



MICHAEL R. DILIBERTO, ESQ.



A Matter of Intent

Congratulations. After a long day of mediation the parties settled. You already know that after all the hard work, it's a smart idea to stick around and get an agreement signed. Confidentiality is often a material term of the agreement. But who must honor confidentiality? Just the parties, or are the attorneys also bound? According to the California Supreme Court, an attorney who signs a settlement agreement approving it as to form and content may also be bound by the agreement's confidentiality clause.

In *Monster Energy Co. v. Schechter* (2018) 26 Cal.App.5th 54, a settlement agreement contained confidentiality provisions that purported to bind the parties and their attorneys. The attorneys signed the agreement under the recital "Approved As To Form And Content." The Court of Appeal held that the attorneys did not consent to be bound by the confidentiality provisions. The court reasoned that (1) the attorneys were not defined or identified as "Parties" in the agreement; and (2) signing solely in their capacity as attorneys for the parties did not express an intent to be bound. As a result, when plaintiffs' attorney, Bruce Schechter, disclosed facts about the settlement to the press, he was not liable for breach of contract.

The California Supreme Court reversed. (*Monster Energy Company v. Schechter*, 2019 WL 302273 (Cal. July 11, 2019).) Generally, an attorney's signature that he or she has "approved as to form and content" merely affirms that the document reflects the deal made by the parties, and that the attorney is approving it for his client's signature. But here, the agreement made numerous references to counsel as one who was bound to maintain confidentiality. The court found it reasonable to infer that counsel's signature on a document with the notation that it is approved as to form and content could indicate an understanding of the agreement's terms, and a willingness to be bound by the terms that explicitly referred to him.

The takeaway:

If the intent is to also bind the attorneys, draft an agreement that explicitly makes the attorneys parties to the contract, even if only to the confidentiality provision, and explicitly requires them to sign as such. Even without that clear drafting, an attorney's signature on an agreement containing substantive provisions imposing duties on counsel may reflect an intent to be bound, even though counsel also approves the document for his or her client's signature.

If counsel are not bound by the agreement, the client's best interests must be considered. An attorney who discloses confidential settlement terms may face ethical issues by potentially creating more litigation for the client over what should have been a done deal.