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PERSPECTIVE

Say it like you mean it

By Jan Frankel Schau

It is 4:30 p.m. and the parties have finally reached an agreement in principle on a contentious personal injury dispute. The plaintiffs, having achieved a financially rewarding agreement, are eager to sign a deal and exit the mediation. The defendants, sophisticated in litigation, are willing to pay more than what they thought the case was worth with the proviso that the matter remains strictly confidential. This has been expressed throughout the negotiation. Then the haggling begins as to the terms of the agreement. Very often at this point in the day, the clients essentially take a back seat while the lawyers put their energy and efforts into creating a written agreement that will be binding and enforceable, and which protects their client's interest. At 7:00 p.m., with essentially all of the critical terms agreed to, they draft the final agreement, but refuse to sign as a party and instead reluctantly agree to add the catch phrase "Approved as to Form and Content." All parties and counsel sign and the settlement is final. Except not always.

In last week's California Supreme Court ruling in *Monster Energy Company v. Schechter*, 2019 DJDAR6457 (Cal. July 11, 2019), the claim that the plaintiffs' attorney was not bound by the contractual agreement between his clients and the defendants because he had signed only "as to form and content" was rejected. The terms of the agreement itself belied the claim that the attorney was not bound by its terms, since it expressly stated that both the plaintiffs and their counsel agreed not to publicly disclose the terms of the settlement. Soon thereafter, the plaintiff's attorney discussed the settlement with a legal blog and Monster Inc. sued the attorney for breach of the settlement agreement. The attorney filed a SLAPP suit in response. The trial court dismissed Monster Inc.'s lawsuit against the attorney, Bruce Schechter, on demurrer and the appellate court upheld the demurrer. When it reached the Supreme Court, that decision was reversed unanimously, on the premise that Schechter had agreed to be bound by the confidentiality provisions even though he had only signed the agreement as to "form and content." The case has now been remanded to the superior court, so the ultimate outcome is not yet known, but there is a cautionary, advisory tale to be told in this reversal by our Supreme Court.

Over the course of the past 30 years, there have been plenty of antiquated legal terms that have become outdated and been replaced by more clearly understandable language. "Chattel" is usually now called "personal property," for example. Young lawyers try to avoid the use of old legal terms such as "heretofore," "party in the first part," "aforementioned" and "inter alia," instead preferring to use more direct and modern language to express the same concepts in a way that can be better understand.

There are good reasons to abandon the use of the term "approved as to form and content" too.

If a settling defendant wants to ensure confidentiality, the terms of that confidentiality should be explicitly spelled out, together with those persons who are agreeing to be bound by it in the agreement itself.

In *Freedman v. Brutzkus*, 182 Cal. App. 4th 1065 (Cal. App. 2d Dist. 2010), the court found that the only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content is that the document is in proper form and reflects the deal that was made between the parties. The court found that the signature of the attorney did not amount to an actionable representation. The court looked for precedent on the issue, and finding no reliable interpretation, used common sense to determine that the term had limited weight.

If you look critically at the phrase "approved as to form and content," you may also find that the approval as to "content" actually does confirm that every term within the agreement has been approved by the lawyer, even though the approval as to "form" does not. How can the lawyer later claim that he or she did not approve of a specific term, such as that both lawyer and client agree to keep the agreement confidential if he or she has approved of the "content" of the document?

In most agreements, there are a combination of procedural terms (when and how the checks will be delivered, when and how the case will be dismissed, the processes for enforcement if necessary, dealing with liens and releases, etc.) and substantive terms (no acknowledgement of liability, how much will be paid to whom). Shouldn't the attorneys, who are typically the ones who engage in the negotiation of these procedural terms, often without their client's active participation, routinely be bound by at least those procedural terms?

As a matter of ethics, a lawyer has a fiduciary duty to promote his or her client's best interest, even if it sacrifices his or her right of self-pro-motion. Although lawyers may not be compelled to sign an agreement that foregoes future business against the same defendant as a matter of public policy, there is no public policy that protects the lawyers right to disclose the terms of a confidential settlement with anyone, including future or other existing clients.

Perhaps the best argument for doing away with the term "approved as to form and content" is because it is usually in the client's best interest (even if not their lawyer's), to maintain confidentiality where the parties request or demand it. The whole process of mediation was premised upon a key principle of confidentiality as an incentive to engage in frank and early negotiations even where the result may be "imperfect" or "imprecise." Simply stated, the candor and informality of a confidential settlement is generally what both parties desire. That is why they are choosing mediation over trial. The public nature of a trial is seldom in the best interest of the clients, who generally prefer to buy their way out of the risk of trial and, on the plaintiffs' side, to be fairly compensated for whatever wrong has been caused by the defendants alleged misconduct.

Another objective of mediation is finality. The parties voluntarily engage in a negotiation with the objective of resolving the dispute by way of an agreement which will be fully enforceable and final. This is why there is so often the lag time between an agreement on the principle terms and the painstaking negotiation of the final terms of the written agreement.

Even without the lawyers' signature, many confidentiality provisions purport to bind the parties and their agents and representatives from disclosing facts relating to the lawsuit or claim. A lawyer would be hard-pressed to argue they were not their client's "representative" after the case had been settled with or without the lawyer's signature. And typically, the bigger the settlement and more highly disputed the facts, the more restrictive the confidentiality clause becomes.

Unfortunately, we know that not all settlements become final. If the confidentiality clause binds only the plaintiff, he or she may be held liable for breach if his or her agent (former attorney) is the one who violates the confidentiality rule. The consequences can be dire. The defendant may move to set aside the settlement and refuse to pay, arguing that the plaintiff's breach renders it null and unenforceable or they may make a claim for liquidated damages. Either of these actions will surely trigger a cross-claim against the [former] lawyer for indemnity or malpractice.

When, as occurred in *Monster Energy Company*, the lawyer breaches the terms of the agreement, he risks not only that the defendant will not only attempt to set aside the settlement, but that it will bring an action against the lawyer for breach of contract, seeking damages caused by the exposure to multiple other lawsuits and adverse publicity. Of course, those damages may be much higher than the damages paid out in a single claim.

This brings it back to "saying it like you mean it." If a settling defendant wants to ensure confidentiality, the terms of that confidentiality should be explicitly spelled out, together with those persons who are agreeing to be bound by it in the agreement itself. The lawyer, if he or she is to be bound by those terms, should sign as a party to the agreement, not merely as to "form and content" as though the terms don't apply to the lawyer.

The terms of the confidentiality can usually be negotiated so that, for example, a plaintiff's attorney may be permitted to disclose the amount of the settlement and the type of injuries on his own website so long as the identity of the parties is nowhere revealed. If there are other pending claims, the parties may agree that the discovery may be used in other lawsuits, but the amount of the settlement may not be revealed. Occasionally, there is even a negotiation which includes specific wording in a memo to staff or a proposed joint press release, as well as an agreement as to which publications will be advised of the settlement and by whom.

The terms of a settlement agreement are always negotiable, but without taking the time to consider future conduct, the signature as to "form and content" is really the lazy way out. If lawyers want to deviate from the terms of an agreement which they are approving for their clients, they ought to take the time to negotiate those exceptions so that all stakeholders feel confident that every settlement agreement will be binding and enforceable as to form, content and substance.

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