

## Memorandum

To: Committee on Professional Responsibility and Conduct (COPRAC)

From: David C. Carr

Date: September 1, 2020

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. This agreement is presented to new hires as a "contract of adhesion," take it or leave it, agreement that must be signed as a condition of employment. Lawyer is tasked with reviewing and updating the agreement, which contains a provision that has been found to be illegal and unconscionable under California law.

1. 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.
2. Same facts, except that lawyer does not know that the provision is illegal and unconscionable.
3. 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 [DMR1], but does not recommend against including the provision.
4. 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 [DMR2], and recommends against including the provision.

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. For purposes of this opinion, the Committee presumes that the contract provision is illegal and unenforceable under California law. [\(Include this fact in hypothetical\)](#)
3. Lawyer cannot knowingly advise client to propose an illegal and unconscionable provision in a contract that will be offered to a third party. See Comment 10 to ABA Model Rule 1.2 ("The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."); ETHICAL GUIDELINES FOR

SETTLEMENT NEGOTIATIONS (August 2002), at 46-47 (“A lawyer should not negotiate a settlement provision that the lawyer knows to be illegal.”).

- a. Unlike the ABA Model Rule 1.2(d), which is limited to “conduct that the lawyer knows is criminal or fraudulent,” California Rule 1.2.1(a) also applies to conduct that the lawyer knows is “a violation of any law, rule, or ruling of a tribunal.”
  - b. Here, in scenario (a), lawyer is knowingly recommending the inclusion of a provision lawyer knows is illegal in violation of Rule 1.2.1 (a).
4. Lawyer can advise client on the effect and consequences of the illegal and unconscionable provision. Rule 1.2.1(b)(1). [\(Cite to COPRAC Opn. 2020-202, Advising a Cannabis business.\)](#)
5. Lawyer has a duty to inquire to make sure lawyer services will not be used to violate law. “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.” ABA Formal Ethics Opinion 1470 (1981); *see also* NY City Bar Ethics Formal Opinion 2018-4 (July 18, 2018); Rule 1.1(a), 1.2.1(a), 1.0.1(f).
  - a. Scenario ~~(b)~~2 implicates the lawyer’s duty of competence under Rule 1.1(a).
  - b. In scenario ~~(c)~~3, does lawyer have a duty to inquire as to client’s use of the provision and recommend that it not be used to avoid violating Rule 1.2.1(a)? [DMR3]
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 is 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. Rule 1.6.
9. Scope of duty under Rule 4.1 (Truthfulness in Statements to Others) and Comment [1].
  - a. By including a provision the lawyers knows is unlawful, is the lawyer knowingly making a false statement of law to a third person? *See* Rule 4.1(a); South Carolina Ethics Op. 05-03 (2005) (lawyer for ex-wife sent letter to ex-husband falsely claiming that ex-husband was required under divorce decree to undergo drug testing; this conduct violated South Carolina Rules of Professional Conduct , Rules 4.1 and 8.4(c)); *In re Discipline of Attorney*, 884 N.E.2d 450 (Mass. 2008) (lawyer disciplined under Rule 8.4(c) alone for sending letters to insurers of opposing parties falsely claiming entitlement to lien on insurance payments payable to his clients).
  - b. Rule 4.1(b) is limited to disclosures necessary to avoid assisting in a “criminal or fraudulent” act by a client, which is narrower than illegal conduct.
10. Scope of duty under Rule 8.4 (a), (c); Bus. & Prof. C. §§ 6106; 6068(a), (d).

- a. Engaging in conduct that violates Rules 1.2.1(a) or Bus. & Prof. C. §§ 6106; 6068(a), (d) would result in a violation of Rule 8.4(a).
  - b. Rule 8.4(c) would also prohibit conduct that is prohibited by Rule 4.1
11. Scope of application of Bus. & Prof. C. §§ 6106; 6068(a), (d).
- a. Does conduct amount to dishonesty or means inconsistent with the truth? Bus. & Prof. C. §§ 6106; 6068 (d).
  - b. Does conduct reflect failure to support the law? Bus. & Prof. C. 6068(a)?

### Hypothetical

1. Lawyer is culpable of violating Rule 1.2.1 because the lawyer knows the provision is unconscionable but does not advise against using it. Lawyer is not culpable for violating Rule 4.1 because the lawyer is not making a false statement of fact or law.<sup>[SB4]</sup>
2. Lawyer is not culpable of violating Rule 1.2.1 because the lawyer does not know the provision is illegal and unconscionable. <sup>[SB5]</sup> Lawyer may be culpable of violating the competence rule, Rule 1.1 because the lawyer is grossly negligent in not knowing that. Lawyer is not culpable for violating Rule 4.1 because the lawyer is not making a false statement of fact or law.
3. Lawyer is culpable of violating Rule 1.2.1 because the lawyer knows the provision is unconscionable and counsels client on the possible adverse consequences but does not advise against using it, thus assisting the client in unlawful behavior. Lawyer is not culpable for violating Rule 4.1 because the lawyer is not making a false statement of fact or law. Lawyer has no duty of disclosure because while unconscionable and illegal, the use of the provision is not a crime or a fraud. Rule 1.0.1: “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive<sup>[SB6]</sup>.
4. Lawyer is not culpable of violating Rule 1.2.1 because the lawyer knows the provision is unconscionable, counsels the client on the negative consequences of using the provision and counsel’s client against using it.

**Main document changes and comments**

**Page 1: Comment [DMR1]** **Dena M. Roche** **9/2/2020 7:29:00 AM**

See notes in my email. I am uncomfortable with the discussion of “risk” here.

**Page 1: Comment [DMR2]** **Dena M. Roche** **9/2/2020 7:29:00 AM**

Same.

**Page 2: Comment [DMR3]** **Dena M. Roche** **9/2/2020 7:03:00 AM**

I would say no as to duty to inquire as to use of the provision, yes, as to the second, but we should research further.

**Page 3: Comment [SB4]** **Sarah Banola** **9/1/2020 5:42:00 PM**

We should discuss this issue at the meeting. We should also analyze the potential applicability of Rule 8.4(c) and Business and Professions Code sections referenced above for all hypos.

**Page 3: Comment [SB5]** **Sarah Banola** **9/1/2020 5:46:00 PM**

We should discuss the potential applicability of the duty to inquire or research under the circumstances and analysis under ABA and NYC bar association opinions noted above.

**Page 3: Comment [SB6]** **Sarah Banola** **9/1/2020 5:48:00 PM**

I believe this issue should be analyzed further. What is the purpose of including a knowingly illegal provision? Is it to deceive the employee, for instance, by deterring the employee from joining a competitor?