigation, *see Kyles v. Whitley*, 514 U.S. 419, 446 (1995), the attorney's opinions and strategy may also be discoverable.

C. EVEN IF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES APPLY, THEY MAY BE OVERCOME IN CRIMINAL PROCEEDINGS AGAINST THE FORMER EMPLOYEE

1. The Confrontation Clause Trumps Privilege

A criminal defendant has the constitutional right to obtain witness statements that are necessary to the effective cross examination of the government's witnesses. In *Murdoch v. Castro,* 609 F.3d 983 (9th Cir. 2010) (en banc), the prosecution's key witness had previously written a letter to his attorney explaining that Murdoch did not commit the crime and that the witness had only accused Murdoch because of police coercion. *Id.* at 987. Murdoch's counsel requested the letter but the trial court held that it was protected by the attorney-client privilege and could not be used to cross-examine the cooperator. *Id.* The issue on *habeas* was whether "clearly established Supreme Court precedent" required that the attorney-client privilege yield to a defendant's confrontation clause rights. *Id.* at 995. The Ninth Circuit held that because a state court *could* draw a "principled distinction" between the facts of that case and Supreme Court precedent, the law was not "clearly established" and Murdoch was denied *habeas* relief**.**

Judge Kozinski argued in dissent that the Sixth Amendment right to confrontation is clearly established. *Id*. at 1002 (J. Kozinski, dissenting) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965) and *Crawford v. Washington*, 541 U.S. 36 (2004)). When an accomplice testifies against a defendant, he "must either be subject to rigorous cross-examination or stand mute before the jury." *Id.* at 1003 (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)). "[F]orcing a witness to confront and explain his prior statements that contradict his testimony is the gold standard for effective cross-examination." *Id.* (citing *Harris v. New York*, 401 U.S. 222, 223-26 (1971)). A criminal defendant cannot be denied the right to this rigorous cross-examination. *Id.* (citing *Crawford*, 541 U.S. at 61 and *Harris*, 401 U.S. at 225-26). "The bottom line is clearly established by a long line of Supreme Court cases: A witness may not testify against a defendant in a criminal trial if that witness cannot be cross-

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examined effectively." *Id.* at 1004 (Kozinski, J., dissenting)*; see also United States v. W.R. Grace*, 439 F.Supp.2d 1125, 1143-45 (D. Mont. 2006) (attorney-client privilege and work product protection must yield when their invocation "is inconsistent with a criminal defendant's Sixth Amendment rights."). But whether or not Judge Kozinski's view that this law is "clearly established" prevails, he makes a strong case that that is what the law requires. Accordingly, criminal defendants will have a strong argument that they have the constitutional right to obtain witness statements, even those obtained by counsel through an internal investigation, that are necessary to the effective cross examination of witnesses who testify against them.

2. Defendants' Right to Present a Defense Trumps Privilege

A criminal defendants' right to present a defense (in addition to the Sixth Amendment right to confront) may overcome a claim of privilege. "The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (citations, internal quotations omitted). This right includes "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). See also *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (holding that the Sixth Amendment protects "the right to present the defendant's version of the facts as well as the prosecution's"). Defendants are entitled to privileged, exculpatory evidence when their need outweighs "the policy behind the rule requiring that the evidence by excluded." *United States v. W.R. Grace,* 439 F.Supp. 1125, 1137-38 (D. Mont. 2006).

In summary, there are a lot of persuasive reasons to conduct thorough internal investigations and share the results with the government in appropriate circumstances. But companies and counsel should not assume that the product of their investigation will remain confidential.

♦ *Kenneth M. Miller is a partner at Bienert, Miller & Katzman.*

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II. CLASS-ACTION WAIVERS AFTER *CONCEPCION*

A. *Concepcion* Class Action Waivers Are Enforceable.

The Supreme Court has long held that the FAA's key objective is to ensure the enforcement of arbitration agreements "according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). Despite this mandate, courts (especially in California) have found arbitration agreements unenforceable by invoking Section 2 of the Act, 9 U.S.C. Section 2, which preserves "generally applicable contract defenses." For example, the California Supreme Court in *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 160-61 (2005), held that a class-action waiver in a consumer contract (whether part of an arbitration agreement or otherwise) was unenforceable if it was part of an "adhesive" contract, and the dispute involved predictably small damages.

Gentry v. Superior Court, 42 Cal. 4th 443 (2007), applied the Discover Bank rule to an arbitration agreement in the employment context. Gentry held that class-action waivers are unenforceable if (1) individual awards tend to be modest for the claim in question; (2) suing poses a risk of retaliation; (3) claimants may not bring individual claims because they are unaware that their legal rights have been violated; and (4) it is cost-effective for defendants to pay judgments in discrete cases while continuing to violate the law. *Id*. at 459-62.

Concepcion held, however, that the Discover Bank rule interfered with, and therefore was preempted by, the FAA. Section 2 did not preserve state law rules that "'stand as an obstacle'" to enforcing arbitration agreements "according to their terms." 131 S. Ct. at 1753 (citation omitted). Cases like *Discover Bank*, which require the availability of class arbitration, violate the FAA because bilateral arbitration is fundamentally different from class arbitration. Class arbitration results in heightened formality, additional costs, procedural complexity, extra risks to defendants, and a slower pace of dispute resolution. *Id*. at 1751-52.

After *Concepcion*, several courts have held that the FAA preempts state rules similar to that announced in

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