

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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HOWELL V. HAMILTON MEATS & PROVISIONS: A LANDMARK DAMAGES CASE



Robert Wright

In *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011), the California Supreme Court decided a recurring issue in personal injury cases: whether the plaintiff can recover as damages the undiscounted amounts that medical providers bill for the plaintiff’s medical care, or only the discounted amounts that providers accept as full payment for that care. The Supreme

Court held that the plaintiff may recover only the discounted amount: the plaintiff “may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received” *Id.* at 566. *Howell* is one of 2011’s most significant damages cases, both because of the direct impact it will have in personal injury actions, and because of the authority it affords in analogous situations where

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THE RELATIONSHIP BETWEEN NLRA SECTION 7 AND SOCIAL MEDIA: “IT’S COMPLICATED”



Katherine Den Bleyker

With the ongoing recession, layoffs, and employers’ cost-cutting measures, workers have a lot to complain about these days. Unlike in previous economic downturns, they now have widespread social media platforms for their gripes. Indeed, Facebook and Twitter are the new office water cooler, and in an attempt to control this phenomenon, many employers have adopted social media policies that restrict what workers can say about their company online. While social media policies—and terminations based upon violations of those policies—are not per se invalid, employers need to be careful that these policies do not encroach upon workers’ rights under the National Labor Relations Act (“NLRA”).

The NLRA’s core protection is found in Section 7, which provides that employees have the right to engage in “concerted activities” for “mutual aid or protection.” This section protects both union and non-union employees, so long as they are acting as a group. See *Parexel Int’l LLC*, N.L.R.B. Case No. 5-CA-33245, 356 N.L.R.B. 82 (Jan. 28, 2011) (explaining the scope of NLRA protection and determining that termination of a non-union employee after a conversation with a supervisor about preferential treatment of other employees was an unlawful preemptive strike against future protected, concerted activity).

All employers thus need to consider the implications of Section 7 when dealing with their employees’ use of social media because what constitutes protected activity does not change if employee statements are communicated via the internet. See *Valley Hospital Medical Center*, 351 N.L.R.B. 1250, 1252-54 (2007), *enforced sub nom.*, *Nevada Service Employees Union, Local 1107 v. Nat’l Labor Relations Bd.*, 358 Fed. Appx. 783 (9th Cir. 2009). So, concerted activity that occurs on Facebook, Twitter, MySpace, and the like is protected by Section 7. Based

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ABTL YOUNG LAWYERS DIVISION ROUNDUP

Jessica Kronstadt and Eleanor Welke *Young Lawyers Division Co-chairs*

The ABTL Young Lawyers Division (“YLD”) organizes events for attorneys with 10 or less years of experience, including the following recent programs.

November 16, 2011 – YLD Meet and Greet With Members of the Local Judiciary

On November 16, 2011, the Young Lawyers Division hosted a meet and greet with several local state and federal judges. The event was attended by District Judge Margaret Morrow, Magistrate Judges Stephen Hillman and Victor Kenton, Los Angeles Superior Court Judges Helen Bendix, Holly Kendig, Rita Miller and Jane Johnson and more than forty lawyers from over ten different law firms. The event provided ABTL’s young lawyers with the opportunity to talk in small groups to many distinguished members of the bench who shared with them tips on how to be successful trial lawyers. The program was a tremendous success, and we hope that it will become an annual YLD event.

January 24, 2012 – Brownbag lunch with Hon. Gerald Rosenberg & Hon. Lisa Cole

YLD kicked off 2012 with a brownbag lunch at the Santa Monica courthouse led by Judges Gerald Rosenberg and Lisa Hart Cole. The lunch was very interactive as Judge Rosenberg shared with the ten young lawyers who attended the facts of a trial over which he presided, and asked for opinions as to how each of us thought the case would, and should, turn out. Judge Rosenberg and Judge Cole shared their thoughts on how to present a case, and how to come across to a jury effectively. Each of them underscored the importance of being prepared, being courteous to everyone in the courtroom, and being mindful that the jury sees everything.

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windfall damage awards are sought.

The Supreme Court's holding seems intuitive. After all, the plaintiff's recovery of amounts no one has paid or will ever pay for the plaintiff's medical care would be a windfall to the plaintiff. Nonetheless, the case was hard fought and the result by no means preordained. In embracing the discounted rate as the measure of damages, the Supreme Court bucked the trend among other state courts of allowing recovery of the "usual and customary" rates for medical services even in cases where the provider has agreed to accept a steeply discounted payment. *See id.* at 566 n.10.

The *Howell* decision will immediately affect a princely sum of damages. As many consumers of medical care can attest, a medical provider's "usual and customary" rates as shown on its invoices are often several times higher than the discounted rates the provider actually agrees to accept from health insurers and others as full payment for a patient's care. For example, in an early decision addressing this issue, *Nishihama v. City of San Francisco*, 93 Cal. App. 4th 298 (2001), the amount billed (\$17,168) was about four times the amount accepted from the patient's insurer (\$3,600). *Id.* at 306-07, 309. And in *Howell*, the difference was about three-fold (almost \$190,000 billed but about \$60,000 paid). *See Howell*, 52 Cal. 4th at 549-50. According to a conservative estimate in an amici curiae brief filed in the case by the insurance industry, the difference between the undiscounted and discounted amounts could aggregate in California to a difference of more than half a billion dollars per year. Brief for American Ins. Ass'n et al. as Amici Curiae Supporting Defendant/Respondent, *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011) (No. S179115). Another amicus estimated that the difference could amount to almost \$3 billion per year. Brief for Allstate Ins. Co. as Amicus Curiae Supporting Defendant/Respondent, *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011) (No. S179115), 2010 WL 3777417 at *19-20.

In other states, the majority of courts to decide the issue have granted the plaintiff a windfall recovery of the undiscounted bills, reasoning that the collateral source rule bars evidence of the discount. *See Howell*, 52 Cal. 4th at 566 n.10. The *Howell* court rejected this result. The collateral source rule generally bars attempts to reduce the plaintiff's damage award by amounts received from sources independent of the tortfeasor. *Id.* at 548. But, as the *Howell* court explained, the rule only applies to "damages the plaintiff 'would otherwise collect from the tortfeasor.'" *Id.* The collateral source rule does not allow a plaintiff to recover as damages sums in excess of the plaintiff's actual damages. Where the medical provider has by agreement

accepted an amount less than the billed amount as full payment, the plaintiff "never incurred liability" for the billed amount and the billed amount is not a damage "plaintiff would otherwise have collected from the defendant." *Id.* at 548-49.

After dispatching plaintiff's collateral source rule arguments, the Supreme Court focused on the key issue of the meaning of detriment. *See id.* at 548-49. Citing California Civil Code sections 3281 and 3282, the Supreme Court explained that damages are awarded to compensate for detriment suffered and that detriment requires "a loss or harm suffered in person or property." *Id.* at 551 (quoting Cal. Civ. Code § 3282). The court held that the provider's billed rate is not a detriment if no one is required to pay it: "if the plaintiff negotiates a discount and thereby receives services for less than might reasonably be charged, the plaintiff has not suffered a pecuniary loss or other detriment in the greater amount and therefore cannot recover damages for that amount." *Id.* at 555 (emphasis added).

Detriment is important to more than just medical damages. California Civil Code section 3281 states broadly that tort damages may be recovered by any person "who suffers detriment from the unlawful act or omission of another." Cal. Civ. Code § 3281 (emphasis added). The concept of detriment applies as well in contract actions. California Civil Code section 3300 states that, "For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code § 3300 (emphasis added).

Because of the fundamental importance of detriment, the *Howell* decision may be persuasive in an array of cases. For example, if a tort plaintiff claims damages for the cost of replacing a vehicle, *Howell* supports an argument that the measure of damages is the amount paid by the plaintiff for the replacement vehicle and not some higher measure such as the market or list price. Likewise, the plaintiff's recovery of mitigation damages should be limited to the amount actually paid in mitigation rather than the market value of the mitigation or the cost of mitigation before applying any discounts.

In the near term, *Howell* may also lead to a flurry of new trials in personal injury cases. Prior to *Howell*, trial courts were arguably required to admit evidence of the amounts billed for past medical expenses. *See Olsen v. Reid*, 164 Cal. App. 4th 200, 204 (2008) ("Even the cases holding that a plaintiff is entitled to the lesser amount of damages . . . have approved of the jury's hearing evidence as to the full

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amount of plaintiff's damages."); *Greer v. Buzgheia*, 141 Cal. App. 4th 1150, 1157 (2006) (Evidence of the amounts billed for plaintiff's medical care "gives the jury a more complete picture of the extent of a plaintiff's injuries.").

Howell flipped this rule on its head. The Supreme Court held that, because the full billed amount is not relevant to show the amount of past medical damages, it is not admissible on that issue. "Where the provider has . . . accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." *Howell*, 52 Cal. 4th at 567. And, of course, only relevant evidence is admissible at trial. Cal. Evid. Code § 350.

The courts will need time to consider the ramifications of this fundamental shift. For example, the Supreme Court declined to decide whether evidence of the full billed amount might be relevant "on other issues, such as noneconomic damages or future medical expenses." *Howell*, 52 Cal. 4th at 567. But evidence of the undiscounted amount should be irrelevant to prove future medical expenses or noneconomic damages for the same reason it is irrelevant to prove past medical expenses—the plaintiff has not incurred a detriment based on the full billed amount. See *Howell*, 52 Cal. 4th at 555. This is especially true as the increasing availability of health insurance further reduces the relevance of the undiscounted amount charged for health care services. See 42 U.S.C. § 300gg (health insurance available to everyone regardless of preexisting conditions.) Since the full billed amount is irrelevant because it cannot be recovered for past medical damages (as *Howell* holds), it should be equally irrelevant as a basis for seeking any other kind of damages.

Error in admitting such evidence cannot be excused on the ground that *Howell* changed the law. *Howell* is controlling even though it may have been decided after trial in any given case and even though it may have taken the trial judge by surprise. "The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978 (1989).

New trials in personal injury cases because of *Howell* will not necessarily be limited to the issue of past medical expenses. Error in admitting evidence of the billed amount can inflate the jury's award of the amounts likely to be paid for similar expenses in the future. See 2 Jerome Nates et al., *Damages in Tort Actions* § 9.06[5][d], at p. 9-37 (2010) ("The cost and frequency of past medical treatment . . . may be used as a 'yardstick for future expenses' if it can be inferred that the plaintiff will continue to seek the same form of treatment in the future.").

Such error can also inflate the jury's awards for

noneconomic loss. Some courts have recognized a logical and intuitive relationship between economic and noneconomic damages, which juries can be expected to understand as well. See, e.g., *Helfend v. S. Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 11 (1970) ("[T]he cost of medical care often provides both attorneys and juries in tort cases with an important measure for assessing the plaintiff's general damages."); *Major v. W. Home Ins. Co.*, 169 Cal. App. 4th 1197, 1216 (2009) ("In determining whether the noneconomic damages award is excessive, we compare the amount of that award to the economic damages award, to see if there is a reasonable relationship between the two.").

Indeed, practice guides confirm the logical relationship between economic and noneconomic damages. See 2 Dan Woods et al., *California Trial Practice: Civil Procedure During Trial* § 19.44, at 1206 (3d ed. 2011) (proposing that, during closing arguments, counsel "instead of specifying a dollar range for pain and suffering, suggest that the jury multiply the plaintiff's economic damages total by some multiple"); Zerne P. Haning et al., *California Practice Guide: Personal Injury* ¶ 3:34.1b, at 3-62 (Rutter 2010) ("Plaintiff's counsel should submit the total bills even where less was actually paid. Doing so may make the jury more sympathetic to plaintiff's injuries and perhaps more generous in awarding pain and suffering damages.").

Rather than submit evidence of the billed amount, it is now clear the parties should instead submit evidence of the paid amount. "[W]hen a medical care provider has . . . accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial." *Howell*, 52 Cal. 4th at 567. Yet anecdotal evidence suggests that, prior to *Howell*, many trial judges viewed the collateral source rule as precluding the admission of such evidence. For all of these reasons, evidentiary error on the issue of past medical damages may in many cases require a new trial on all or most damages issues.

Howell will be one of this year's most significant damages cases. Not only does the decision reject windfall damages claims, but it will reduce potential medical damages in California by hundreds of millions of dollars a year, necessitate new trials in many pending cases, and may have broad ramifications generally in cases where plaintiffs seek windfall damages. ■

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on recent NLRB decisions and two recent reports from the NLRB General Counsel offering guidance on this issue, a number of interrelated factors are considered when determining whether employee comments made via social media are protected by Section 7.

Is the post or tweet about the terms and conditions of employment? Although Section 7 only protects statements concerning working conditions, this could cover a broad category of topics. For example, Facebook posts by a luxury car salesperson mocking the “overcooked hot dogs and stale buns” served at a sales event involved the terms and conditions of employment, because the salesperson was concerned about the impact his employer’s choice of inexpensive refreshments would have on sales, and therefore his commissions. *Karl Knauz Motors, Inc. d/b/a Knauz MNW*, N.L.R.B. Case No. 13-CA-46452 (Sep. 28, 2011). However, a post by the same salesman regarding a different luxury car dealership across the street was not protected activity because that dealership was not his employer. *Id.* Accordingly, the NLRB found the salesperson’s termination—which was based on this second post—did not violate the NLRA. *Id.* In contrast, a Facebook post by a homeless shelter employee mocking the mentally ill residents merely discussed what was happening on her shift and did not raise issues about her working conditions. *Martin House*, N.L.R.B. Case No. 34-CA-12950 (July 19, 2011). Similarly, a newspaper reporter’s inappropriate sexual tweets did not raise issues about the terms and conditions of his employment, and were not protected by Section 7. *Lee Enterprises*, N.L.R.B. Case No. 28-CA-23267.

Does the post or tweet concern a group complaint, or is it an individual gripe? Obviously, if a post seeks to rally coworkers to action about the terms and conditions of employment, it is protected concerted activity. However, if the tweet constitutes an individual gripe, or a one-sided venting session, it does not implicate Section 7. For example, a Wal-Mart employee’s Facebook posts about the “tyranny” of his store and his Assistant Manager constituted individual gripes, not group activity. *Wal-Mart*, N.L.R.B. Case No. 17-CA-25030 (July 19, 2011).

Did other employees respond to the post or tweet? Whether other employees respond to a post or tweet—and how they respond—can be persuasive when attempting to determine if there is concerted group activity. Facebook posts and tweets are, by their nature, passive individual posts until someone comments on them. Comments turn a post or tweet into a twenty-first century conversation. Of course, the poster has no control over her friends’ reactions or comments, which poses a unique complication under Section 7, since coworkers’ reactions to a post can influence whether it receives Section 7 protection. For example, when it denied the Wal-Mart

employee Section 7 protection for his derogatory posts, the NLRB noted that coworkers who commented on the posts interpreted them as an attempt at humor, or a plea for emotional support, and not a call for group action against Wal-Mart. *Id.* Further, social media “conversations” with non-coworkers are not protected under Section 7, even if they concern the terms and conditions of employment. *JT’s Porch Saloon & Eatery, Ltd.*, N.L.R.B. Case No. 13-CA-46689 (July 7, 2011) (posts discussing employer’s tipping policy with step-sister not protected); *Martin House, supra* (social media conversations with two non-coworker friends about mentally ill patients of employee’s hospital were not protected); *Rural Metro*, N.L.R.B. Case No. 25-CA-31802 (June 29, 2011) (post by employee on her Senator’s wall about wages and other working conditions was unprotected).

Were the concerns raised in the post or tweet previously discussed in the workplace? Discussions on social media platforms stemming from in-person discussions with coworkers or with management about workplace conditions are more likely to be seen as “protected concerted activity.” For example, in *Karl Knauz*, the Board noted that several employees previously raised concerns about the quality of the food being served with the sales manager during a meeting discussing the sales event in question. In *Hispanics United of Buffalo, Inc.*, N.L.R.B. Case No. 3-CA-27872 (Sept. 2, 2011), the Board found that a Facebook discussion stemming from one employee’s request for her coworkers’ thoughts on whether their organization did enough to help its clients was protected, since the group was taking advance steps to defend themselves against accusations of poor job performance another coworker was going to make to their supervisor.

Is the content of the post or tweet so opprobrious to lose Section 7 protection? In determining whether the employee’s conduct is so offensive as to lose protection under the NLRA, the Board looks at four factors: (i) the place of the discussion; (ii) the subject matter of the discussion; (iii) the nature of the employee’s outburst; and (iv) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979). *Atlantic Steel* is used most often to prevent disruptive or violent outbursts in the physical workplace. In social media cases, the NLRB has held that since social media posts are not akin to a workplace outburst, they cause minimal disruption, and thus the “place” prong of the *Atlantic Steel* test usually cuts in favor of NLRA protection. *Hispanics United of Buffalo, Inc., supra*. Sarcastic or profane comments made on social media—even if they are directed towards a particular individual—do not lose protection under the NLRA. *See id.* (employees’ protected Facebook discussion involved profanity and sarcastic comments about the clients being helped).

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However, posts threatening violence might lose protection. See *Am. Med. Response of Connecticut*, N.L.R.B. Case No. 34-CA-12576 (Oct. 5, 2010) (post using profanity towards a supervisor, and calling him a scumbag and mental patient, did not lose protection because it was unaccompanied by any verbal or physical threats); *Kiewit Power Constructors Co. v. Nat'l Labor Relations Bd.*, 652 F.3d 22, 27 (2011) (threats of violence cut towards removing employees from NLRA protection).

Is the employer's social media policy overbroad? Given the potential for wide-reaching negative publicity, many employers have begun to adopt social media policies in an attempt to regulate or curb employees' internet discussions. These policies cannot chill employees from exercising Section 7 rights. For example, vague policies prohibiting disparaging comments about supervisors or the company are unlawful without language stating that Section 7 rights are excluded. *Am. Med. Response of Connecticut*, *supra*. Overbroad policies prohibiting employees from posting pictures depicting their employer, including pictures of the employer's logo, also may chill Section 7 activity because they could be interpreted to prohibit posting photographs of protests or pickets. *Id.* However, policies which provide sufficient context—such as examples of prohibited and permissible posts—are generally permissible, because they cannot be reasonably be interpreted in a way that would chill Section 7 activity. N.L.R.B. Advice Memo., *Sears Holdings (Roebucks)*, Case No., 18-CA-19081 (Dec. 4, 2009). Further, when enforcing any social media policies, employers must be mindful of the considerations discussed in this article to ensure they are not unlawfully disciplining or terminating employees in violation of Section 7.

The factors discussed in this article are a sample of factors in an evolving area of law. To date, there is no bright-line test for whether a Facebook post or tweet is protected by Section 7, and one is unlikely to develop given the fact-specific inquiry necessary to determine whether use of social media concerns an individual gripe or concerted activity. What has recently become clear is that social media is a powerful platform to organize and enact change. Both the Arab Spring uprisings and the Occupy Wall Street protests have been coordinated via social media. It is thus foreseeable that unions and employee rights organizations will use social media to publicize and organize concerted labor movements in the years to come. This likelihood, combined with the proliferation of social media and the ongoing recession, guarantees that this area of law will continue to be important to the both employees and employers. ■

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ARBITRATION BY EMAIL

The pervasive, some would say, overwhelming, use of email in business and in the professions has created a new kind of arbitration – arbitration by email. This does not mean that the parties email their testimony and arguments to the arbitrator. Rather, this means that arbitration is morphing from the traditional paradigm of testimony about events and reading of documents to the much different approach of reading emails to provide the narrative of facts and events surrounding the dispute.



Robert S. Mann

I recently completed a lengthy arbitration of a dispute between the owner/developer of a commercial building and the general contractor. The dispute centered on whether liquidated damages would be assessed against the contractor for a substantial delay in completing the project. Both parties generated emails on a daily basis. One party used a software program that enabled him to dictate emails. As a result, there were as many as 15 or 20 emails a day between the parties.

In addition to the emails, there were “source documents,” such as the construction contract, change orders, invoices, checks, plans, and letters. But as the arbitration unfolded, reviewing and analyzing those documents consumed only a small percentage of the time. The great majority of the time was spent in dialogue between the witnesses and the lawyers that typically took the following form: “Question: What happened next?” “Answer: I sent him/her an email.” “Question: Please read it.” “Answer: Witness reads the email.” “Question: Then what happened?” “Answer: I received an email in response.” “Question: Please read it.” The arbitration went on like this for weeks, with lawyers and I reading emails along with the witnesses.

This new phenomenon of arbitration by email presents a host of challenges to lawyers who arbitrate cases. From the arbitrator's perspective, here are the most important:

1. The parties should present emails so the arbitrator can easily follow them. Although this seems basic, during the above arbitration it surprised me how much time I spent flipping back and forth between the pages of an email exhibit in order to “track” through the sequence of emails. Because emails are recorded chronologically, the arbitrator often must have the whole email “chain” to understand the context of a particular email, and must read from the bottom of the printed email chain and work his or her way to the top. Many times, the implications of a single email were lost because they were

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not presented in context. Thus, the parties must organize information so that it is presented in context and easy to follow. Highlighting the pertinent part of a lengthy email chain is extremely helpful to the arbitrator.

2. Who received the email and is it important that a particular person did or did not receive it? Often, many people receive courtesy copies (“CCs”) of an email. It may be critically important that a certain individual did, or did not, receive a copy of the email. During the above arbitration, I had to ask witnesses to explain the identities of other individuals in the distribution list rather than counsel taking the lead on that issue. It is essential to remember that the arbitrator, unlike the parties and their attorneys who have lived with the facts of the case for so long, is a stranger to the facts and the main players in the dispute. It is essential that the attorneys provide context to the emails, and identify main players in the dispute, in order to educate the arbitrator.

3. The implications of “colorful” email language. The essential task of the arbitrator is to decide the controversy. In doing so, the arbitrator seeks to base his or her decision on the most reliable evidence. For most arbitrators, the most reliable evidence is what people said in writing before they thought that their business relationship was going to land them in court (the least reliable evidence is usually the testimony of the parties during the arbitration). Yet even the most reliable evidence can be suspect, and the arbitrator must continually test the veracity of statements made in emails and compare those statements to what witnesses say during the arbitration. Even very sophisticated people tend to treat email communications in an astonishingly cavalier way. They say things in emails that they would likely never say in letters. This has interesting implications, including:

A. The use of colorful language in an email can give the arbitrator insight into both the character of the author and the level of emotion involved.

B. A witness who writes emails in one fashion, e.g., “blunt,” but testifies in another fashion, e.g., by carefully parsing his or her words, presents a challenge to the arbitrator – which is the “real” person? Is it the blunt, expletive spewing, angry person or is it the thoughtful and careful person? If a witness seems much different in person than in his or her emails, it is possible that the witness is deliberately changing his persona, and perhaps not for a good reason.

C. Sometimes people “give away the store” in emails in a way that is so clear that it leaves little doubt to anyone in the room. This puts counsel in the awkward position of

saying “Yes, but....” This is rarely a good position. Sometimes the “giving away” is more nuanced, and the explanation for what the witness “really” meant to say might be more persuasive. Regardless of how clear the admission is, emails are there forever. Counsel in a case where the email admission is clear and unequivocal should think carefully about whether the admission is so persuasive that it will wipe out other countervailing evidence.

D. People also say things in emails that are offensive or embarrassing. People say things that are racist, prejudiced, sexist and demeaning. This is hardly news, but there is a difference between hearing something and reading something. Perhaps it is the permanence of the written word. Perhaps it is the fact that when a person is accused of saying something bad, often the only evidence is another person’s testimony. Although arbitrators are used to reading and hearing the most astonishing things and putting them into perspective, those statements might have a profound impact on a particular arbitrator. This is particularly true when a witness who is prone to email outbursts of various kinds shows up in the arbitration as a milquetoast, leaving the arbitrator to conclude that the witness has been “cleaned up” for his or her testimony and wondering whether the real witness is not the one portrayed in the emails.

4. The implications of the “missing” email. In the aforementioned construction arbitration a central issue was whether the owner extended the contract completion date. Although the case involved thousands of emails, there was no email from the contractor confirming the extension. There were many emails from the owner in which the owner articulated his annoyance and distress that the project was not being completed on time. From my perspective, the lack of a confirming email was a powerful point on this issue.

5. The “manufactured” email. As already noted, arbitrators comfortably rely on documents, including emails, that were created before anyone thought about litigation. Arbitrators are equally uncomfortable about relying on documents after the parties clearly understand that they are heading for court. At that point, they may start to “manufacture” email evidence. In this regard, emails have the same (lack of) force as self-serving letters. Even so, many lawyers and parties feel that a statement has some magical power of persuasion just because it is said in an email. They ignore the fact that the line of demarcation between “innocent” and “contrived” emails is usually clear to the arbitrator. The electronic nature of the self-serving email communication does make it more persuasive.

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ENFORCING MEDIATED SETTLEMENT AGREEMENTS IN THE AGE OF FACEBOOK: WHERE CONFIDENTIALITY, FIDUCIARY DUTIES AND CLIENT RELATIONS COLLIDE

Imagine, for a moment, a system that promises the intellectual opposite of lawlessness. Instead, all promises are fulfilled and whether you formulate an agreement to enter into a contract based upon fraud, duress or even incompetence, your contracts are always enforceable. It is the land of “super contracts,” and it is not science fiction.



Jan Frankel Schau

In the real world, these “super contracts” are enforced in huge commercial class action cases as well as minor impact soft tissue personal injury actions. And, nobody can set aside these contracts of the future, because they are the practical outcome of the modern mediated agreement, according to U.S. Magistrate Judge Wayne Brazil in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d. 1110 (1999).

Because of the strict confidentiality which forms the cornerstone of mediation, recent cases have upheld settlement agreements where the parties’ assent was based upon allegedly substandard legal advice (*Cassel v. Superior Court*, 51 Cal. 4th 113 (2011)), where the lawyer is alleged to have breached his fiduciary duty towards his clients (*Wimsatt v. Superior Court*, 152 Cal. App. 4th 125 (2007)) and where the defendant is accused of securities fraud in the valuation of stock (*Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d. 1034 (9th Cir. 2011)).

Practical Implications for Practical Lawyers

How can lawyers protect their clients when entering into a “super contract” in a mediation, which they know cannot be challenged even if it turns out that the contract would be set aside based upon fraud, duress or incompetence were it not the product of a mediation? The simple answer is: be prepared and prepare your client to enter into an agreement which is intended to be fully binding and nearly impossible to set aside later for any reason. This includes fully preparing your clients for settling the case on the date of the mediation.

Discuss Confidentiality

First, it begins with a dialogue about confidentiality, so that your clients understand the implications and benefits of

maintaining strict confidentiality about everything involved in the mediation. Explain to your clients that nobody may ever testify about dialogue between you and your clients or anyone else at the mediation and that the reason for this is to allow the mediator to attempt to meet your interests and goals as expressed in the mediation, whether or not they are a part of the pleadings and evidence developed in the legal case.

Encourage Participation by Your Client

Encourage your clients to ask questions and to engage freely and fully in the mediation, so that when the time comes to agree to a particular set of terms, they completely understand the justification for doing so and agree voluntarily, without coercion or pressure, that their assent is in their own best interests on the terms proposed.

Ensure All Signatories are Present

Third, be fully prepared by making sure that the “party to be charged” is present for the entire negotiation and most especially for their signature at the end of the day. If you intend to enforce a mediated agreement, bring all necessary parties to the mediation and make sure they sign the agreement on the day it is written and negotiated. *Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008), provides the reason why. In that case, the physician being sued for malpractice agreed to consent to a settlement only if it fell below a certain (she thought unrealistic) number. She left without signing an agreement and late into the night an agreement was reached at that amount. When she refused to execute the agreement the following day, the plaintiff sought to enforce it based in part upon a written declaration by the mediator of her intent, claiming it was enforceable as an oral agreement at the least. The court rejected the evidence submitted by the mediator on the grounds of mediation confidentiality and the settlement was never enforced.

Discuss Ranges in Advance

Fourth, fully discuss the range of potential outcomes, including specific values, with your client before including them in your confidential briefs or revealing them to the mediator or opposing counsel. Remember, mediators and lawyers negotiate for a living and understand reasonable ranges in ways that our clients may not. You may also want to discuss the pacing of the negotiations, so that your client is prepared for what is often a long, slow process to arrive at an agreement within the target range.

In a recent case arising from a claim of age discrimination, plaintiff’s and defense counsel discussed the range that they both agreed to be reasonable and, based upon that conversation, agreed to retain a mediator to attempt to settle

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the case. However, the plaintiff's attorney had not brought his client into that conversation and had no authority to begin the negotiation at the higher end of that range. In reaction, the defendant became incensed and never got to the offer of the low end of the range either, a place from which he expected to begin the negotiations. This was a recipe for an early impasse and disappointed clients all around.

In another similar example, plaintiff's counsel in a personal injury action made an early settlement demand to defense counsel, leading them to engage a mediator to settle the case. When he arrived at the mediation, it was apparent that his clients had not authorized him to make that demand, and we worked many hours to get them to agree to a certain figure. When that was finally communicated to the defense lawyer, he revealed that he had come to the mediation expecting that figure as the initial demand, not the final one, since opposing counsel had made that demand two weeks before the hearing.

The result was not only an early impasse, but also distrust between the two sides as negotiations proceeded through the mediator for several weeks following the hearing. What is worse, both sides' clients were upset with their lawyers for being misled in anticipation of the mediation.

It is imperative that you verify any settlement ranges with your clients before articulating them to opposing counsel. Although these off-hand conversations cannot be used as evidence in court, your clients will be forever displeased with you if they think you have either sold their case short or misled the other side by presenting an offer without first securing their authority.

Bring Your Proposed Settlement Agreement to the Mediation

Finally, be prepared to settle the case by bringing a template of the long form agreement to the mediation hearing, including all of the potential terms, even those your client may not insist upon. She who arrives at the mediation most prepared to resolve usually receives the most favorable terms.

For example, include the terms of no re-hire; converting a termination to a resignation; excluding a pending worker's compensation claim or lien; tax treatments and characterization; liens by former counsel or treating physicians; all payees and where applicable, all relevant tax identification numbers; legal description of all real property which may need to be identified; and the like. Consult with your client's accounting department or CPA and be prepared to negotiate pivotal tax issues that may be important to either side. Consult with the Human Resources Department to find out the possible ways to handle sealing personnel records, changing a termination to a voluntary resignation, limits on re-hiring, etc.

In most instances, litigators are wise to err on the side of including all conceivable nonmonetary terms, with an open-minded view towards negotiating them at key intervals to create some real concessions on those terms that are not critical to your clients. Those concessions may buy you valuable reciprocity in the negotiation, and should not be discounted for their value, even though they are typically nonmonetary. Moreover, they may jumpstart the momentum for reaching accord on minor terms, paving the way to the ultimate settlement of the case.

Another concrete advantage to bringing a template of the long form agreement is that, as the negotiation and the mediation wears on, participants become anxious to complete it, and sometimes become careless or forget important terms. It is so much harder to reinsert these forgotten terms once the case has been settled!

One issue that also arises with some degree of regularity is releasing all liens, whether formally asserted or not, before a case is settled. If the lawyers do not know of the liens during the negotiation, getting them released can be a hassle or at least a delay after the agreement has been signed. Best practice would suggest that lawyers be prepared to secure releases or satisfy all liens where applicable before the mediation hearing.

Be Prepared to Eliminate the Need to Challenge the Agreement

The opinion in *Fair v. Bakhtiari*, 40 Cal. 4th 189 (2006), suggests "magic language" which must be included in every mediated agreement to ensure its enforceability. That language is easily remembered as the old advertising slogan, "Where's the BEEF?" Always include language that states that the matter is "binding, effective on a particular date, enforceable and final." Even if you intend to prepare a more final agreement, this language will protect your right to enforce the short form agreement of the terms even if the proposed terms are never executed in a superseding long-form agreement.

The obvious way to avoid a challenge by your client or adversary is to ensure that all parties participate voluntarily and are not coerced into agreeing upon a deal which they may later second-guess. In *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536 (2007), the California Supreme Court specifically addressed the voluntary nature of mediation as follows: "even after a case has been ordered to mediation, the mediator must inform the parties that participation in mediation is completely voluntary, refrain from coercing a party to continue its participation in the mediation and respect the right of each party to decide the extent of its participation or withdraw from the mediation." *Id.* at 118 (citing Cal. R. Ct. 3.853).

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Minor Exceptions to the Absolute Confidentiality Privilege

Very few exceptions to the absolute privilege of all things related to mediation exist in recent case law. In *Olam*, the court allowed testimony of the mediator (who was, in that case, court appointed) to establish that, contrary to their later assertion, the parties were competent to sign the settlement agreement after a long, arduous day of negotiation. His testimony was allowed, but the agreement was still enforced, not set aside. See *Olam*, 68 F. Supp. 2d. at 1146-51.

Then in *Molina v Lexmark Int'l, Inc.*, 77 Fed. R. Evid. Serv. 905 (C.D. Cal. 2008), Judge Margaret Morrow allowed testimony about the mediation—not to enforce or set aside an agreement, but to help the court determine whether the amount in controversy met the jurisdictional requirements to place the matter in the United States District Court.

Finally, in *Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (1998), the court found that the confidentiality privilege under Evidence Code section 1119 extended even to a juvenile delinquency proceeding, though for public policy reasons ultimately held that the privilege must yield “when necessary to ensure a minor’s constitutional right to effective cross-examination.” *Id.* at 160-61.

Otherwise, recent case law has disallowed evidence of any communication within mediation either to support setting aside a mediated agreement (as in *Facebook*) or to substantiate malpractice or breach of fiduciary duty (as in *Cassel* and *Wimsatt*). In other words, none of the participants can later rely upon extrinsic evidence to show that a mediated agreement should be set aside. They are, in effect “super contracts” that cannot be later challenged through any evidence of anything that occurred before, during or after the mediation.

You Can Still Win your Client’s Peace and Admiration Through Mediation

Mediators know that we partner with our litigator clients every day to ensure that your clients are also satisfied with the outcome of the mediation. You can achieve that by carefully examining issues like indemnity agreements, nonmonetary demands or concessions, the legal competence of the representatives present to sign the agreement and your client’s expectations before arriving and throughout the mediation hearing.

You can demonstrate your preparedness by bringing a long-form proposed agreement, making sure that the right signatories are present and remain throughout the day and reviewing all of the critical evidence which may be necessary to close the case. By this, I am not only referring to the evidence upon which you would rely at trial, but all of the necessary documentation which may be referenced in the

ultimate settlement agreement as well.

Once you have carefully evaluated the range of settlement with your client, the mediator and the other side, you will be ready to fully engage in a settlement negotiation that can lead to a binding, enforceable, effective and final settlement agreement. That is a good thing, since it is not going to be easily set aside. ■

Jan Frankel Schau, specializes in mediating Business and Employment disputes. Ms. Schau has been a panel member of ADR Services, Inc. for the past five years and serves as a mediator and arbitrator in both State and Federal Courts in a wide range of litigated matter. Recognized and named a “Super Lawyer” for her work in ADR in 2010, 2011 and 2012, Jan is also a Fellow of the International Academy of Mediators.

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6. Finally, from the arbitrator’s perspective, there is the boredom factor. Arbitrators and mediators sometimes joke that the hardest part of a mediation is staying calm, but the hardest part of an arbitration is staying awake. In addition to the risk of an email-induced coma, an arbitration that consists of reading thousands of emails creates the real danger that the few essential trees will become lost in the forest of emails. Counsel are often tempted to introduce every document, letter, and now, every email, that might conceivably bear upon the issues. This may reflect what many lawyers, arbitrators and judges decry as the tendency to over-try cases. From my perspective, it is the unusual case that has more than a dozen truly important documents. Similarly, it is also unusual if a case has more than three or four facts or issues that are really essential to the arbitrator’s determination of the dispute. In short, parties should resist the temptation to introduce hundreds or thousands of inconsequential emails.

In summary, parties should (a) arrange emails in a way that provides the arbitrator with the context for the important part of the email chain, (b) clearly identify those involved in the communication unless it is otherwise obvious, and (c) think about the implications of both negative language and of “cleaning up” the witness. In addition, the parties should emphasize emails written before the outbreak of a dispute, and recognize that emails written after litigation becomes evident are far less persuasive. The parties should also avoid the temptation to introduce every email from the beginning of time and focus on those emails which are truly important to resolving the dispute. ■

Robert S. Mann, the principal of The Mann Law Firm, arbitrates and mediates cases through ADR Services, Inc., and the American Arbitration Association.

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