BY JAN FRANKEL SCHAU

Importance of "Form" and "Content" in Settlement Agreements

ONE OF THE GREATEST CHALLENGES in mediation comes after the deal has been reached. Late into the process, lawyers haggle over the language in the final agreement in a last-gasp effort to get a few favorable terms after the hard-fought battle over liability and damages is over. Occasionally, they simply cannot agree to the "minor points" and default to inserting a clause expressing that the lawyer approves "as to form and content" only.

In *Monster Energy Company v. Schechter*,[1] plaintiffs' attorney did exactly that. A settlement agreement imposing a confidentiality clause on the parties and their counsel was signed by the lawyers under a notation that it was approved "as to form and content." Soon after the settlement, Schechter allegedly violated the confidentiality provisions of the agreement by making public statements about the settlement. Monster Energy sued. Schechter argued he was not personally bound by the agreement and moved to strike the complaint under the anti-SLAPP statute. The trial court denied the motion and the appellate court reversed, finding that the attorneys' signature alone did not demonstrate an intent to be bound. The state supreme court reversed the court of appeal. The high court found that counsel's signature evinced an understanding of and willingness to be bound by the terms of confidentiality that explicitly referred to "counsel," even though he signed the agreement only as to "form and content." This was sufficient, the high court held, to demonstrate the "minimal merit" required to defeat the anti-SLAPP motion. The case has now been remanded to the superior court, but there is a cautionary tale here.

In *Freedman v. Butzkus*,[2] the court of appeal ruled that a recital that an attorney approved an agreement only as to "form and content" insulated the attorney from liability for breaching the agreement. But in *Monster Energy*, the court ruled that an attorney may be bound by the terms of the agreement despite signing only "as to form and content," particularly when the content makes reference to "the parties and their representative, attorneys, etc.". In short, blindly defaulting to the old "approved as to form and content" can be a trap for the unwary attorney who breaches the terms of the agreement, thinking they only apply to the client.

As a matter of ethics, a lawyer has a fiduciary duty to promote a client's best interest, even if it sacrifices his or her right of self-promotion. While there is a well-established body of law and public policy that protects the confidentiality of settlement discussions in the context of mediation, there is no public policy that protects the lawyer's ability to disclose the terms of a confidential settlement. As a matter of course, taking into account ethical obligations, shouldn't lawyers be bound by the confidentiality to which their clients commit?

Not all settlements become final. If the confidentiality clause binds only the plaintiffs, they may be held liable for breach if their agent is the one who violates the confidentiality clause. The consequences can be dire. The defendant may move to set aside the settlement and refuse to pay, arguing that the plaintiffs' breach renders it null and unenforceable, or they may make a claim for liquidated damages against the plaintiffs. Either of these actions will surely trigger a cross-claim against the [former] lawyer for indemnity or even malpractice. Shouldn't the lawyer be looking out for the client's best interest, even after the case has settled?

Finally, isn't it in the lawyer's best interest to protect and safeguard the settlement agreement? The lawyer who breaches the terms of the agreement risks not only a motion by the defendant to set aside the settlement, but also a breach of contract action naming both the lawyer and his or her client. The damages for "publicizing" the settlement of a disputed claim may be exponentially higher than the damages in a single claim, and even higher than the liquidated damages in the agreement.

Shouldn't the lawyer be looking out for the client's best interest, even after the case has settled?

But take heart—even late into the process, the terms of a settlement agreement, including confidentiality, are almost always negotiable. Experienced mediators, when confronted with this issue, will attempt to broker a deal that may, for example, allow a carefully worded joint press release, a memo to staff, or specify what can and cannot be told to whom.

The assertion that a lawyer is not bound by the agreement because it was only "approved as to form and content" no longer insulates the lawyer from liability for disclosing the terms of a confidential agreement.

If lawyers want to deviate from the terms of an agreement that they have "approved" for their clients, they should negotiate any exceptions before signing off on the agreement. That way, all stakeholders can be confident that every settlement agreement will be binding and enforceable as to form, content, and substance. Anything short of that not only undermines the mediation process but threatens to destabilize the enforceability of all settlement agreements. ■

[1] Monster Energy Co. v. Schechter, 7 Cal. 4th 781 (2019).
[2] Freedman v. Butzkus,182 Cal. App. 4th 1065 (2010).

Jan Frankel Schau is a mediator with ADR Services, Inc. in Century City, California, specializing in mediation of employment, tort, and business disputes.