

Memorandum

To: Committee on Professional Responsibility and Conduct (COPRAC)
From: David C. Carr
Date: October 14, 2019
Re: 19-0003 Re: Improper Contract Provisions - Hypothetical, Issues Outline

Hypothetical

Lawyer works for large corporation providing employment law advice to Human Resources department (HR) responsible for all non-executive hiring. Employees hired through HR are presented with a standard form written employment agreement. These agreements are presented to new hires as a "contract of adhesion" take it or leave it, agreements that must be signed as a condition of employment. Lawyer is tasked with writing and updating those agreements. In updating each agreement, Lawyer includes a provision from a former agreement that has recently been found to be illegal and unconscionable under California law.

- (a) Lawyer knows that the provision has been found to be illegal and unconscionable but advises HR to use the forms anyway, without further advice or analysis.
- (b) Same facts, except that lawyer does not know that the provision has been illegal and unconscionable.
- (c) Same facts, except that lawyer advises that the contract provision has been found to be illegal and unconscionable, advises HR that there is some risk that this provision in the agreement may not be enforced but does not recommend against including the provision
- (d) Same facts, except that lawyer advises that the contract provision has been found to be illegal and unconscionable, advises HR that there is some risk that this provision in the agreement may not be enforced and recommends against including the provision.

Issues

Does merely proffering an illegal or unenforceable provision in a proposed contract amount to misrepresentation or fraud? When?

Is unenforceable the same as fraudulent?

Does lawyer representing a client in the transaction owe any duty to make sure the other party to the transaction is treated fairly?

Does it make a difference if the lawyer does not have any direct contact with the other party to the contract?

What if those duties conflict with the client's interests?

Does the disparity in bargaining power ("Contracts of Adhesion") matter?

Is the employment context different?