

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 California 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 is 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. [Should we change facts for this scenario to state that lawyer identifies illegal provision in former agreement that he is updating since lawyer is recommending against including this provision in updated agreement?]

1. Scope of duty under Rule 1.2.1 not to advise or assist violations of law

a. Encompasses transactional work

b. Broader than crime/fraud, includes "any violation of any law, rule, or ruling of a tribunal" including statutes and civil case law rules.

2. Some contract provisions found to be unconscionable

a. Non-compete agreements [I don't believe we should opine on this issue in the ethics opinion as this is a question of law and also legality and enforceability may depend on choice of law issues for multistate employer; rather, for purposes of

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our opinion, I recommend we assume that the provision is indisputably illegal and unconscionable without specifying its contents.]

3. Lawyer cannot knowingly advise client to propose an illegal and unconscionable provision in a contract that will be offered to a third party.
4. Lawyer can advise client on the effect and consequences of the illegal and unconscionable provision. Rule 1.2.1(b)(1).
5. Lawyer has a duty to inquire to make sure lawyer services will not be used to violate law (see ABA formal ethics opinion 1470 (1981): [a] lawyer cannot escape responsibility by avoiding inquiry. A lawyer must be satisfied, on the facts before him and readily available to him that he can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants.”
6. If client insists on including illegal and unconscionable provision contrary to lawyer's instructions, then lawyer must advise the client regarding the limitations on the lawyer's conduct, including that the lawyer will not represent the client in any dispute attempting to enforce the illegal provision. Rule 1.2.1, Comment [5]; Rule 1.4(a)(4).
7. Lawyer may withdraw but not compelled to withdraw if client chooses to use the illegal and unconscionable fee provision (Rule 1.2.1, Comment [2]; Rule 1.16(b)(1) -(3).)
8. Lawyer may not reveal confidential advice regarding use of the illegal and unconscionable fee provision.
9. [I suggest we also consider and address other potentially applicable Rules and State Bar Act provisions, such as Rule 4.1 (Truthfulness in Statements to Others) and Comment [1]. By including a provision the lawyers knows is unlawful, is the lawyer knowingly making a false statement of law to a third person? Also, Rule 8.4 (a), (c); Bus. & Prof. C. §§ 6106; 6068(a), (d). Even if we conclude these provisions do not apply, I believe it is worth evaluating and explaining why or why not.].