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COVER STORY

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Whose privilege is it anyway?

By Michael R. Diliberto

A mediator is hired to settle a pre-litigation antitrust dispute between Plaintiff (Sony) and Defendant (HannStar) with federal and state antitrust claims. The mediator sends a proposal by email to counsel suggesting a $4.1 million settlement amount, which both sides accept via emails with the mediator. Thus, the "agreement" is the email exchange. When HannStar refused to pay, Sony sued in federal court for antitrust claims and breach of contract, based upon HannStar's refusal to honor the settlement. In a motion for summary judgment for the contract claim, Sony submitted the emails exchanged with the mediator to establish HannStar's breach of the mediated settlement.

Which privilege law governs whether the settlement email exchange during mediation is admissible into evidence, the California Evidence Code, or Federal Rule of Evidence 501? According to *In re TFT–LCD (Flat Panel) Antitrust Litigation*, 2016 DJDAR 9170 (9th Cir. Sept. 1, 2016), federal privilege law governs admissibility of the emails because the evidence relates to both the federal and state law claims.

The district court determined that the emails exchanged at mediation were protected by mediation confidentiality, unless the agreement complied with California Evidence Code Section 1123(b). This statutory exception to mediation confidentiality provides that a written settlement agreement is admissible if it contains a statement that the agreement is "enforceable or binding or words to that effect." Here, the emails did not contain that required language, and the email exchange (and the resulting agreement) was deemed inadmissible.

The 9th U.S. Circuit Court of Appeals reversed and remanded, finding that federal privilege law applied. The panel relied on *Wilcox v. Arpaio*, 753 F.3d 872, 876-77 (9th Cir. 2014) ("Where, as here, the same evidence relates to both federal and state law claims, we are not bound by Arizona law on privilege. Rather, federal privilege law governs"). The appellate court noted facts similar to *Wilcox*: "Sony initially filed suit under both state and federal law. The settlement negotiations concerned both issues; the evidence that Sony sought to admit 'relates' to both federal and state law claims. At the time of mediation, both parties would have expected to litigate both federal and state law issues. HannStar conceded ... that the settlement negotiations related to all claims, both federal and state."

Sony ultimately dismissed the federal law claims, and only state law claims remained when Sony sought to admit evidence of the email exchange. However, the 9th Circuit found that dismissal of the federal claims did not govern whether the evidence related to federal law: "Because, here, at the time the parties engaged in mediation, their negotiations concerned (and the mediated settlement settled) both federal and state law claims, the federal law of privilege applies. Accordingly, the district court erred in applying California privilege law to resolve this dispute."

What's next? Now that the emails are admissible, upon remand to the district court, or en banc review before the 9th Circuit, HannStar may challenge whether a contract exists as a matter of law. The mediator's proposal suggested that the matter be settled for "$4.1 million, to be paid on March 30, 2012, subject to the execution of an appropriate Settlement Agreement, MOU, or Agreement in Principle." That was the extent of the settlement terms. The district court already found that the emails do not provide that the agreement is "enforceable or binding or words to that effect." While the district court scrutinized the absence of those words to determine whether the emails were admissible evidence, on remand, how will the court view the conditional language in the proposal in the context of contract formation?

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HannStar may argue that the mediator's proposal was simply an agreement to agree, and point to the conditional language in the proposal. Also, after the parties emailed their acceptance of the proposal, the mediator announced: "This case is now settled subject to agreement on terms and conditions in a written settlement document." Arguably, the mediator and the parties contemplated that a written agreement with additional as yet undetermined terms would follow the email exchange. Is that definitive enough to have a meeting of the minds?

As most experienced trial lawyers and judges appreciate, the terms of a settlement agreement can be the subject of much negotiation. And the terms can be problematical. For example, settlement agreements typically contain a waiver of all claims "known and unknown." The scope of the release can be fiercely debated. As every lawyer who has settled a case knows, the issue as to Civil Code Section 1542 in a release can be the subject of much discussion. What about a confidentiality clause? Were the parties left to guess at what terms each might insist upon?

In response, Sony may argue that the settlement has the necessary term (the $4.1 million settlement amount) to make the resulting agreement enforceable, and that the parties intended to bind each other, even though everyone understood that some material aspects of the deal would be papered later. This would not be the first time that the 9th Circuit has been tasked with determining whether a settlement agreement contains enforceable terms. The case *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011), involved high-stakes litigation between the Winklevoss brothers versus Facebook, as depicted in the movie "The Social Network." The lawsuit settled in mediation with a handwritten agreement less than one-and-a-half pages in length. The settlement fell apart post-mediation when the parties could not agree to the form of the final deal documents drafted by Facebook. At issue was whether the agreement signed at mediation was enforceable.

Facebook attempted to enforce the short "term sheet" agreement, which provided that it would acquire all of the Winklevoss' ConnectU shares in exchange for cash, a percentage of Facebook stock, mutual releases and a waiver of claims. The Winklevosses asserted that the short agreement was unenforceable because it lacked material terms and was procured by fraud. The missing "material" terms, according to the Winklevosses, were later presented in lengthy stock purchase and shareholder agreements which they refused to sign. The district court found the short agreement enforceable and ordered the Winklevosses to transfer all ConnectU shares to Facebook.

Upon review, the 9th Circuit distinguished a "necessary term, without which there can be no contract," from an "important term that affects the value of the bargain." Omitting the former renders the contract a nullity. However, an agreement that omits the latter is enforceable if the terms are "sufficiently definite for a court to determine whether a breach has occurred, order specific performance or award damages." The short agreement easily passed this low-threshold test.

For Sony and HannStar, will the court find that a contract exists with the necessary terms, and "fill in missing terms by reference to the rest of the contract, extrinsic evidence and industry practice" as in the *Facebook* case? Stay tuned.

Michael R. Diliberto *is a full-time mediator and arbitrator with ADR Services, Inc., specializing in employment, intellectual property, entertainment, insurance, and business disputes. He also serves as an administrative law judge and hearing officer. Michael is an adjunct professor at Loyola Law School where he teaches "negotiations." His monthly negotiation articles are found at www.DilibertoADR.com.*