

HEADLINE: Proposed Formal Opinion Interim No. 19-0003 (Improper Contract Provisions)

SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 19-0003 (Improper Contract Provisions).

Deadline: June 8, 2021

Background

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with applicable State Bar policy and procedure, the committee shall publish proposed formal opinions for public comment (See, State Bar Board of Trustee Resolutions July 1979 and December 2004. See also, Board of Trustee Resolution November 2016).

On May 10, 2018, the California Supreme Court issued an order approving 69 new Rules of Professional Conduct, which went into effect on November 1, 2018. Information about the new rules is available [here](#). Proposed Formal Opinion Interim No. 19-0003 interprets the new Rules of Professional Conduct.

Discussion/Proposal

Proposed Formal Opinion Interim No. 19-0003 considers:

What are a lawyer's ethical duties when advising a client regarding the use of a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction?

The opinion interprets rules 1.1, 1.2.1, 1.4, 1.13, 1.10, 1.16, 4.1, and 8.4 of the Rules of Professional Conduct of the State Bar of California; Business and Professions Code section 6068(d).

The opinion digest states: A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. That conduct includes the use of a contract provision in a transaction with a third party that has been found to be illegal under the law of the jurisdiction applicable to the transaction. If the lawyer knows that the provision is illegal, the lawyer should advise the client accordingly, may not recommend the use of the provision, and must counsel the client not to use it. If the client insists on the use of the illegal provision against the lawyer's advice, the lawyer may not participate in presenting the illegal provision to the third party. In that event, the lawyer may withdraw from the representation but is not required to do so. If the lawyer

concludes that the conduct is a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer for an organization must report the actions of the client constituent to a higher authority, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

At its February 26, 2021, meeting, and in accordance with their procedures, COPRAC tentatively approved Proposed Formal Opinion Interim No. 19-0003 for a 90-day public comment distribution.

Any fiscal/personnel impact

None

Background material

Proposed Formal Opinion Interim No. 19-0003

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

June 8, 2021

Direct comments to

Comments should be submitted using the [online Public Comment Form](#). The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 19-0003
ADVISING CLIENT ON ILLEGAL CONTRACT PROVISIONS**

ISSUES: What are a lawyer’s ethical duties when advising a client regarding the use of a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction?

DIGEST: A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. That conduct includes the use of a contract provision in a transaction with a third party that has been found to be illegal under the law of the jurisdiction applicable to the transaction. If the lawyer knows that the provision is illegal, the lawyer should advise the client accordingly, may not recommend the use of the provision, and must counsel the client not to use it. If the client insists on the use of the illegal provision against the lawyer’s advice, the lawyer may not participate in presenting the illegal provision to the third party. In that event, the lawyer may withdraw from the representation but is not required to do so. If the lawyer concludes that the conduct is a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer for an organization must report the actions of the client constituent to a higher authority, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

**AUTHORITIES
INTERPRETED:**

California Rules of Professional Conduct 1.1, 1.2.1, 1.4, 1.13, 1.16(b), 4.1, 8.4(c).^{1/}

Business and Professions Code section 6068(d).

INTRODUCTION

Certain types of contract provisions have been found to be illegal under California law. For example, provisions in employment contracts that impair the ability of employees to compete against their employers following termination of employment have generally been found to be illegal under California law, subject to limited exceptions. See *Edwards v. Arthur Andersen LLP*

^{1/} Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

(2008) 44 Cal.4th 937, 945 [81 Cal.Rptr.3d 282]; *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 309 [209 Cal.Rptr.3d 81]; Business and Professions Code section 16600. For purposes of this opinion, the Committee does not opine on whether a particular clause in a contract is illegal as this raises an issue of law; instead, the Committee confines its discussion to the ethical issues presented by the factual scenarios set forth below.

STATEMENT OF FACTS

Lawyer works for a large California corporation providing employment law advice to the Human Resources department (“HR”) responsible for all non-executive hiring. Employees hired through HR are presented with a standard form written employment agreement (“Agreement”). This Agreement is presented by HR to new hires as a non-negotiable 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 under California law.

Factual Scenarios

1. Lawyer knows that the provision has been found to be illegal, but advises HR to use the Agreement anyway, without further advice or analysis.
2. Same facts, except that Lawyer does not know that the provision is illegal.
3. Same facts, except that Lawyer advises that the contract provision has been found to be illegal under California law, 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 under California law and recommends against including the provision. HR advises Lawyer that it understands the provision is illegal but would still like to include it in the Agreement for its chilling effect. HR has asked the Lawyer to assist in enforcing the provision.

DISCUSSION

A. Duty to Advise of an Illegal Contract Provision

Rule of Professional Conduct 1.2.1(a) states that a “lawyer shall shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal, fraudulent, *or a violation of any law, rule, or ruling of a tribunal.*” (Emphasis added.) Rule 1.2.1 is modeled in substance after former rule 3-210 but adds clarifying language derived from ABA Model Rule 1.2(d). The California rule is broader than the ABA Model Rule 1.2(d), which merely prohibits counseling or

assisting a client on conduct known to be criminal or fraudulent.^{2/} Both the California rule^{3/} and the ABA Model Rule allow a lawyer to discuss the legal consequences of any proposed course of action and counsel or assist the client in interpreting the application of any law, rule or ruling to that course of action.^{4/}

The California rule on its terms applies to every type of legal representation, including transactional work and negotiation. A lawyer cannot knowingly advise a client to propose an illegal provision in a contract that will be offered to a third party. See ABA Model Rule 1.2, Comment [10] (“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.”); ABA Section of Litigation, *Ethical Guidelines For Settlement Negotiations* (August 2002), at pp. 46-47) (“A lawyer should not negotiate a settlement provision that the lawyer knows to be illegal.”).^{5/}

In Scenario 1, Lawyer is knowingly recommending the inclusion of a provision that Lawyer knows is illegal in violation of rule 1.2.1(a).^{6/} Conversely, in Scenario 2, Lawyer does not know that the specific type of contract provision is illegal and, thus, does not violate the rule. However, Lawyer likely violated the duty of competence under rule 1.1(a). Knowing that the specific provision was illegal is likely to be reasonably necessary to provide competent legal advice to HR on employment law matters consistent with rule 1.2.1(b), and Lawyer’s failure to acquire such knowledge before advising the client, might be grossly negligent under rule 1.1(a). See also rule 1.1(b).

^{2/} ABA Model Rule 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

^{3/} Rule 1.2.1(b): “Notwithstanding paragraph (a), a lawyer may: (1) discuss the legal consequences of any proposed course of conduct with a client; and (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.”

^{4/} See California State Bar Formal Opn. 2020-202, generally, for discussion on the scope of permitted advice and assistance a lawyer may provide to clients related to conduct described in rule 1.2.1(a).

^{5/} The ABA Model Rules may be looked to for guidance on proper professional conduct, particularly in areas where there is no contrary California authority or conflicting public policy. See California Rule of Professional Conduct 1.0, Comment [4] (“Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered” for guidance on proper professional conduct).

^{6/} The Committee would reach the same conclusion in all four scenarios if Lawyer was drafting the agreement *ab initio*.

B. Duty Not to Assist Enforcement of an Illegal Contract Provision

While the ABA frames this issue in terms of fraud or crime, the duty is broader in California because our variation of ABA Model Rule 1.2(d), rule 1.2.1, also adds violation of any law, rule, or ruling of a tribunal, even if those violations do not amount to a crime or fraud.

In Scenario 3, Lawyer has a duty not only to advise the client or client constituent, HR, on the interpretation of the applicable law and the possible consequences of using the provision in question, but also to recommend against its use and avoid assisting the client's enforcement of the illegal provision.

In Scenario 4, because the client or client constituent insists on including the illegal provision for its in terrorem effect contrary to Lawyer's advice, Lawyer must advise the client regarding the limitations on Lawyer's conduct, including that Lawyer will not represent the client in advocating or attempting to enforce the illegal provision. Rule 1.2.1, Comment [5]; rule 1.4(a)(4).

A lawyer may not knowingly make a false statement of law to a third person. Rule 4.1(a). Rule 8.4(c) states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." California statutory law states the duty in broader terms. See Business and Professions Code section 6068(d)^{7/} (It is the duty of an attorney "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth . . ."). Accordingly, advocating or attempting to enforce an illegal provision in an employment agreement for its chilling effect on third parties would violate rule 8.4(c) and Business and Professions Code section 6068(d). See also, California State Bar Formal Opn. 2015-194, where this Committee opined that a lawyer may not knowingly make false statements of fact or implicit misrepresentations of material fact during negotiations because such statements could constitute deceit, employment of means not "consistent with truth," and dishonest conduct, all of which are ethically prohibited by Business and Professions Code sections 6106, 6128(a), and 6068(d), and related California case law.^{8/}

Traditionally, in representing a client in arm's length business negotiations, a lawyer owes a limited duty to the other side that does not include a duty to inform that party of relevant facts. "[I]n drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document." Rule 4.1, Comment [1]. Nonetheless, a "nondisclosure can be the equivalent of a false statement of material fact *or law* under paragraph (a) where a lawyer

^{7/} While the statute has most often been applied in the context of a lawyer's duty not to mislead the Court, relying on the second clause of the statute [citation], there is no textual limitation of the application of the first clause to transactional work.

^{8/} California State Bar Formal Opn. 2015-194 was issued prior to the time that rule 4.1 was enacted, but the Committee also relied on ABA Model Rule 4.1 in support of its argument.

makes a partially true but misleading material statement or material omission.” *Id.*; see also California State Bar Formal Opn. 2015-194.

Lawyers have less latitude to make or ratify a false statement of *law* made by the client. See South Carolina Bar Ethics Opn. 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 4.1 and 8.4(c)); *In re Discipline of Attorney* (2008) 451 Mass. 131 [884 N.E.2d 450] (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). 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. However, the advocacy of a contract provision *known both by the client and the lawyer* to be illegal for its chilling effect is a fraudulent act.^{9/}

C. Lawyer May Have a Duty to Withdraw from the Representation

In Scenario 4, if HR insists on including the illegal provision, Lawyer may withdraw but is not compelled to withdraw merely because the client chooses to use the illegal provision, despite the lawyer’s admonition, even if the use of that contract provision is deemed fraudulent or even criminal. Rule 1.2.1, Comment [2]; rule 1.16(b)(1) –(3).^{10/} If, however, HR conditions Lawyer’s employment on continued participation in HR’s use of the contract provision, or enforcement thereof, Lawyer may be required to withdraw under rule 1.16(a)(2), which makes withdrawal mandatory if “the lawyer knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act,” that is, a violation of rules 1.2.1, 4.1, and 8.4 and Business and Professions Code section 6068(d).^{11/}

D. Duty to Report Up in An Organization

Because the client is an organization, in Scenario 4 Lawyer will have a duty to report the conduct of the corporate constituent (*e.g.*, HR) to the higher authority in the organization if

^{9/} Under rule 1.0.1(d): “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

^{10/} See rule 1.16 (b) (“Except as stated in paragraph (c), a lawyer *may* withdraw from representing a client if: (1) the client insists upon presenting a claim or defense in litigation, or *asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law*; (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer’s services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud; (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent . . .”). (Emphasis added.)

^{11/} The lawyer may not reveal confidential advice or information regarding the use of the illegal provision, except as required by rule 1.13. (See rule 1.6 and Cal. Bus. & Prof. Code § 6068(e)(1). See also Cal. State Bar Form. Opn. 2015-192, generally, for discussion on lawyer’s duty to maintain confidential information when withdrawing from a client representation.)

Lawyer knows or reasonably should know that the conduct is “(i) a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization” unless the lawyer reasonably believes that “it is not necessary in the best lawful interest of the organization to do so.” Rule 1.13(b).

Labor Code section 432.5 provides that “[n]o employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.” Business and Professions Code section 16600 states that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” For purposes of this opinion, we assume that the contract provision is unlawful under California law. Given the possibility of substantial injury to the organization, Lawyer must evaluate carefully whether disclosure to a higher authority is reasonably necessary. (See rule 1.4 and rule 1.13, Comment [2].) Moreover, because Lawyer has a duty not to withdraw without taking reasonable steps to avoid reasonably foreseeable prejudice to the organization client. Rule 1.16(d), this disclosure must be made even if Lawyer opts to withdraw as provided by rule 1.16(c)(1) – (3).

CONCLUSION

A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. That conduct includes the use of a contract provision in a transaction with a third party that has been found to be illegal under the law of the jurisdiction applicable to the transaction. If the lawyer knows that the provision is illegal, the lawyer: (1) should advise the client accordingly; (2) may not recommend the use of the provision; and (3) must counsel the client not to use it.

If the client insists on the use of the illegal provision against the lawyer’s advice, the lawyer may not participate in presenting the illegal provision to the third party and may not assist the client in enforcing the provision. In that event, the lawyer may withdraw from the representation but is not required to do so.

If the lawyer concludes that the conduct is a violation of law reasonably imputable to the organization and likely to result in substantial injury to the organization, the lawyer for an organization must report the actions of the client constituent to a higher authority, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

Public Comment - Proposed Opinion 19-0003

Commenting on behalf of an organization	No
Name	John L Romaker
City	Poway
State	California
Email address	jlromaker2@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Oppose

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

This is arrant pendency up with which we ought not put. The analysis is shallow at best. One cannot know that the non-compete clause will be void for illegality until one knows the facts at the time of termination. The employee may be given access to trade secrets as part of his/her/their job. A cook might learn the secret recipe. A machinist may learn a method for cutting a highly engineered o-ring. A lowly coder may learn the secrets of the program operations. A covenant not to compete is lawful to the extent necessary to protect trade secrets. Businesses want their contracts to operate prospectively. Consequently, one anticipates that the employees will develop to jobs of greater responsibility. Does the committee want to require a new contract for each promotion? An arbitration clause in the employment contract may be illegal in some circumstances, and perfectly legal in others. In family law prenuptial agreements are a mystery. A waiver of spousal support may be unconscionable. It depends on the circumstances at the time of enforcement, not when the contract was made. Whether a term is void for illegality is often determined under the circumstances at the time of enforcement. The good lawyer will explain to the client the fact that the term may be unenforceable as void for illegality depending on the circumstances with apt examples.

So, is it unethical for a lawyer to write a promissory note charging interest at a rate exceeding ten percent? The general rule is that such a contract is illegal. It could even be a crime. But there are at least a dozen circumstances in which the note is not illegal. I think the lawyer has a duty to investigate whether...

... such circumstances exist and advise the client accordingly. If the circumstances do not fit an exception or exemption, then the lawyer should not participate in documenting the transaction. And, if the client is an entity take that advice up the chain of management. (Perhaps that would be a better example to illustrate your point than a questionable legality situation like a restrictive covenant).

I agree that a lawyer may not participate in enforcing the restrictive covenant if the employee was not privy to trade secrets. I have litigated against such enforcement many times. I do not believe my opposing counsel were acting unethically when they attempted to enforce the restrictive covenant by asserting that certain matters were trade secrets. Once I could prove they were not, then that becomes a different ethical issue.

This committee approves of lawyers writing contracts for the sale of marijuana. It is a federal felony. We are still bound by federal law. Yet, this opinion asserts it is unethical for a lawyer to write a form employment agreement with a covenant not to compete that may be unenforceable for illegality at the time of termination. I think your ethical opinion is form over substance and hypocritical as well.

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Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, CA 94105

May 12, 2021

Re: COPRAC Proposed Formal Opinion Interim 19-0003

Dear Ladies & Gentlemen:

On behalf of the San Diego County Bar Association, we are writing to comment on COPRAC's proposed Formal Opinion Interim No. 19-0003. We appreciate the work COPRAC has done on the draft opinion. At the same time, we have some concerns, as well as some requests that certain points be clarified.

On the Digest, we have two suggestions. First, where the digest mentions that the lawyer may not participate in presenting the illegal provision to the third party, we recommend that COPRAC add, "nor may the lawyer assist with enforcing the illegal provision in dealing with third parties," or similar language. We further suggest that after the words, "higher authority" that COPRAC add, "within the organization." We recommend the same edit on page 6.

The opinion is premised on the non-compete clause being "illegal." We are unclear about whether the opinion applies to provisions that are "unenforceable" and the distinction between an "illegal" provision and one that is "unenforceable," if any. We would appreciate further clarity in the opinion.

As to the discussion of competence on page 3, we recommend that COPRAC add a reference to indicate that the in-house counsel could address this matter by either learning the subject matter or hiring outside counsel to address the issue if in-house counsel is unaware of the matter. A discussion of the definition of "knows" from Rule 1.0.1(f) would also be appropriate. We are also unclear on when failure to acquire knowledge "might be grossly negligent" given the myriad issues that may arise before in-house counsel, and the practical limitations on the acquisition and awareness of such information.

On page 4, second paragraph that states:

In Scenario 3, Lawyer has a duty not only to advise the client or client constituent, HR, on the interpretation of the applicable law and the possible consequences of using the provision in question, but also to recommend against its use and avoid assisting the client's enforcement of the illegal provision.

We think it would be helpful to state where the duty arises. For example, is it the duty of competence, or is it a duty listed under Rule 1.4?

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Also on page 4, the discussion of 6068(d) and fn. 7 is unclear as to the language “the purpose of maintaining the causes confided.” Overall, this is not needed, as it seems 8.4(c) addresses the situation.

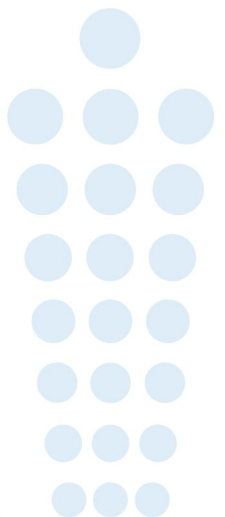
On page 5, the argument as to lawyers having less latitude to make or ratify false statements, based only on out-of-state law/ethics opinion, is not helpful. The South Carolina opinion relies in part on rule 8.3 which was not adopted in California.

Also on page 5, further clarification would be helpful concerning the withdrawal of the in-house counsel from representation. Is it suggested that the in-house lawyer would need to terminate employment, or advise the company that the lawyer would no longer advise on the issue.

We appreciate the opportunity to provide our comments on the draft opinion.

Sincerely,

San Diego Bar Association





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May 19, 2021

VIA ATTACHMENT TO ONLINE FORM

Angela Marlaud
Office of Professional Competence
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180 Howard Street
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Re: **BASF Comments on CA Proposed Formal Opinion Interim No. 19-0003**

Dear COPRAC Members,

This letter is being submitted on behalf of the Bar Association of San Francisco's ("BASF") Legal Ethics Committee ("Committee") to provide comments on Proposed Formal Opinion Interim No. 19-0003 by the California State Bar's Committee on Professional Responsibility and Conduct ("COPRAC"), entitled "Advising Client on Illegal Contract Provisions." Thank you for tackling this issue. We respectfully submit the following comments and recommendations, which reflect the thoughts of the majority of the voting members of our Committee as reviewed and approved by the BASF board.

First, we suggest that the opinion consider an additional scenario. As it stands now, the opinion addresses a scenario in which a lawyer, drafting a non-negotiable employment contract for the client to provide to a prospective employee, includes in the contract a provision that the lawyer knows to be illegal, without further analysis or advice to the client. The opinion also addresses a scenario in which the lawyer does not know the provision is illegal, as well as two other similar scenarios. The opinion does not, however, consider the possibility that the lawyer knows a court has held the provision to be unlawful, but nonetheless has a good faith belief that the ruling was incorrect, another court has ruled or would rule otherwise, or the provision might be enforceable under some circumstances. See Cal. Rules Prof. Conduct ("rule") 1.2.1, Comment [3]. In those instances, the lawyer would need to explain the relevant facts, law, and implications to the client, but the lawyer might wonder if it would still be a violation of the California Rules of Professional Conduct to include the provision in the contract pursuant to the client's directive, particularly if the provision started with a phrase such as, "To the extent lawful and enforceable," Because the use of such limiting language is not uncommon, we believe it would be helpful if the opinion discussed this situation.

Second, we suggest a minor edit for clarity. Footnote 7 on page 4 states that the first clause of Business and Professions Code section 6068(d) applies to making a false statement of law to a third person in transactional work, while the second clause has been applied in the litigation context. In regard to the second clause, the footnote includes a place for a citation that should be filled in. In addition, we believe that the phrase "there is no textual limitation of the application of the first clause to transactional work" is unclear. Assuming that the first clause of section 6068(d) does apply outside the litigation context, and in addition to the inclusion of the citation pertaining to the second clause, we propose the following edit:

^{7/} While the statute has most often been applied in the context of a lawyer's duty not to mislead the Court, relying on the second clause of the statute [citation], there is ~~no textual limitation of~~ **nothing in the text precluding** the application of the first clause to transactional work.

Third, we suggest a clarification of some of the language used as to Scenario 4, which describes a situation where the client insists on including an illegal provision in a contract for its "chilling effect." This phrase is repeated on pages 4 and 5. On page 4, the opinion refers to including an illegal term in the contract for its "in terrorem effect." The words "chilling" and "in terrorem" typically refer to actions taken to instill fear or to intimidate. Perhaps the intent is to describe a situation where a client wants to include a term not merely to frighten employees, but to obtain the client's desired result by inducing employees to comply with an unenforceable provision out of a mistaken fear of liability or fear of the risks and costs of litigation. If so, a clarification to this effect would be helpful.

Fourth, we suggest a clearer depiction of the lawyer's misconduct. On pages 4 and 5, the opinion indicates that a lawyer's inclusion of an illegal term in an employment contract for its chilling effect would violate Business and Professions Code section 6068(d) (means inconsistent with the truth), rule 8.4(c) (dishonesty, fraud, deceit, reckless or intentional misrepresentation), rule 4.1(a) (false statement of law to a third person, including nondisclosure), and rule 4.1(b) (failure to disclose a material fact). It is not clear if the opinion is characterizing the lawyer's conduct as a misrepresentation of law, a misrepresentation of fact, an omission of material fact, or a failure to disclose the law. More specifically, is a lawyer's delivery of a non-negotiable contract to a prospective employee of the client "fraud" in the sense of an affirmative representation that all of the terms in the contract are legal? If the conduct is better construed as an omission, is it an omission of law, or an omission of fact?

Fifth, the last paragraph on page 4 starts by stating that a lawyer does not have a duty to inform the other party of relevant *facts*. The end of the paragraph, however, notes that a nondisclosure may be the equivalent of a false statement of "material fact *or law*" under rule 4.1(a), citing Comment [1] to rule 4.1. (Italics in original.) The italicization of "or law" is confusing. While it is true that rule 4.1(a) prohibits a lawyer from knowingly making a false statement of law as well as fact, it would be clearer if the paragraph dealt only with the omission of material fact. (The next paragraph in the opinion deals with failure to disclose the law.)

Sixth, the first paragraph on page 5 indicates that a lawyer is prohibited from making or ratifying a false statement of law to a third party. Later in that paragraph, the opinion discusses the applicability of rule 4.1(b), but by its terms rule 4.1(b) prohibits a lawyer from knowingly failing to disclose a material *fact* (when disclosure is necessary to avoid assisting a client's fraudulent act), not law. See rule 4.1, Comment [2] ("This rule refers to statements of fact.").

Lastly, in that same paragraph on page 5, the opinion states that "the advocacy of a contract provision *known both by the client and the lawyer* to be illegal for its chilling effect is a fraudulent act." (Italics in original.) The reader may take this to mean that the *lawyer* is committing fraud by not disclosing to the prospective employee that the term is unlawful. It seems to us that the intent of the paragraph is not to opine on a lawyer's tort liability, but simply to explain that the client's insistence on the illegal term is a fraudulent act by the *client*, such that the lawyer violates rule 4.1(b) by failing to disclose the illegality and assisting the client's fraud. The potential uncertainty may be cured by adding "by the client" after the words "fraudulent act."

Thank you for your consideration.

Respectfully,

BASF LEGAL ETHICS COMMITTEE

A handwritten signature in blue ink, appearing to read "Dianne Jackson McLean".

By: Dianne Jackson McLean, Chair
Carl W. Chamberlin, Vice Chair