

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

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

9 **DIGEST:** A California lawyer has a duty not to counsel or assist a client in conduct
10 that the lawyer knows is criminal, fraudulent, or a violation of any law,
11 rule, or ruling of a tribunal. That conduct includes promulgating or
12 enforcing a contract provision in a transaction with a third party that is
13 illegal under the law of the jurisdiction applicable to the transaction. If
14 the lawyer knows that the provision is illegal as applied to the
15 transaction, the lawyer should advise the client accordingly, may not
16 recommend the use of the provision, and must counsel the client not to
17 use it. If the client insists on the use of the illegal provision against the
18 lawyer's advice, the lawyer may not participate in promulgating or
19 enforcing the illegal provision against a third party. The lawyer is
20 permitted to withdraw from the representation if the client insists on
21 using the illegal provision and, depending on the client's continued
22 conduct, may be required to do so. If the lawyer concludes that the
23 client's conduct is a violation of law reasonably imputable to the
24 organization and likely to result in substantial injury to the organization,
25 the lawyer for an organization must report the actions of the client
26 constituent to a higher authority within the organization, unless the
27 lawyer reasonably concludes that it is not in the best lawful interest of
28 the organization to do so.

29 **AUTHORITIES**

30 **INTERPRETED:** California Rules of Professional Conduct 1.1, 1.2.1, 1.4, 1.13, 1.16(b), 4.1,
31 8.4(c).¹

32 Business and Professions Code section 6068(d).

33

^{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.

INTRODUCTION

Certain types of contract provisions are 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* (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 below and assumes that the contract provision at issue is illegal at the time the agreement is made and not potentially subject to an exception that would make the provision legal.^{2/}

STATEMENT OF FACTS

Lawyer works for a large California corporation (“Company”) 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 in California as a nonnegotiable agreement that must be signed as a condition of employment. Lawyer is tasked with reviewing and updating the Agreement, which contains a material provision that is illegal under California law.

FACTUAL SCENARIOS

Scenario 1

Lawyer knows that the provision is illegal under California law but advises HR to use the Agreement anyway, without informing HR of the illegality.

Scenario 2

Lawyer does not know that the provision is illegal under California law and Lawyer performs no research or analysis to determine the legality of the provision but advises HR to use the Agreement anyway.

^{2/} The use of the term “illegal” in this opinion refers to a provision that is illegal under the law of the jurisdiction applicable to the transaction. The opinion is not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition; Nor is it intended to address situations where 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 in the controlling jurisdiction has ruled or would rule otherwise, or the provision might be enforceable against the person who is being asked to sign it under reasonably foreseeable circumstances. See Rule 1.2.1, Comment [3].

Scenario 3

Lawyer advises HR that the provision is illegal under California law but does not recommend against including the provision.

Scenario 4

Lawyer advises HR that the contract provision is 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 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 ABA Model Rule 1.2(d), which merely prohibits counseling or assisting a client on conduct known to be criminal or fraudulent.^{3/} Both the California rule^{4/} 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.^{5/}

The California rule on its terms applies to every type of legal representation, including transactional work and negotiation. A lawyer shall not 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*

^{3/} 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.”

^{4/} 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.”

^{5/} See Cal. 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).

87 *Negotiations* (August 2002), at pp. 46-47) (“A lawyer should not negotiate a settlement
88 provision that the lawyer knows to be illegal.”).^{6/}

89 In Scenario 1, Lawyer recommends the inclusion of a provision that Lawyer knows is illegal
90 under California law in violation of rule 1.2.1(a) and not potentially subject to an exception that
91 would make the provision legal.^{7/} Rule 1.0.1(f) helps to define knowing: “‘Knowingly,’ ‘known,’
92 or ‘knows’ means actual knowledge of the fact in question. A person’s knowledge may be
93 inferred from circumstances.” Here, knowing means the lawyer has actual knowledge that the
94 provision in question is prohibited by the controlling legal authority in the jurisdiction whose
95 law is applicable to the transaction or contract.

96 Conversely, in Scenario 2, Lawyer does not know that the specific type of contract provision is
97 illegal under the controlling legal authority of the applicable jurisdiction. Therefore, the lawyer
98 does not violate rule 1.2.1.

99 However, in Scenario 2, the Lawyer likely violated the duty of competence under rule 1.1(a)
100 because Lawyer’s conduct reflects a deliberate or reckless disregard for the lawfulness of the
101 subject provision. Knowing that the specific provision is illegal is likely to be reasonably
102 necessary to provide competent legal advice to HR on employment law matters consistent with
103 rule 1.1(b), particularly to the extent it is well-established that this type of provision is illegal.
104 Rule 1.1(c) allows a lawyer to fulfill the duty of competence by associating or consulting a
105 lawyer the lawyer reasonably believes to be competent or acquiring sufficient learning and skill
106 to become competent before advising the client on a material legal provision. A lawyer’s failure
107 to do so might be reckless or grossly negligent under rule 1.1(a). See, *In the Matter of Morse*
108 (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24 (Respondent’s mass advertising without
109 thoroughly researching relevant statute to evaluate exemption was “grossly negligent and
110 could be characterized as reckless or intentional after he disregarded the later request from the
111 Attorney General’s Office that he stop mailing unlawful advertisements.”); see also rule 1.1(b).

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

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

116 In Scenario 3, Lawyer has a duty under rule 1.2.1 not only to advise the client or client
117 constituent, HR, on the applicable law and the possible consequences of using the provision in

^{6/} 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 Cal. Rule of Professional Conduct 1.0, Cmt. [4] (“Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered” for guidance on proper professional conduct.).

^{7/} The committee would reach the same conclusion in all four scenarios if Lawyer was the original drafter of the agreement.

question, but also to recommend against its use and avoid assisting the client's promulgation or enforcement of the illegal provision. See also rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

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

If Lawyer ultimately decides to assist Corporation in promulgating or enforcing the illegal provision, Lawyer's conduct may be a misrepresentation by omission or an affirmative misrepresentation that the provision is legal. See rule 4.1(a), Comment [1].

A lawyer shall 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." Promulgating or enforcing a knowingly illegal provision in an employment agreement for its chilling effect^{8/} on third parties would violate rule 4.1(a), 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.^{9/}

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

In addition, a lawyer may not make or ratify a false statement of law or fact made by the client that the lawyer knows is false. See rule 4.1(a); see also 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

^{8/} The chilling effect includes situations 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 illegal provision out of a mistaken fear of liability or fear of the risks and costs of litigation.

^{9/} Cal. State Bar Formal Opn. 2015-194 was issued prior to the time that rule 4.1 was enacted; the committee principally relied on existing statutory law (Bus. & Prof. Code, §§ 6106, 6128(a), and 6068(d)), and related California case law, but it also relied on ABA Model Rule 4.1 in support of its argument.

[884 N.E.2d 450] (lawyer disciplined under Massachusetts 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 a failure to disclose a material fact necessary to avoid assisting in a “criminal or fraudulent” act by a client, which is narrower than illegal conduct.^{10/} However, the advocacy of a contract provision known both by the client and the lawyer to be illegal for its chilling effect could be viewed as a fraudulent act by the client. Whether rule 4.1(b) applies will depend on the scope of the lawyer’s conduct in promulgating or enforcing the provision.

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

In Scenario 4, if HR insists on including the illegal provision in Company’s employment agreements, Lawyer may withdraw, but is not compelled to withdraw merely because the client chooses to use the illegal provision despite Lawyer’s admonition. Even where the use of that contract provision is deemed fraudulent or even criminal, withdrawal from representation is permissive, not mandatory (see rule 1.2.1, Comment [1]; rule 1.16(b)(1)–(3).)^{11/}

If, however, HR not only ignores Lawyer’s advice but insists that Lawyer be involved with promulgating or enforcing the illegal contract provision, Lawyer would likely be required to terminate his representation of Company with respect to this matter.^{12/} Rule 1.16(a)(2) provides that withdrawal is 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.” Lawyer’s continued,

^{10/} 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.

^{11/} 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.)

^{12/} In the case of an in-house lawyer, we assume that Lawyer would be permitted to ethically limit the scope of the representation to exclude this matter or decline the representation if HR sought to have Lawyer negotiate, advocate or litigate the illegal provision. See rules 1.2(b); 1.16(a)(2). Whether Lawyer would need to withdraw from other matters or whether Lawyer would be required to terminate Lawyer’s employment at Company is beyond the scope of this opinion and depends on specific facts, including HR’s instructions or continued demands, and whether the withdrawal from representation relating to the illegal provision would impact Lawyer’s representation of Company on other matters.

active participation in promulgating and enforcing the illegal contract provision would likely violate rules 1.2.1, 4.1, 8.4, and possibly Business and Professions Code section 6068(d).¹³

D. Duty to Report Up in An Organization

Lawyer in Scenario 4 has a duty to report the conduct of the corporate constituent (*e.g.*, HR) to a higher authority within Company because the lawyer knows that HR's conduct is illegal and is "likely to result in substantial injury to the organization." See rule 1.13(b).^{14/} Rule 1.13(b) provides for an exception to reporting up if the facts indicate that "it is not necessary in the best lawful interest of the organization to do so." *Id.* While the duty to report up is fact specific, in Scenario 4, if HR insists on using the illegal provision or that Lawyer participates in promulgating or enforcing the illegal provision, reporting up would very likely be in the best lawful interest of Company.

Moreover, because Lawyer has a duty not to withdraw without taking reasonable steps to avoid reasonably foreseeable prejudice to the organization client under rule 1.16(d), this disclosure must be made even if Lawyer opts to withdraw under the permissive withdrawal provisions in rule 1.16(b)(1)–(3). Beyond this scenario, a lawyer should evaluate carefully whether disclosure to a higher authority within the organization is reasonably necessary, which will depend on the relevant circumstances.

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. As such, a lawyer shall not knowingly promulgate or enforce a contract provision in a transaction with a third party that is illegal under the law of the jurisdiction applicable to the transaction and not potentially subject to an exception that would make the provision legal. 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 using the illegal provision against the lawyer's advice, the lawyer shall not participate in presenting the illegal provision to the third party and shall not assist the client in

^{13/} If this matter was before a tribunal, Lawyer may not reveal confidential advice or information regarding the use of the illegal provision in seeking withdrawal, except as required by rule 1.13. (See rule 1.6 and Cal. Bus. & Prof. Code, § 6068(e)(1). See also, Cal. State Bar Formal Opn. 2015-192, generally, for discussion on lawyer's duty to maintain confidential information when withdrawing from a client representation.)

^{14/} Company's use of an illegal provision is likely to result in substantial injury to the organization. See also, Cal. Lab. Code, § 432.5 ("No 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.")

198 enforcing the provision against a third party. The lawyer is permitted to withdraw from the
199 representation if the client insists on using the illegal provision and, depending on the client's
200 continued conduct, may be required to do so.

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

Public Comments Analysis to Illegal Contract Provisions Draft Ethics Opinion

- **Neil Wertlieb**

- The term “illegal” is inconsistent with Rule 1.2.1, which applies to “conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” (Emphasis added).
 - Illegal was used as shorthand and appears consistent with “a violation of any law, rule, or ruling of a tribunal.” Based on Neil’s and comments of others, we should clarify that the term illegal means a violation of California law. Or we could consistently use a “violation of California law” throughout the opinion.
 - As Richard Zitrin’s comments note, counseling a client or assisting a client in drafting, promoting and enforcing a contract provision that the lawyer knows is a violation of California law concerns “conduct.” If the law clearly prohibits such agreements, it appears the lawyer is counseling or assisting a client in conduct that the lawyer knows if a violation of law.
- Footnote 2 states that it is “not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition.” The Intro provides an example of a non-compete covenant in an employment agreement, but there is little support for the proposition that a non-compete covenant is or could be a violation of law in California. Business and Professions Code section 16600 states that absent an exception, a noncompete is “void” (not a violation of law). The cases cited do not hold that a non-compete could be a violation of law. The 2008 California Supreme Court case *Edwards v. Arthur Andersen LLP* held that the non-compete covenant was invalid (not a violation of law nor illegal). Although the 2016 Court of Appeals case *Robinson v. U-Haul Co. of California* states that such covenants are illegal under California law, it cites to both Section 16600 and *Edwards v. Arthur Andersen LLP* for support, although neither use the term “illegal,” and does not find that a non-compete provision is a “violation of law.” The draft opinion skirts this issue by assuming “that the contract provision at issue is illegal at the time the agreement is made.” Perhaps a better example could be used, but Neil is unaware of any contract provision that is itself a violation of any law in California.
- We should consider changing the example provided based on the feedback received regarding distinction between void/unenforceable contract provisions and illegal contract provisions. David McGowan suggests limiting to agreements that are unlawful to propose or consummate, such as price-fixing agreements, agreements restraining a lawyer’s right to practice (CA Rule 5.6(a)), or agreements precluding reports of a violation of the rules of conduct. (CA Rule 5.6(b); Business & Professions Code Section 6090.5).

38 ▪ California case law supports the notion that noncompete agreements are illegal
39 or in violation of law absent an applicable exception. For example, in *Arthur*
40 *Anderson*, the California Supreme Court concludes that “section 16600 prohibits
41 employee noncompetition agreements unless the agreement falls within a
42 statutory exception.” *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 942, 946-
43 47 (2008) (“Under the statute's plain meaning, therefore, an employer cannot by
44 contract restrain a former employee from engaging in his or her profession,
45 trade, or business unless the agreement falls within one of the exceptions to the
46 rule.”). The Court also states that “following the Legislature, this court generally
47 condemns noncompetition agreements. (See, e.g., *Armendariz v. Foundation*
48 *Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 123, fn. 12 [99 Cal. Rptr. 2d
49 745, 6 P.3d 669] [such restraints on trade are “largely illegal”].)” *Id.* at 946.

50 ▪ See also *Brown v. TGS Management Co., LLC*, 57 Cal. App. 5th 303, 315 (2020)
51 (“An employer's use of an illegal noncompete agreement also violates the UCL (§
52 17200 [‘unfair competition shall mean and include any unlawful, unfair or
53 fraudulent business act or practice and unfair, deceptive, untrue or misleading
54 advertising’].) [Citations.]”).

55 ○ Even if a contract provision could be a violation of law or illegal, Rule 1.2.1(a)
56 prohibits “conduct” that is in violation of law. A contract provision cannot constitute
57 “conduct” for purposes of Rule 1.2.1(a). The draft opinion, in discussing Scenario 1,
58 asserts that Lawyer, by recommending “inclusion of a provision that Lawyer knows is
59 illegal under California law,” would be in violation of Rule 1.2.1(a). However,
60 because Rule 1.2.1 requires that a lawyer counsel or assist a client in conduct the
61 lawyer knows is in violation of the law, there must be conduct by the client that is
62 (or would be) a violation of the law. The act of including an illegal provision in a
63 contract must also be illegal, but there is no basis for reaching this conclusion under
64 California law.

65 ▪ See Response to first comment above.

66 ○ The Conclusion asserts that “a lawyer shall not knowingly promulgate or enforce a
67 contract provision ... that is illegal.” There is no basis for concluding that the
68 “conduct” of promulgating or enforcing an illegal provision is in violation of the law.
69 This may suggest a lawyer is violating Rules 3.1 or 3.4, but not Rule 1.2.1.

70 ▪ We should discuss, but Rules 3.1 or 3.4 do not appear to apply to our scenarios.

71 ○ The draft opinion assumes that if a lawyer knows a contract provision is illegal, the
72 lawyer must know that certain conduct relating to that provision is also illegal. Rule
73 1.2.1(a) requires “conduct that the lawyer knows is criminal, fraudulent, or a
74 violation of any law, rule, or ruling of a tribunal.”

75 ▪ See Response to first comment above.

- It is nonsensical to conclude as a matter of law that the inclusion of an illegal contract provision is itself illegal conduct. Provides example of an employee who seeks to include such provision in exchange for higher compensation.

- See Response to first comment above.

- If the draft opinion assumes that the inclusion of an illegal provision in a contract is (by definition) illegal conduct, then the draft opinion's conclusion is stating the obvious and provides no assistance.

- **CLA**

- Cut and paste of Neil's personal comments.

- **Richard Zitrin**

- He does not understand the use of the term "illegal," and new footnote 2 confuses issues by distinguishing between "illegal" and "unenforceable" without further explanation. In addition, fn. 2 references "legal but against public policy." If something is found to be against public policy, doesn't that make it illegal?

- Based on overall feedback, a clarifying footnote is still useful to avoid confusion even if we decide to make Richard's proposed edit noted below. We should evaluate claim regarding whether something against public policy is necessarily illegal. While contracts against public policy will not be enforced by the courts, the courts do not appear to use the term "illegal" and "against public policy" interchangeably.

- Recommends following revision in first paragraph of the introduction and throughout the draft opinion, which tracks language of Rule 1.2.1:

Certain types of contract provisions are ~~illegal under~~ violations of 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~~ violations of California law, subject to limited exceptions.

- Agree with this suggestion or just clarifying upfront the definition of illegal.

- He disagrees with Neil's comments about the contract itself not being conduct. The prohibition on the lawyer under Rule 1.2.1 is not to "counsel a client to engage, or assist a client in conduct" It seems disingenuous to say that the client's drafting, entering into, negotiating, or signing a contract is neither "engaging" nor "conduct." The contract was drafted, negotiated, and executed. All those things both are engaging and conduct.

- 110 ▪ Agree. See response to Neil’s first comment.
- 111 • **Stanley Lampert**
- 112 ○ Disagrees with the following conclusion: “If Lawyer ultimately decides to assist
113 Corporation in promulgating or enforcing the illegal provision, Lawyer’s conduct may
114 be a misrepresentation by omission or an affirmative misrepresentation that the
115 provision is legal. See rule 4.1(a), Comment [1].” Rule 4.1, Comment 1 states in
116 pertinent part: “A misrepresentation can occur if the lawyer incorporates or affirms
117 the truth of a statement of another person* that the lawyer knows* is false.
118 However, in drafting an agreement or other document on behalf of a client, a lawyer
119 does not necessarily affirm or vouch for the truthfulness of representations made by
120 the client in the agreement or document. A nondisclosure can be the equivalent of a
121 false statement of material fact or law under paragraph (a) where a lawyer makes a
122 partially true but misleading material statement or material omission.” The
123 Comment does not stand for the proposition that “promulgating” an unenforceable
124 contract provision may be a violation of rule 4.1. It takes more than including a
125 provision in a contract to trigger a rule 4.1 violation because drafting an agreement
126 does not necessarily affirm or vouch for the truthfulness of a representation made
127 by the client.
- 128 ▪ Here, we are not addressing a client misrepresentation of fact, but the lawyer
129 knowingly promoting and enforcing a provision the lawyer knows is illegal. We
130 should discuss whether to use another term instead of “promulgating” in the
131 opinion if readers are confused by the meaning.
- 132 ○ The Comment notes that a rule 4.1 violation can arise when a lawyer makes a
133 statement of material fact with respect to the terms of the contract; but there are
134 no such facts in the draft opinion.
- 135 ▪ Our draft opinion is focused on the lawyer’s statements in promulgating and
136 enforcing the contract provision, which could be interpreted as a representation
137 that the knowingly illegal contract provision is legal. See comment above –
138 should we use different term besides promulgating in opinion.
- 139
- 140 ○ Using the word “may” indicates that there might be a violation of rule 4.1 or there
141 might not be a violation of that rule and provides no meaningful guidance. The
142 sentence is misleading to the extent it could be read to mean that merely advising a
143 client regarding enforcing an “illegal” contract provision may constitute a
144 misrepresentation by the lawyer.
- 145 ▪ The opinion is not addressing providing mere advice to the client about
146 enforcement and the first paragraph in Section A makes clear that a lawyer may
147 discuss the legal consequences of any proposed course of action. We should

148 discuss the use of the term “may” and whether to change to “must” or clarify
149 why it depends on the circumstances.

- 150
- 151 ○ The question whether assisting a client to enforce an unenforceable contract
152 provision is beyond the scope of the draft opinion. The draft opinion is limited to a
153 lawyer working with a client to review and update an agreement. There is nothing in
154 the draft opinion to suggest that the lawyer will have any contact with an employee
155 who is asked to sign the agreement or will make any statement or representation to
156 such an employee.

- 157 ■ This is not correct. Scenario 4 and the body clearly address assisting a client with
158 enforcement.

- 159
- 160 ○ COPRAC addressed misrepresentations in the context of a contract in State Bar
161 Formal Opinion 1996-146. If COPRAC wants to address the question of a
162 misrepresentation in the context of an unenforceable contract provision, it should
163 build on Formal Opinion 1996-146 in the context of a different hypothetical that
164 would allow COPRAC to reach a definite conclusion.

- 165 ■ This older COPRAC opinion addresses a different factual situation involving a
166 lawyer’s fraudulent conduct, however, we could consider whether there is some
167 value in referencing the older opinion in a footnote here when discussing
168 scenario 4.

169

- 170 • **David McGowan**

- 171 ○ Fn. 2 does not adequately distinguish illegal and unenforceable contracts and this
172 distinction is not followed in body of opinion:

173 The use of the term “illegal” in this opinion refers to a provision that is illegal
174 under the law of the jurisdiction applicable to the transaction. The opinion is not
175 intended to address provisions that are legal, but against public policy,
176 unenforceable or subject to some other prohibition; Nor is it intended to address
177 situations where the lawyer knows a court has held the provision to be unlawful,
178 but nonetheless has a good faith belief that the ruling was incorrect, another
179 court in the controlling jurisdiction has ruled or would rule otherwise, or the
180 provision might be enforceable against the person who is being asked to sign it
181 under reasonably foreseeable circumstances.

182 To say that “illegal” means “illegal” under controlling law does not clarify what the
183 opinion covers or excludes. Business & Professions Code § 16600, does not state
184 that non-compete terms are “illegal” in the sense that forming such an agreement
185 violates the law. It states instead that they are “void,” which means unenforceable.

187 ▪ This is consistent with Neil’s and CLA’s identical comments and Richard’s first
188 comment discussed above and we should discuss. This also appears to be based
189 on the example provided which McGowan and others feels is limited to void or
190 unenforceable contracts as opposed to illegal.

191 ○ The concept of an illegal agreement should be limited to agreements that are
192 unlawful to propose or to consummate. Examples include price-fixing agreements,
193 agreements restraining a lawyer’s right to practice (CA Rule 5.6(a)), or agreements
194 precluding reports of a violation of the rules of conduct. (CA Rule 5.6(b); Business &
195 Professions Code Section 6090.5). The concept should not extend to agreements
196 the that will not be enforced but which are not illegal to form.

197 ▪ Again, this seems based solely on the example. Our opinion is intended to focus
198 only on illegal contract provision. If such provisions are clearly prohibited by
199 controlling California law, then wouldn’t they be unlawful to promulgate or
200 enforce?

201 ○ Disagrees with our conclusion that Rule 1.2.1 is broader than ABA Model Rule 1.2(d)
202 because it forbids a lawyer from counseling or assisting in “a violation of any law,
203 rule, or ruling of a tribunal.” He argues that under canons of interpretation, this
204 phrase must be construed with reference to “criminal [and] fraudulent.” This rule
205 should be limited to laws that forbid formation of an agreement, not laws declaring
206 that a term will not be enforced.

207 ▪ David’s interpretations would render the term “violation of any law, . . .”
208 superfluous. His argument rests again on the premise that our opinion is only
209 addressing an unenforceable contract provision, not an illegal provision.

210 ○ Disagrees with definition of fraud and following conclusion: “Promulgating or
211 enforcing a knowingly illegal provision in an employment agreement for its chilling
212 effect on third parties would violate rule 4.1(a), rule 8.4(c), and Business and
213 Professions Code section 6068(d).” He does not agree that promulgating (giving
214 counterparty copy of the agreement without making any express representation
215 regarding enforceability) a contract with a void provision would violate these rules.
216 Claims that our conclusion appears to rest on unstated premise that noncompete is
217 enforceable versus representation of what the law allows.

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222 counterparty copy of the agreement without making any express representation
223 regarding enforceability) a contract with a void provision would violate these rules.
224 Claims that our conclusion appears to rest on unstated premise that noncompete is
225 enforceable versus representation of what the law allows.

219 ▪ Again, this comment appears to rest on the mistaken premise that our opinion is
220 addressing an unenforceable provision. We should reconsider the use of the
221 term “promulgate” or clarifying what we mean to avoid any misunderstanding.
222 Do we mean drafting, promoting or supporting? Per Merriam-Webster, this
223 term is defined as “to make known to many people by open declaration,” “to
224 make known or public the terms of” or “to put into action or force.” This
225 definition does not seem to be consistent with our use in the Draft Opinion.

- The Draft Opinion notes that deceit may exist “where a lawyer makes a partially true but misleading material statement or material omission.” That observation is correct but is relevant only if a partially true statement of fact or law is made. Draft agreements are not opinion letters, and no concealed facts are involved. Reference to Formal Opinion 2015-194 is thus inapt. In a settlement context, a third party represented by their own counsel would not be able to discern a material fact that was concealed, whereas the party would be able to determine provision is illegal with advice from counsel.
- To the extent a lawyer is involving in promoting or enforcing the illegal provision, a reasonable consumer may be misled into believing the provisions are legal and enforceable.
- With respect to enforcement of an illegal term, he claims other rules more directly address. Rule 3.1 forbids a lawyer from bringing or continuing an action without probable cause and for the purpose of harassment (effectively what the proposed opinion refers to as “chill”). A lawyer dealing with an unrepresented third party is already forbidden by Rule 4.3 from advising them, except to retain their own lawyer. And by hypothesis a third party with a lawyer will not be contacted by counsel for the proponent of an illegal term (Rule 4.2) but will be told by their own lawyer of the unenforceability of a term.
- See above response to Neil’s comment. It is not clear how Rule 3.1 applies to our scenarios. Despite the limitations on communications with represented and unrepresented parties under Rules 4.2 and 4.3, a violation of Rules 4.1(a) or 8.4(c) could still occur. For example, a lawyer could send a demand letter on behalf of the company to an unrepresented party threatening to enforce the illegal noncompete provision.
- Based on the issues noted above, he disagrees with conclusion regarding withdrawal. discussion of withdrawal. Rule 1.13(b) compels reporting “up the ladder” only if an entity constituent’s conduct is both (i) unlawful and (ii) likely to result in substantial injury to the entity. The Draft Opinion acknowledges that this is a fact-specific inquiry, but then in a footnote asserts categorically that “use of an illegal provision is likely to result in substantial injury,” citing a Labor Code provision stating that employers may not require employees to agree to contract terms known “to be prohibited by law.” Section 16600 does not forbid inclusion of non-competes but declares them to be void. And the text of the Rule states that violation of a law alone does not compel reporting up.
- As noted above, in *Arthur Anderson*, the Supreme Court clearly stated non-competes are prohibited by Section 16600. In any event, our draft opinion is not intended to address only non-compete agreements.

- Outside the context of non-competed, the Draft Opinion “will raise more questions than it answers.” For example, is inclusion of an arbitration provision illegal if it does not explicitly enumerate causes of action courts have found non-arbitrable? An example would be a standard employment agreement specifying arbitration but not stating that PAGA claims, Labor Code Section 2698 *et seq*, are not subject to it. Labor Code Section 432.6 states that employers “shall not” require employees to “waive any . . . forum” for a violation of FEHA or the Labor Code? A term doing so would seem to be illegal on its face unless that provision is itself pre-empted by the increasingly broad sweep of the Federal Arbitration Act. A district court enjoined this provision—is the decision of one such court enough to exempt such agreements from the scope of the Draft Opinion?⁴ The Ninth Circuit recently vacated that injunction in *Chamber of Commerce v. Bonta*, 13 F.4th 766 (9th Cir. 2021), which held that the statute itself is not preempted by the FAA because a prohibition on “requiring” employees to arbitrate does not foreclose voluntary agreements, but which also held that penalties for violating the statute are preempted because they are impediments to the policy of the FAA. Does the Draft Opinion mean that a lawyer may help a client draft such a term but may not allow the client to “require” it? What might that mean?

- The arbitration provision would be legal in certain situations, so it is not covered by the scope of the opinion. Fn. 2 explains that the opinion does not address a provision that might be enforceable against the person who is being asked to sign it under reasonably foreseeable circumstances. It also seems like the preemption issue would also be beyond the scope based on fn. 2 as the lawyer would have a good faith belief that the California prohibition would be subject to preemption.

- **LACBA Ethics Committee**

- The Draft Opinion does not address conduct that is a violation of law. Instead, the draft opinion concerns an unenforceable contract provision, which the draft opinion characterizes as “illegal.”
- With reference to non-compete example, claims this provision is unenforceable and that the draft opinion does not explain how a lawyer would have actual knowledge that including an unenforceable clause in a contract would be a violation of law in the absence of a law that enjoins the act of including it.
- Calling an unenforceable contract clause “illegal” does not answer the question whether the conduct of including an unenforceable clause in a contract is a violation of law, particularly when none of the legal authorities state that such conduct is a violation of law.
- Whether a lawyer may seek to enforce an unenforceable provision would be governed by rule 3.1, not rule 1.2.1(a).

- 303 ○ They agree with footnote 2 but claim the sole example in opinion is inconsistent.
- 304 ▪ These issues overlap with the comments addressed above.
- 305 • **Laurence Hummer**
- 306 ○ Disagrees with the conclusion that the lawyer's inclusion of a contractual term that
307 is illegal or unenforceable is a misrepresentation by the lawyer to the other party
308 that the provision is legal or enforceable.
- 309 ▪ This overlaps with comments addressed above.
- 310 ○ Refers to examples of real estate brokers or paralegals using form agreements that
311 may contain unenforceable provisions.
- 312 ▪ The CRPC do not apply to real estate brokers or paralegals. If the lawyer uses a
313 form agreement and does not know the provision is illegal, Rule 1.2.1 would not
314 apply.
- 315 • **AG Rob Bonta**
- 316 ○ Supports Draft Opinion and emphasizing the need for this guidance, especially given
317 California's longtime public policy favors the freedom of workers to seek any lawful
318 employment they choose, and therefore prohibits non-compete agreements or
319 other arrangements that seek to undercut that mobility.
- 320 ○ Because unenforceable non-compete provisions remain widespread in employment
321 contracts in California, we need clear ethical guidance to prohibit the participation
322 of attorneys in formulating or promoting any such unlawful contract provisions.
- 323 • **Peggy Kong**
- 324 ○ Supports Draft Opinion based on her personal experience of being presented
325 with a contract that she claims was illegal and references State Bar complaint.
- 326

From: noreply@fs16.formsite.com on behalf of [Formsite](#)
To: [Tuft, Andrew](#)
Subject: 19-0004 - Public Comment Form Result #14281483
Date: Friday, October 22, 2021 9:40:11 PM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Commenting on behalf of an organization

No

Name

Richard Zitrin

City

San Francisco

State

California

Email address

richard@zitrinlawoffice.com

From the choices below, we ask that you indicate your position. (This is a required field.)

Support if Modified

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The opinion states: "If Lawyer ultimately decides to assist Corporation in promulgating or enforcing the illegal provision, Lawyer's conduct may be a misrepresentation by omission or an affirmative misrepresentation that the provision is legal. See rule 4.1(a), Comment [1]." iIt then discusses myriad likely violations.

I believe that the opinion should say "Lawyer's conduct IS a misrepresentation by omission or an affirmative misrepresentation...." Mincing words and minimizing the clear violation with "may" weakens the opinion, with which I otherwise agree.

RZ

RICHARD ZITRIN
LECTURER EMERITUS

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This email was sent to andrew.tuft@calbar.ca.gov as a result of a form being completed.
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Public Comment - Proposed Opinion 19-0003

Commenting on behalf of an organization	No
Name	Laurence L. Hummer
City	Los Angeles
State	California
Email address	llh@hummeralc.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.	<p>I don't think this is fully thought-out. The idea that a party's lawyer's inclusion of a contractual term that is illegal or unenforceable is somehow a misrepresentation by the lawyer directly to the other party that the provision is enforceable, giving rise to potential liability of the lawyer to the other side of the transaction could create serious mischief and tort liability, including malpractice claims. The idea that a contractual term is a representation by the lawyer about legality is unsupported. The opinion could create litigation and disputes over whether something is illegal or not. California law is notoriously complex. Add mixtures of federal law, other states' law and choice-of-law issues and the situation gets even more complex. The idea that a lawyer can very simply know whether something is illegal or not is inconsistent with recent litigations I have seen over leases and zoning. The proposal's example based on an employment law context may seem innocuous to lawyers who focus their law practices in other areas, but the proposed decision would be far-reaching in many areas of the law. For just a few examples, it is common in business contracts form software (for one</p>

prominent example, the AIR Commercial Real Estate form commercial purchase and sale agreements) to include a waiver of jury trial. It's always there, but it's unenforceable under California law. By using AIR CRE's software and not modifying that language, has a real estate broker violated some duty it owes? By not striking that language in a (commonly-prepared by broker) AIR CRE contract, has either the lawyer for the landlord/seller or tenant/buyer violated the Rules of Professional Conduct or opened himself/herself up to a claim by an adverse party that the...

... lawyer has made a misrepresentation? If so, would either the lawyer be supposedly negligent by not realizing the provision is unlawful and failing to strike it, or, if the lawyer knows the AIR CRE's pre-dispute jury trial waiver is unenforceable but has failed to strike it, the lawyer is acting intentionally and thus should be open to exemplary damages in a lawsuit by the other side? If the proposal for paraprofessionals is adopted, I imagine the same questions will apply to them. It is very common for paralegals to prepare forms as it is, without always understanding in my experience what they are doing beyond filling in the blanks, just the way a real estate broker's assistant prepares an AIR CRE form contract for a broker.

The issue raised is very broad and far-reaching, and opens the door to major mischief. It is indeed ridiculous that contracts entered into in California commonly include pre-dispute jury trial waivers that are not enforceable. It is ridiculous for employers to put non-compete provisions into employment agreements that are unenforceable. Maybe there should be a statute specifically

prohibiting certain clauses in contracts, by requiring statutory mandatory language. See the mandatory disclosure form of Civil Code Section 1102 transfer disclosure statements, or the optional statutory form powers of attorney, or truth in lending disclosures. By a statute enacted by the legislature, the specific problematic provisions could readily be referred to by the lawyer and every contract forms publisher or member of the general public. That does risk making the lengthy mandatory disclosures in real property transactions, for example, even longer and less-actually-read-by-the-clients than they already are. But making a contract provision...
... into a representation by a lawyer through the mechanism of this poorly-thought-out opinion would make no sense.

From: [Neil Wertlieb](#)
To: [Tuft, Andrew](#)
Subject: Proposed Revised Formal Opinion Interim No. 19-0003 (Illegal Contract Provisions)
Date: Friday, December 3, 2021 10:35:41 AM

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Hello, Andrew. In response to your request, set forth below are my concerns regarding Proposed Revised Formal Opinion Interim No. 19-0003 (Illegal Contract Provisions). (I hope this format is acceptable – please advise if otherwise.)

With all due respect to COPRAC’s members, I fear that this draft opinion and its conclusions are fundamentally flawed for the following reasons:

First, the draft opinion, which addresses a lawyer’s obligations under Rule 1.2.1, opines with respect to a contract provision that is “illegal.” However, the term “illegal” is not used in Rule 1.2.1(a), which applies to “conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” Presumably, the draft opinion is using the term “illegal” as a shorthand means of referring to a contract provision that is (or might be) a violation of law, but that terminology is inconsistent with the Rule.

Second, the draft opinion (in footnote 2) states that it is “not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition.” Unfortunately, the draft opinion (in the Introduction) uses the example of a non-compete covenant in an employment agreement. However, there is little support for the proposition that a non-compete covenant is or could be a violation of law in California. Business and Professions Code section 16600 merely states that such a restraint on trade, absent application of an exception, is “void” (not a violation of law). The cases cited in the Introduction likewise do not hold that a non-compete covenant could be a violation of law. The 2008 California Supreme Court case *Edwards v. Arthur Andersen LLP* held that the non-compete covenant at issue in that case was invalid (not a violation of law nor illegal). Although the 2016 Court of Appeals case *Robinson v. U-Haul Co. of California* states that such covenants are illegal under California law, it cites to both Section 16600 and *Edwards v. Arthur Andersen LLP* for support, although neither use the term “illegal,” and does not find that a non-compete provision is a violation of law (to use the terminology of Rule 1.2.1(a)). The draft opinion skirts this issue entirely by assuming “that the contract provision at issue is illegal at the time the agreement is made.” Perhaps a better example could be utilized, but we are unaware of any contract provision that is itself a violation of any law in California.

Third, even if we were to assume that a contract provision can be a violation of law or illegal, the prohibition expressed in Rule 1.2.1(a) pertains to “conduct” that is in violation of law. A contract provision is not conduct. The term “conduct” means behavior or “to plan or do (something, such as an activity).” (See Merriam-Webster online dictionary.) A contract provision is a thing or an object (a noun), and not an activity or behavior (a verb) – and therefore a contract provision by itself cannot constitute “conduct” for purposes of Rule 1.2.1(a).

Fourth, for Rule 1.2.1 to apply, there must be conduct that is (or would be) a violation of the law. A contract provision that is itself illegal or a violation of the law is not the same as conduct that is a violation of the law. The draft opinion, in discussing Scenario 1, asserts that Lawyer, by recommending “inclusion of a provision that Lawyer knows is illegal under California law,” would be in violation of Rule 1.2.1(a). However, because a Rule 1.2.1 violation requires that a lawyer counsel or assist a client in conduct the lawyer knows is in violation of the law, there must be conduct by the client that is (or would be) a violation of the law. And, because there must be illegal conduct, the act of including an illegal provision in a contract (i.e., the “conduct” of doing so) must also be illegal. (E.g., what is the basis for concluding that the inclusion of an illegal provision in a contract is by definition an illegal act?) Unfortunately, this leap of reasoning is not reflected in California law, nor (more importantly) is it explained or justified by the draft opinion.

Fifth, the draft opinion (in its Conclusion) asserts that “a lawyer shall not knowingly promulgate or enforce a contract provision ... that is illegal.” This assertion also fails for the reason stated above – i.e., it is the “conduct” of promulgating or enforcing such a provision that must be in violation of the law for Rule 1.2.1 to apply. This assertion also fails to appropriately apply Rule 1.2.1 because it appears to assume that the lawyer is engaging in illegal conduct due to the illegality of the provision. Although such conduct might be the basis for concluding the lawyer is acting inappropriately (e.g., in violation of Rule 3.1 or 3.4), Rule 1.2.1 relates to counseling or assisting a client in conduct that is (or would be) a violation of law by the client.

Sixth, the draft opinion would have us assume without explanation that if a lawyer knows a contract provision is illegal, then the lawyer must know that certain conduct relating to that provision is also illegal. Rule 1.2.1(a) requires “conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” Just because a lawyer might (hypothetically) know that a non-compete provision is “illegal” does not mean that the lawyer also knows that including the provision in an employment agreement is illegal, or that promulgating or enforcing such a contract provision is illegal. Again, knowledge that a thing is illegal does not mean that certain actions relating to that thing are also illegal, nor that a lawyer should know that those actions are illegal simply because the thing itself is illegal.

Seventh, it is nonsensical to conclude as a matter of law that the inclusion of an illegal contract provision is itself illegal conduct. To return to the example of a non-compete provision (and assuming it to be an illegal provision), an employee (not an employer) might seek to include such a provision in an employment agreement, for example, so as to encourage the employer to hire the employee and/or agree to more generous compensation. If the employee’s lawyer were to assist the employee in the preparation of such an employment agreement, would that lawyer be acting in violation of Rule 1.2.1? Because such a provision is void by statute and against public policy for the protection of employees, presumably such employee would not be found to have engaged in illegal conduct. Further, although the lawyer may know that such a provision is illegal, the lawyer would not know, and need not know, that such conduct by the employee was also illegal merely because the provision itself is illegal. As a result, a lawyer assisting an employee client in including a such provision in a contract would not know (and need not know) that such conduct is (or would be) illegal simply because the provision itself is illegal.

Eighth, if the draft opinion is asking the reader to assume that the inclusion of an illegal provision in a contract is (by definition) illegal conduct, then the draft opinion's conclusion is merely stating the obvious: i.e., if the lawyer knows the conduct is illegal, then counseling or assisting with respect to such illegal conduct is a violation of Rule 1.2.1. Clearly stating these assumptions would render the opinion irrelevant and of no assistance.

For the above reasons, we believe the draft opinion makes implicit and explicit assumptions that are inappropriate, unsupported by the law, and inconsistent with Rule 1.2.1. As a result, we think it would be dangerous to issue an advisory opinion that a lawyer could be subject to discipline for counseling or assisting a client to include a provision in a contract, where there is no clear example of a contract provision that is illegal or meets the standard of Rule 1.2.1 (e.g., in violation of the law), where just because the provision is illegal does not necessarily mean that any conduct associated with that provision is illegal, and where the lawyer may know the provision is illegal but does not know that any specified conduct with respect to such provision is illegal simply because the provision is illegal.

Thank you for the opportunity to comment on this draft opinion.

Neil

Neil J Wertlieb | [Wertlieb Law Corp](#)
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Public Comment - Proposed Opinion 19-0003

Reference #	14489556
Status	Complete
Commenting on behalf of an organization	No
Name	Peggy B Kong
City	El Dorado Hills
State	California
Email address	pkinternational2@gmail.com
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am totally supporting this because I am scammed by an attorney who is registered California attorney and he drafted the contract for his client and me to sign but the contract was totally illegal which did not allow buyer to exercise due diligence and perform final inspection of the vehicles I was purchasing. In the contract, the attorney was named as escrow officer but he did not provide any escrow procedures as well as his escrow duties.</p> <p>I filed the complaint with the State Bar who assigned Mr. Jason Kwan to review the complaint. He then decided the contract was nothing wrong.</p> <p>After the sale was disapproved by FedEx, I should be able to be refunded for all the deposit I paid in the amount of \$150K, I contacted Mr. Robert Steinberger who refused to release my deposit and told me that I was at bad faith so he could not refund me the money. I sent the new</p>

information to Jason Kwan who has not replied to me for almost a month.

I hope the State Bar can review my case again and bring me justice.

Attached is th copy of the contract drafted by Mr. Robert Steinberger who is the seller's friend and escrow officer and accepted no payment for being an escrwo officer. He refused to provide me with Federal Tax ID numbr as an escrow officer . He now took the my deposit and I have not heard from him ever since I requested for my deposit back.

ATTACHMENTSYou may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.

[Signed_DeltaPK.pdf \(3.30 MB\)](#)

ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (the "Agreement") is made on 3rd September, 2021 (the "Effective Date"), by and between Delta Shipping, Inc., an Ohio corporation, whose address is 100 Park Plaza, Suite 2210, San Diego, CA 92101 (the "Seller") on one hand, and PK International, a California corporation, whose address is 2044 Impressionist Way, El Dorado Hills, CA 95762 ("Buyer") on the other hand. The Seller and Buyer are sometime referred to as a "Party" and jointly as the "Parties."

RECITALS

WHEREAS, Seller owns, leases, operates, or controls certain Assets (as defined in Section 1.0) used in the operation of a FedEx trucking routes (the "Business").

WHEREAS, Seller desires to sell to Buyer all of its rights, title, and interest in the four (4) Freightliner Cascadia Trucks and Buyer desires to acquire the same from Seller.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby.

TERMS AND CONDITIONS

1.0 PURCHASE AND SALE OF ASSETS.

Subject to the terms and conditions of this Agreement, on the Closing Date (as defined below), Buyer shall purchase and acquire from Seller, and Seller shall sell and provide to Buyer, all of Seller's rights, titles, and interests in and to the assets described below.

1.1 Fixed Assets. The four (4) Freightliner Cascadia trucks listed on the attached Appendix 1.1 (the "Fixed Assets"). All Fixed Assets shall be free and clear of all liens and encumbrances and in good working order and condition at the time of the Closing.

2.0 PURCHASE PRICE.

2.1 Purchase Price. Buyer shall pay to Seller, the purchase price of the Assets in the amount of One Million Dollars 00/100 (\$1,000,000.00) (the "Purchase Price"). Escrow services shall be provided by Soden & Steinberger, APLC legal counsel for Seller. ("Escrow") located at 550 West C Street, Suite 1160, San Diego, CA 92101. Escrow officer shall be Robert Steinberger ("Escrow Officer") Email address bob@legalmattersllp.com (619) 239-3200. Buyer shall pay all escrow fees and costs.

2.2 Payment. Buyer shall pay to Seller the Purchase Price as follows: The sum of One Hundred Fifty Thousand Dollars 00/100 (\$150,000) shall be paid upon execution of this Agreement. ("Initial Deposit") within 3 business days to the Escrow via check made payable to Soden & Steinberger, APLC Trust Account. Five (5) days prior to the Closing Date, Buyer shall pay to Seller the balance of the Purchase Price in the sum of Eight Hundred and Fifty Thousand

Dollars 00/100 (\$850,000). ("Balance of Purchase Price") If Buyer is not approved by FedEx for the four Ohio truck routes, Seller shall instruct Escrow to refund to Buyer the Initial Deposit.

2.3 Liquidated Damages. If Buyer fails to complete the purchase because of Buyer's default under this Agreement, Buyer shall relinquish and Seller shall retain, as liquidated damages, the entire Initial Deposit under Section 2.2, which shall be released by Escrow to Seller, as Seller's sole and exclusive remedy, the payment of which is not intended as a forfeiture or penalty within the meaning of California Civil Code Sections 3275 or 3369, but is intended to constitute liquidated damages pursuant to California Civil Code Sections 1671, 1676 and 1677; and in consideration of the payment of such liquidated damages, Buyer shall have no other liability to Seller for such breach, and Seller shall be deemed to have waived all other claims for damages or equitable relief, including, but not limited to, specific performance of Buyer's obligations under this Agreement, including, but not limited to any rights under California Civil Code Section 1680. Buyer's default shall be defined as failure to complete the purchase after FedEx has approved Buyer for the four Ohio routes. In any action, proceeding or arbitration related to the release of the Initial Deposit from Escrow, the prevailing party shall be entitled to reasonable attorney's fees and costs.


Buyer Initials


Seller Initials

2.4 Allocation. Seller and Buyer shall report the allocation of the Purchase Price and other consideration for tax purposes as set forth in Appendix 2.3, which allocation shall be mutually agreed upon within 5 business days after the execution of this Agreement if not attached hereto.

3.0 CLOSING.

3.1 Closing.

3.1.1 Closing Date. The Closing Date shall be the earlier of October 15, 2021 or one (1) business day after FedEx approves Buyer.

3.2 Documents to Be Delivered by Seller. On the Closing Date after full receipt of the Purchase Price, Seller shall deliver to Buyer the following documents, duly executed by Seller:

3.2.1 Bill of Sale. Bill of Sale for the tangible Assets, which are owned by Seller, in the form attached as Appendix 3.2.1;

3.2.2 Such other documents as are required to be delivered by Seller under this Agreement or as are necessary or reasonably requested by Buyer to carry out the purposes of this Agreement and to transfer the Assets to Buyer.

3.3 Documents to Be Delivered by Buyer. On or before the Closing Date, Buyer shall deliver to Seller the following documents, duly executed by Buyer and/or Buyer's Owners:

3.3.1 All documentation required by the FedEx to issue to Buyer rights to operate four (4) Columbus, Ohio Truck Routes, and

3.3.2 Such other documents as are required to be delivered by Buyer under this Agreement or as are necessary or reasonably requested by Seller or their counsel to carry out the purposes of this Agreement.

3.4 Items to Be Delivered by Seller on the Closing Date. On the Closing Date, once the Buyer has fulfilled their terms and transferred the balance of the Purchase Price to the Seller, Seller shall deliver to Buyer physical possession of the following items, consistent with the terms of this Agreement, by leaving such items at the Premises:

3.4.1 Title to four (4) Freightliner Cascadia Trucks;

3.5 Risk of Loss. Pending the Closing, Seller shall bear all risk of loss, damage, or destruction of the Assets. Buyer shall assume all risk of loss, damage, or destruction after the Closing Date.

4.0 SELLER'S REPRESENTATIONS AND WARRANTIES. As of the Effective Date and the Closing Date, Seller represents and warrants to Buyer the following:

4.1 Title. Seller is the owner of and has good and marketable title to all of the Assets owned by the Seller as set forth in Paragraph 1.1, and all Assets are free and clear from all liens, encumbrances, and charges.

4.2 Authority. Seller has full authorization and right to enter into and perform this Agreement.

4.3 Binding Agreement. This Agreement has been duly authorized, executed and delivered by Seller and constitutes a legal, valid, and binding obligation of Seller, enforceable in accordance with its terms, except as such enforceability might be limited by bankruptcy or insolvency laws or general principles of equity.

4.4 Condition. All of the Assets, are in good condition and working order and will be in good condition and working order at the Closing Date, ordinary wear and tear excepted.

4.5 Litigation. Seller has not received any notice of any, and to the best of Seller's knowledge there are no, claims, actions, suits, proceedings, or investigations of any description whatsoever pending or threatened against or relating to Seller, or with respect to any of the Assets, at law or in equity, or before any governmental entity, or by any person which might prohibit or prevent the consummation of the transactions set forth herein.

4.6 Survival; Knowledge. All warranties and representations will survive the Closing Date for a period of 1 year.

5.0 BUYER'S REPRESENTATIONS AND WARRANTIES. As of the Effective Date and the Closing Date, Buyer warrants and represent to Seller each of the following:

5.1 Authorization and Organization. Buyer has full authorization and right to enter into and perform this Agreement.

5.2 Binding Agreement. This Agreement has been duly executed and delivered by Buyer and constitutes a legal, valid, and binding obligation of Buyer, enforceable in accordance with its terms, except as such enforceability might be limited by bankruptcy or insolvency laws or general principles of equity.

5.3 Litigation. To Buyer's knowledge, no claims, actions, suits, proceedings, or investigations of any description whatsoever are pending or threatened against or relating to Buyer or his assignee, if any, at law or in equity, or before any governmental entity, or by any person which might prohibit or prevent the consummation of the transactions set forth herein.

5.4 Survival. All warranties and representations will survive the Closing for a period of 1 year.

6.0 CONDITIONS TO BUYER'S OBLIGATIONS. Obligations of Buyer to purchase the Assets and take the other actions required to be taken by Buyer at the Closing are subject to the fulfillment prior to or at the Closing of all of the following conditions:

6.1 Consents. All third-party consents for the transfer of the Assets, and any other contract or agreement which requires a consent as a result of the sale of the Assets shall have been obtained.

6.2 No Litigation. No litigation has been threatened or commenced and no preliminary or permanent injunction or other order by a court or government entity shall have been issued which could prevent the Closing, prevent consummation of the transaction contemplated by this Agreement, or which could have a material adverse impact on the Assets or the Business.

6.3 Performance. Seller shall have performed and complied with all agreements, covenants and conditions on its part required to be performed and complied with on or before the Closing Date including, without limitation, the timely delivery of all documents required to be delivered by Seller.

6.4 FedEx Approval. Buyer shall have obtained the approval of FedEx, for operation of the four (4) Columbus, Ohio Routes.

7.0 CONDITIONS TO OBLIGATION OF SELLER. Obligations of Seller to sell the Assets and take the other actions required to be taken by Seller are subject to the fulfillment on or before the Closing of all of the following conditions:

7.1 Representations. All of Buyer's representations and warranties contained in this Agreement shall be true and accurate as if made as of the Closing Date in all material respects.

7.2 Performance. Buyer shall have performed and complied with all agreements, covenants and conditions on Buyer's part required to be performed and complied with on or

before the Closing Date including, without limitation, the timely delivery of all documents required to be delivered by Buyer to Seller.

7.3 No Litigation. No litigation has been threatened or commenced and no preliminary or permanent injunction or other order by a court or government entity shall have been issued which could prevent the Closing, prevent consummation of the transaction contemplated by this Agreement, or which could have a material adverse impact on the Assets or the Business.

7.4 FedEx Approval. Buyer shall have obtained the approval of FedEx for operation of the four (4) Columbus, Ohio Truck Routes.

7.5 Balance of Purchase Price. Buyer has paid the Balance of Purchase Price as set forth in Section 2.2.

8.0 INDEMNITY BY BUYER. Buyer, hereby agrees to indemnify, defend and hold harmless Seller, and their respective owners, attorneys, agents, employees, members, managers, officers, directors, and affiliates (referred to in this Section 9 as "Seller") from, against and in respect of any and all claims, demands, losses, costs, expenses, obligations, liabilities and damages (herein "Liabilities") that are asserted against, incurred by, or imposed upon Seller, which arise or result in any way (i) from Buyer's use of the Assets or operation of the four (4) Columbus, OH Routes and four (4) Trucks after the Closing Date; (ii) any material breach or violation of this Agreement by Buyer; (iii) any material inaccuracy in or breach of any of the warranties, covenants, or agreements made or delivered by Buyer or any obligations to be performed by Buyer under this Agreement; (iv) any material inaccuracy or misinterpretation in any appendix, or any other certificate, document, instrument or affidavit furnished by Buyer in accordance with the provisions of this Agreement.

9.0 INDEMNITY BY SELLER. Seller hereby agrees to indemnify, defend and hold harmless Buyer and their respective attorneys, agents, employees, officers, directors, and affiliates (referred to in this Section 10 as "Buyer") from, against and in respect of any and all Liabilities (as defined in Section 10) that are asserted against, incurred by or imposed upon Buyer and which arise or result in any way from (i) the use of the Assets before the Closing Date; (ii) any material breach or violation of this Agreement by Seller; (iii) any material inaccuracy in or breach of any of the warranties, covenants, or agreements made or delivered by Seller or any obligations to be performed by Seller under this Agreement; (iv) any material inaccuracy or misinterpretation in any appendix, or any other certificate, document, instrument or affidavit furnished by Seller in accordance with the provisions of this Agreement.

10.0 INDEMNITY PROCEDURES. In the event that any Party seeks to assert a right to indemnification pursuant to Sections 9 or 10, such Party shall promptly provide the other Party with written notice of the claim for indemnity and full information concerning the underlying Liability. The indemnifying Party shall have the right to participate in or assume control of the defense of the Party seeking indemnification, and the Party seeking indemnification shall fully cooperate with the indemnifying party. No Party shall settle or compromise any claim, action, or matter with respect to which indemnification has been sought without the other Party's prior written consent, which consent shall not be unreasonably withheld. If the indemnifying Party

assumes the defense of a matter, it may use counsel of its choosing and shall not be liable to the other Party for any costs or expenses of counsel subsequently incurred by the indemnified Party. Failure of any Party to give prompt notice of a claim for indemnification shall not affect its right to indemnification except to the extent that the indemnifying Party shall have been prejudiced as a result of such failure, and except that the indemnifying Party shall not be liable for any expenses incurred during the period in which the indemnified Party failed to give notice.

11.0 EMPLOYMENT MATTERS. Seller shall terminate all employees on the Closing Date and shall be responsible for any and all costs and liabilities associated with any employee for any employment matters during Seller's employment of such person or Seller's termination of such employee. Buyer shall be responsible for hiring new drivers for the truck routes.

12.0 INSPECTION RIGHTS; VERIFICATION OF ASSETS. Buyer or its representatives have had the right to conduct such inspections, investigations, and inquiries, as Buyer deems appropriate. Buyer acknowledges and agrees that Seller has provided Buyer prior to the execution of this Agreement and the Effective Date, with documents related to the Columbus, Ohio Routes and four (4) trucks. As such, the Buyer hereby waives as a condition to the Closing any further due diligence reviews, inspections, or examinations with respect to the Assets. Notwithstanding the foregoing, Buyer shall have the right within two (2) days prior to Closing to inspect and confirm the Assets as set forth in Appendix 1.1 are in good working order. Seller shall be responsible to repair any Asset that is not in good working order.

13.0 SUCCESSORS AND ASSIGNS; ASSIGNMENT. This Agreement shall be binding and inure to the benefit of the Parties, their permitted successors, and assigns. This Agreement may not be assigned by either Party. A change of control of a Party shall constitute an assignment.

14.0 SALE AGREEMENT: CHANGES IN WRITING. This Agreement contains the complete understanding of the Parties with respect to the subject matter herein, and there are no written or oral agreements or representations or warranties not contained herein or incorporated by reference herein. This Agreement incorporates and supersedes all prior negotiations and agreements of the Parties. This Agreement may not be changed, modified, or amended except in writing signed by the Parties hereto.

15.0 APPLICABLE LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of California applicable to contracts to be performed within the State, without regard to any conflict of law principles.

16.0 NOTICES. All notices, requests, demands and other communications hereunder shall be in writing, including telegrams and facsimiles, and shall have been deemed duly given upon delivery, if personally delivered, or the day of sending if sent by facsimile with confirmation of sending, or one (1) day after being sent by overnight mail, five (5) days after being sent by registered or certified mail, return receipt requested (if available). All notices shall be properly addressed to the addresses below, or such address as may be changed by notice as provided hereunder, and with postage or other cost prepaid:

If to Seller:	Delta Shipping, Inc.
	Attn: Sameer Trehan

100 Park Plaza, Suite 2210
San Diego, CA 92101

If to Buyer:

PK International
Attn: Peggy Biru Kong
2044 Impressionist Way
El Dorado, CA 95762

17.0 SEVERABILITY AND WAIVER. The unenforceability of one provision hereof shall not affect the remaining provisions, provided that the severed provision does not materially defeat the general intentions of the Parties. The waiver by either Party of the performance or timing of any provision hereof shall not invalidate this Agreement nor shall it be considered a waiver by said Party of any subsequent performance.

18.0 DISPUTES. Any controversy between the Parties arising out of, concerning, interpreting, or otherwise related to this Agreement shall be submitted first for mediation before a mediator. The parties shall jointly agree upon a mediator or, if no agreement can be reached within 10 days, the mediation shall be held before the Judicial Arbitration and Mediation Services ("JAMS") in San Diego County, California. If the Parties are unable to agree upon a JAMS mediator, the local manager of the JAMS shall select three candidates with experience in similar disputes and who are retired judges, and each Party shall have the right to reject one of the three candidates. The remaining candidate, or the candidate with the alphabetically first last name if more than one candidate remains, shall be the mediator. The Parties agree to mediate for not less than 6 hours in an effort to resolve the dispute. The costs of the mediation, including any JAMS administration fee, the mediator's, and costs for the use of facilities during the hearings, shall be borne equally by the Buyer and Seller. If any Party fails or refuses to participate in the mediation process, such Party shall not be permitted to recover attorney's fees and costs in any subsequent action related to the matter to have been mediated. Notwithstanding the foregoing, either Party may apply to a court of competent jurisdiction for any provisional remedies, provided such Party shall continue to participate in good faith in the mediation set forth above. All applicable defenses and statutes of limitations based upon the passage of time shall be tolled from the date of the notice of the dispute is provided until the conclusion of the mediation process and each Party shall take such action as may be required to effectuate such tolling.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date first above set forth.

SELLER: Delta Shipping, Inc.

By

Sameer Trehan, CEO

BUYER: PK International, Inc.

By

Peggy Biru Kong, President

APPENDIX 1.1 – ASSETS

1. Four Freightliner Cascadia Trucks VIN

Freightliner Cascadia Truck VIN: 1FUJGLDR3GLGW7031 (420,000 miles)

Freightliner Cascadia Truck VIN: 1FUJGLDR0GLGW8587 (433,000 miles)

Freightliner Cascadia Truck VIN: 3AKJHHDR0KSKA4196 (385,000 miles)

Freightliner Cascadia Truck VIN: 3AKJHHDR0KSKB5814 (379,000 miles)

All miles is approximate on the four trucks.

From: [Richard Zitrin](#)
To: [Tuft, Andrew](#)
Cc: [McCurdy, Lauren](#)
Subject: Comment on 19-0003
Date: Friday, December 17, 2021 3:05:50 PM

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Andrew and Lauren,

My apologies for not using the comment form, but the redline of this opinion, and Neil Wertleib's comments just came to my attention and I know that there's a very short fuse on the comment period.

Overall, I think this is a very helpful opinion, but I have two considerations that I believe are important and that I encourage the committee to consider.

First, I do not understand the use of the term "illegal," and I particularly don't understand the new footnote 2, which seems to me to further confuse things by distinguishing between "illegal" and "unenforceable" without further explanation. In addition, fn 2 references "legal but against public policy." Again, if something is found to be against public policy, doesn't that make it illegal? Even if there was further explanation, I'd remain puzzled.

I think there is an easy fix, because rule 1.2.1 is quite specific:

A lawyer 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.***

Thus, in the first paragraph of the introduction, I believe it should be amended as follows:

Certain types of contract provisions are ~~illegal under~~ **violations of** 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~~ **violations of** California law, subject to limited exceptions.

Not only would this track the rule, but it would clarify both the ambiguity that the word "illegal" brings, but it would obviate the need for fn 2. I would then track that language throughout the opinion. We are interpreting the rule here, and what could be better or clearer than using the language of the rule.

Also, I really didn't understand the essence of Neil's comments about the contract itself not being conduct. I don't understand it b/c the test of what the lawyer can't do is, again from 1.2.1, **counsel a client to engage, or assist a client in conduct....** First, the obligation of the lawyer is not to "engage or conduct" but to counsel. Second, it seems disingenuous to me to say that the client's drafting, entering into, negotiating, or signing a contract is neither "engaging" nor "conduct." The contract didn't float into existence. It was drafted, negotiated, and executed. All those things both are engaging and conduct.

Again, my apologies for circumventing comment procedure, but at this late moment with the holidays this week, I hope you'll be tolerant of me.

Warm holiday regards to you both.

Richard

RICHARD ZITRIN
LECTURER EMERITUS

UC HASTINGS COLLEGE OF THE LAW

c/o 535 PACIFIC AVENUE, SUITE 100

SAN FRANCISCO, CA 94133

PH: 415.354.2701 Fx: 415.274.9957

ZITRINR@UCHASTINGS.EDU

RICHARD@ZITRINLAWOFFICE.COM

From: noreply@fs16.formsite.com on behalf of [Formsite](#)
To: [Tuft, Andrew](#)
Subject: 19-0003 - Public Comment Form Result #14535050
Date: Monday, December 20, 2021 10:11:03 AM

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**Commenting on
behalf of an
organization**

No

Name Stanley W. Lamport

City Los Angeles

State California

Email address slamport@coxcastle.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.**

Dear COPRAC members:

I fully support the comment letter from the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC") that the draft opinion should not be issued. I had a hand in drafting that letter. I write in my own capacity regarding the rule 4.1 discussion in the draft opinion. Nothing in this comment is intended or should be construed to diminish the PREC comment that the draft opinion should not be issued.

My concern is with the following sentence: "If Lawyer ultimately decides to assist Corporation in promulgating or enforcing the illegal provision, Lawyer's conduct may be a misrepresentation by omission or an affirmative misrepresentation that the provision is legal. See rule 4.1(a), Comment [1]."

Rule 4.1, Comment 1 states in pertinent part:

"A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in 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. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission."

The Comment does not stand for the proposition that "promulgating" an unenforceable contract provision may be a violation of rule 4.1. It takes more than merely including a provision in a contract to trigger a rule 4.1 violation because, as the Comment states, merely drafting an agreement does not necessarily affirm or vouch for the truthfulness of a representation made by the client. The Comment notes that a rule 4.1 violation can arise when a lawyer makes a statement of material fact with respect to the terms of the contract; but there are no such facts in the draft opinion.

Stating that assisting a client in enforcing an unenforceable contract provision may violate rule 4.1 provides no meaningful guidance. Using the word "may" indicates that there might be a violation of rule 4.1 or there might not be a violation of that rule. The draft opinion provides no guidance to allow a practitioner to distinguish when the rule might or might not apply. The sentence is misleading to the extent it could be read to mean that merely advising a client regarding enforcing an "illegal" contract provision may constitute a misrepresentation by the lawyer,

The question whether assisting a client to enforce an unenforceable contract provision is beyond the scope of the draft opinion. The draft opinion is limited to a lawyer working with a client to review and update an agreement. There is nothing in the draft opinion to suggest that the lawyer will have any contact with an employee who is asked to sign the agreement or will make any statement or representation to such an employee.

COPRAC addressed misrepresentations in the context of a contract in State Bar Formal Opinion 1996-146. If COPRAC wants to address the question of a misrepresentation in the context of an unenforceable contract provision, it should build on Formal Opinion 1996-146 in the context of a different hypothetical that would allow COPRAC to reach a definite conclusion. The draft opinion is not a vehicle for this analysis.

The foregoing comments are made on my own behalf and not by or on behalf of my law firm.

Sincerely,

Stanley W. Lamport



David McGowan
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dmcgowan@sandiego.edu
www.sandiego.edu

December 20, 2021

Dear COPRAC Members—

I write to suggest that proposed Formal Opinion 19-0003 (Illegal Contract Provisions, which I will refer to as the “Proposed ICP Opinion”) not be adopted in its present form. I offer five points for your consideration.

First, the proposed opinion does not adequately distinguish “illegal” contracts from unenforceable contracts. Footnote two to the opinion states:

The use of the term “illegal” in this opinion refers to a provision that is illegal under the law of the jurisdiction applicable to the transaction. The opinion is not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition; Nor is it intended to address situations where 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 in the controlling jurisdiction has ruled or would rule otherwise, or the provision might be enforceable against the person who is being asked to sign it under reasonably foreseeable circumstances.

The Proposed ICP Opinion does not adhere to this distinction. To say that “illegal” means “illegal” under controlling law does not clarify what the opinion covers or excludes.¹ Though note two attempts to distinguish illegality from unenforceability, the balance of the Proposed ICP Opinion obscures this distinction. Business & Professions Code Section 16600, which provides the paradigm example for the Proposed ICP Opinion, does not state that non-compete terms are “illegal” in the sense that forming such an agreement violates the law. It states instead 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 all practical purposes, “void” means unenforceable; unenforceability is a consequence of a term being void. “A void contract is without legal effect. It binds no one and is a mere nullity.” Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it....” *Yvanova v. New*

¹ In the contracts context California Civil Code Section 1667 defines “unlawful” to include provisions “contrary to an express provision of law,” “contrary to the policy of express law, though not expressly prohibited,” or “otherwise contrary to good morals.” The Proposed ICP Opinion appears to exclude the second category of “unlawful” while embracing the first category, though Section 16600 would seem to fit better in the second category than in the first.

Century Mortg. Corp., 62 Cal. 4th 919, 929 (2016)(citations omitted); *Safarian v. Govgassian*, 47 Cal. App. 5th 1053, 1067 (2020), review denied (Aug. 12, 2020)(same).² The legal meaning of the statutory term “void” appears to place the example of non-compete provisions outside the scope of the Proposed ICP Opinion, which is confusing because such provisions are the principal example used in the opinion.

As footnote two to the Proposed ICP Opinion implies, the concept of an illegal agreement should be limited to agreements that are unlawful to propose or to consummate. Examples include price-fixing agreements, agreements restraining a lawyer’s right to practice (CA Rule 5.6(a)), or agreements precluding reports of a violation of the rules of conduct. (CA Rule 5.6(a); Business & Professions Code Section 6090.5). The concept should not extend to agreements that will not be enforced but which are not illegal to form.

Second, the Proposed ICP Opinion advances an unsound reading of California Rule 1.2.1. The proposed opinion notes that Rule 1.2.1 forbids a lawyer from counseling or assisting in “a violation of any law, rule, or ruling of a tribunal,” and that the California rule is to this extent broader than ABA Model Rule 1.2(d), which extends only to counseling or assistance in “criminal or fraudulent” conduct. Standard canons of interpretation would construe “violation of any law” in view of the accompanying references to “criminal [and] fraudulent.” *E.g.*, *Kaatz v. City of Seaside*, 143 Cal. App. 4th 13, 40 (2006)(defining doctrine of *noscitur a sociis*, or “a word takes meaning from the company it keeps”). At a minimum, in this context Rule 1.2.1 should be limited to laws that forbid formation of an agreement, not laws declaring that a term will not be enforced. As noted above, Section 16600 does not state that it is unlawful to include language restricting competition in an agreement. It states instead that such language “is to that extent void.”

Third, the opinion posits a legally unsound definition of fraud and of Rule 4.1(a). Citing a hypothetical case in which a client tells a lawyer that the client knows a term is unlawful but wants to use it anyway because it has a “chilling effect,” the Proposed ICP Opinion states:

Promulgating or enforcing a knowingly illegal provision in an employment agreement for its chilling effect on third parties would violate rule 4.1(a), rule 8.4(c), and Business and Professions Code section 6068(d).

Although this statement appears in the portion of the opinion pertaining to enforcement, the text of the draft includes “promulgating,” which presumably includes giving a counterparty a copy of an agreement reciting an illegal provision.

With respect to promulgation of the term, the Proposed ICP Opinion appears to take the position that a contractual promise that is void under controlling law is a false statement of law to a third party, even if the contractual text does not include any express representation about the enforceability of the promise. The opinion cites no authority so holding. Its unstated premise appears to be that language of promise—such as an employee’s promise not to

² *Edwards v. Arthur Anderson, LLP*, (2008) 44 Cal.4th 937, 945 (2008), cited in the Proposed ICP, tracks the statutory language: “Today in California, covenants not to compete are void, subject to several exceptions” The issue would arise outside Section 16600. For example, the California Consumer Privacy Act, Civil Code Section 1798.135(g), provides that “[a]ny provision of a contract or agreement of any kind that purports to waive or limit in any way this subdivision shall be void and unenforceable.” Within the meaning of the proposed ICP Opinion, is a provision waiving or limiting the protections of the subdivision “illegal” or simply unenforceable?

compete with an employer in the future—may be read as a (mis)representation that courts would enforce the promise. That premise is in tension with the principle that contractual text is construed for its ordinary meaning. Cal. Civ. Code § 1644. Promises not to do something are materially different from representations as to what the law allows.

The Proposed ICP Opinion notes that deceit may exist “where a lawyer makes a partially true but misleading material statement or material omission.” That observation is correct but is relevant only if a partially true statement of fact or law is made. Draft agreements are not opinion letters, and language available for anyone to read is not a concealed fact.³

With respect to enforcement of an illegal term, the Proposed ICP Opinion would seem to add little to other rules that address problematic conduct more directly. Rule 3.1 forbids a lawyer from bringing or continuing an action without probable cause and for the purpose of harassment (effectively what the proposed opinion refers to as “chill”). A lawyer dealing with an unrepresented third party is already forbidden by Rule 4.3 from advising them, except to retain their own lawyer. And by hypothesis a third party with a lawyer will not be contacted by counsel for the proponent of an illegal term (Rule 4.2) but will be told by their own lawyer of the unenforceability of a term (and inference grounded in the duty of care).

Fourth, the above flaws affect the Proposed ICP Opinion’s discussion of withdrawal. For example, Rule 1.13(b) compels reporting “up the ladder” only if an entity constituent’s conduct is both (i) unlawful and (ii) likely to result in substantial injury to the entity. The proposed opinion acknowledges that this is a fact-specific inquiry, but then in a footnote asserts categorically that “use of an illegal provision is likely to result in substantial injury,” citing a Labor Code provision stating that employers may not require employees to agree to contract terms known “to be prohibited by law.” As noted above, Section 16600 does not forbid inclusion of non-competes but declares them to be void. And the text of the Rule states that violation of a law alone does not compel reporting up.

Fifth, outside the context of non-competes, the Proposed ICP Opinion will raise more questions than it answers. For example, is inclusion of an arbitration provision illegal if it does not explicitly enumerate causes of action courts have found non-arbitrable? An example would be a standard employment agreement specifying arbitration but not stating that PAGA claims, Labor Code Section 2698 *et seq.*, are not subject to it. The non-arbitrability of certain claims fits the Proposed ICP Opinion’s definition of knowledge.

Consider as well Labor Code Section 432.6, which (unlike Section 16600) states that employers “shall not” require employees to “waive any . . . forum” for a violation of FEHA or the Labor Code? A term doing so would seem to be illegal on its face, unless that provision is itself pre-empted by the increasingly broad sweep of the Federal Arbitration Act. A district court enjoined this provision—is the decision of one such court enough to exempt such agreements from the scope of the Proposed ICP Opinion?⁴ The Ninth Circuit recently vacated

³ The Proposed ICP Opinion’s reference to Formal Opinion 2015-194 is thus inapt. In a settlement context a third party represented by their own counsel would not be able to discern a material fact that was concealed; an employee who takes an agreement to a lawyer need only show the lawyer the text.

⁴ Presumably not—the Proposed ICP Opinion states: “knowing means the lawyer has actual knowledge that the provision in question is prohibited by the controlling legal authority in the jurisdiction whose law is applicable to

that injunction in *Chamber of Commerce v. Bonta*, 13 F.4th 766 (9th Cir. 2021), which held that the statute itself is not preempted by the FAA because a prohibition on “requiring” employees to arbitrate does not foreclose voluntary agreements, but which also held that penalties for violating the statute are preempted because they are impediments to the policy of the FAA. Does the Proposed ICP Opinion mean that a lawyer may help a client draft such a term but may not allow the client to “require” it? What might that mean? Is it possible that an ethics rule interpreted to deprive clients of legal assistance in negotiating such contracts would itself be preempted as an impediment to the policy of the FAA?

In sum, to the extent the Proposed ICP Opinion goes beyond rules 3.1, 4.2, and 4.3 it does so through readings of both substantive law and of the Rules that are unsound and are more likely to confuse than to clarify the law.

By way of background, I have taught Professional Responsibility for over 20 years and teach it currently, have a casebook on the subject published by West, and represent lawyers with respect to legal ethics issues. I also teach contract and antitrust law, and I am familiar with both the doctrinal and academic debates over non-competes. The views expressed here are solely mine; my university affiliation is noted for identification only.

Thank you for your consideration of these comments.

Very truly yours,



David McGowan
Lyle L. Jones Professor of Competition and Innovation Law;
University of San Diego School of Law
5998 Alcala Park, San Diego CA 92110
619.260.7973 (voice)
619.260.2748 (fax)

the transaction or contract.” A district court opinion does not control even another district court or a state court, but what about the Ninth Circuit? Its construction of California law and of the FAA need not bind California courts, either but would bind a district court in California. Could legality under the Proposed ICP opinion turn on whether a filed case could be removed?

December 21, 2021

Committee on Professional Responsibility and Conduct (COPRAC)
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion Interim No. 19-0003
(Illegal Contract Provisions)

Dear COPRAC members:

On behalf of the California Lawyers Association Ethics Committee and in response to the State Bar of California's request for public comment, we respectfully submit this letter addressing Proposed Revised Formal Opinion Interim No. 19-0003 and appreciate the opportunity to comment on the proposed opinion.

We appreciate the work COPRAC put into analyzing the issues presented and in preparing this draft opinion. However, we believe the draft opinion and its conclusions are fundamentally flawed for the following reasons:

First, the draft opinion, which addresses a lawyer's obligations under Rule 1.2.1, opines with respect to a contract provision that is "illegal." However, the term "illegal" is not used in Rule 1.2.1(a), which applies to "conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal." Presumably, the draft opinion is using the term "illegal" as a shorthand means of referring to a contract provision that is (or might be) a violation of law, but it would be helpful if the draft opinion were to clarify this point so as to match the language of the applicable rule.

Second, the draft opinion (in footnote 2) states that it is "not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition." Notwithstanding this statement, the draft opinion (in the Introduction) uses the example of a non-compete covenant in an employment agreement. However, there is little support for the proposition that a non-compete covenant is or could be a violation of law in California. Business and Professions Code section 16600 merely states that such a restraint on trade, absent application of an exception, is "void" (not a violation of law). The cases cited in the Introduction likewise do not hold that a non-compete covenant could be a violation of law. The 2008 California Supreme Court case *Edwards v. Arthur Andersen LLP* held that the non-compete covenant at issue was invalid (not a violation of law nor illegal). Although the 2016 Court of Appeals case *Robinson v. U-Haul Co. of California* states that such covenants are illegal under California law, it cites to both Section 16600 and *Edwards v. Arthur Andersen LLP* for support, although neither use the term "illegal," and does not find

that a non-compete provision is a violation of law (to use the terminology of Rule 1.2.1(a)). The draft opinion skirts this issue entirely by assuming “that the contract provision at issue is illegal at the time the agreement is made.” Perhaps a better example could be utilized, but we are unaware of any contract provision that is itself a violation of any law in California.

Third, even if we were to assume that a contract provision can be a violation of law or illegal, the prohibition expressed in Rule 1.2.1(a) pertains to “conduct” that is in violation of law. A contract provision is not conduct. The term “conduct” means behavior or “to plan or do (something, such as an activity).” (See Merriam-Webster online dictionary.) A contract provision is a thing or an object (a noun), and not an activity or behavior (a verb) – and therefore a contract provision by itself cannot constitute “conduct” for purposes of Rule 1.2.1(a).

Fourth, for Rule 1.2.1 to apply, there must be conduct that is (or would be) a violation of the law. A contract provision that is itself illegal or a violation of the law is not the same as conduct that is a violation of the law. The draft opinion, in discussing Scenario 1, asserts that Lawyer, by recommending “inclusion of a provision that Lawyer knows is illegal under California law,” would be in violation of Rule 1.2.1(a). However, because a Rule 1.2.1 violation requires that a lawyer counsel or assist a client in conduct the lawyer knows is in violation of the law, there must be conduct by the client that is (or would be) a violation of the law. And, because there must be illegal conduct, the act of including an illegal provision in a contract (i.e., the “conduct” of doing so) must also be illegal. (E.g., what is the basis for concluding that the inclusion of an illegal provision in a contract is by definition an illegal act?) Unfortunately, this leap of reasoning is not reflected in California law, nor (more importantly) is it explained or justified by the draft opinion.

Fifth, the draft opinion (in its Conclusion) asserts that “a lawyer shall not knowingly promulgate or enforce a contract provision ... that is illegal.” This assertion also fails for the reason stated above – i.e., it is the “conduct” of promulgating or enforcing such a provision that must be in violation of the law for Rule 1.2.1 to apply. This assertion also fails to appropriately apply Rule 1.2.1 because it appears to assume that the lawyer is engaging in illegal conduct due to the illegality of the provision. Although such conduct might be the basis for concluding the lawyer is acting inappropriately (e.g., in violation of Rule 3.1 or 3.4), Rule 1.2.1 relates to counseling or assisting a client in conduct that is (or would be) a violation of law by the client.

Sixth, the draft opinion would have us assume without explanation that if a lawyer knows a contract provision is illegal, then the lawyer must know that certain conduct relating to that provision is also illegal. Rule 1.2.1(a) requires “conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.” Just because a lawyer might (hypothetically) know that a non-compete provision is “illegal” does not mean that the lawyer also knows that including the provision in an employment agreement is illegal, or that promulgating or enforcing such a contract provision is illegal. Again, knowledge that a thing is illegal does not mean that certain actions relating to that thing are also illegal, nor that a lawyer should know that those actions are illegal simply because the thing itself is illegal.

Seventh, we strongly disagree with the conclusion that as a matter of law the inclusion of an illegal contract provision is itself illegal conduct. To return to the example of a non-compete provision (and assuming it to be an “illegal” provision), an employee (not an employer) might seek to include such a provision in an employment agreement, for example, so as to encourage the employer to hire the employee and/or agree to more generous compensation. If the employee’s lawyer were to assist the employee in the preparation of such an employment agreement, would that lawyer be acting in violation of Rule 1.2.1? Presumably, because such a provision is void by statute and against public policy for the protection of employees, such employee would not be found to have engaged in illegal conduct. Further, although the lawyer may know that such a provision is illegal, the lawyer would not know, and should not know, that such conduct by the employee was also illegal merely because the provision itself is illegal. As a result, a lawyer assisting an employee client in including a such provision in a contract would not know (and should not know) that such conduct is (or would be) illegal simply because the provision itself is illegal.

Eighth, if the draft opinion is asking the reader to assume that the inclusion of an illegal provision in a contract is (by definition) illegal conduct, then the draft opinion’s conclusion is merely stating the obvious: i.e., if the lawyer knows the conduct is illegal, then counseling or assisting with respect to such illegal conduct is a violation of Rule 1.2.1. Clearly stating these assumptions would render the opinion irrelevant and of no assistance.

For the above reasons, we believe the draft opinion makes implicit and explicit assumptions that are inappropriate, unsupported by the law, and inconsistent with Rule 1.2.1. As a result, we think it would be dangerous to issue an advisory opinion that a lawyer could be subject to discipline for counseling or assisting a client to include a provision in a contract, where there is no clear example of a contract provision that is illegal or meets the standard of Rule 1.2.1 (e.g., in violation of the law), where just because the provision is illegal does not necessarily mean that any conduct associated with that provision is illegal, and where the lawyer may know the provision is illegal but does not know that any specified conduct with respect to such provision is illegal simply because the provision is illegal.

Thank you for the opportunity to comment on this draft opinion.

Sincerely,



Alison Buchanan, Chair
California Lawyers Association Ethics
Committee



LOS ANGELES COUNTY BAR ASSOCIATION

200 South Spring Street | Los Angeles, CA 90012
Telephone: 213.627.2727 | www.lacba.org

December 21, 2021

State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Interim Opinion 19-0003

Dear State Bar of California:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to comment on proposed Interim Opinion No. 19-0003.

We appreciate the work COPRAC put into analyzing the issues presented and in preparing this draft opinion. However, we believe the draft opinion is fundamentally flawed and should not be issued.

Rule 1.2.1(a) states, “A lawyer 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.) The question under the rule is whether a lawyer knows the client’s conduct is a violation of law, rule or ruling of a tribunal.

The draft opinion does not address conduct that is a violation of law. Instead, the draft opinion concerns an unenforceable contract provision, which the draft opinion characterizes as “illegal.” The opinion’s lone example of an “illegal” contract provision is a non-compete clause which Business and Professions Code §16600 declares is void. *Robinson v. U-Haul Co. of California* (2016) 4 Cal.App.5th 304, 309 characterized a clause that is subject to Section 16600 as “illegal,” but does so in the context of addressing whether the clause is enforceable. In *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945, the Supreme Court merely held that the non-compete covenant at issue was unenforceable. Neither the statute nor the cases cited prohibit the conduct of inserting the provision in the agreement. They merely state that such a clause is unenforceable when it appears in a contract.

The draft opinion assumes, without explanation, that a lawyer would know that conduct of including the clause in a contract is a violation of law

based on a court referring to the clause as illegal in the context of enforcing it. The opinion does not explain how a lawyer would have actual knowledge that including an unenforceable clause in a contract would be a violation of law in the absence of a law that enjoins the act of including it.

Based on this problematic analysis, the draft opinion concludes that “a lawyer shall not knowingly promulgate or enforce a contract provision ... that is illegal.” Rule 1.2.1 does not use the word “illegal.” Calling an unenforceable contract clause “illegal” does not answer the question whether the conduct of including an unenforceable clause in a contract is a violation of law, particularly when none of the legal authorities state that such conduct is a violation of law.

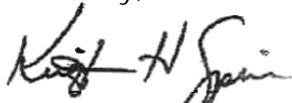
Whether a lawyer may seek to enforce an unenforceable provision would be governed by rule 3.1, not rule 1.2.1(a). Yet the draft opinion does not address rule 3.1 at all.

The Committee recognizes that footnote 2 states the draft opinion is “not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition.” We agree with the implicit recognition in the footnote that contract provisions which are merely unenforceable or against public policy are not rule 1.2.1(a) violations and that the rule would apply only if the act of including the clause in the contract is a violation of law. However, the footnote does not cure the analytical problems with using a non-compete clause as the lone example in the body of the draft opinion, which is plainly inconsistent with the footnote.

The draft opinion’s fundamentally flawed analysis is based on implicit and explicit assumptions that are inappropriate, unsupported by law and are inconsistent with rule 1.2.1(a). For these reasons, we urge COPRAC to not issue this opinion.

Thank you for the opportunity to comment on the Proposed Formal Opinion.

Sincerely,

A handwritten signature in black ink, appearing to read "Kirsten H. Spira".

Kirsten H. Spira

Chair

Professional Responsibility and Ethics Committee,
Los Angeles County Bar Association



State of California
Office of the Attorney General

ROB BONTA

ATTORNEY GENERAL

December 22, 2021

Submitted via Online Portal

The State Bar Standing Committee on
Professional Responsibility and Conduct

RE: Proposed Formal Opinion Interim No. 19-0003 (Advising Client on Illegal Contract Provisions)

To the Committee on Professional Responsibility and Conduct:

I write to express my firm support for Proposed Formal Opinion Interim No. 19-0003, “Advising Client on Illegal Contract Provisions” (herein “Proposed Opinion”). If adopted, the Proposed Opinion will help ensure that California attorneys continue to be held to rigorous ethical standards that safeguard California consumers and workers and promote fair and lawful business practices.

The Proposed Opinion seeks to reinforce the ethical obligations an attorney may have 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 proposed rule would rightfully cover advice attorneys provide regarding contract provisions in all types of contracts. However, in furtherance of my duty as California Attorney General, to protect the welfare of California workers and maintain a level playing field for legitimate businesses operating in the State, I would like to focus the Committee’s attention on the particular harm caused by the inclusion of non-compete provisions in employment contracts, and similar contractual provisions that act to limit worker mobility.

In particular, there are two points that warrant emphasis. First, California’s longtime public policy favors the freedom of workers to seek any lawful employment they choose, and therefore prohibits non-compete agreements or other arrangements that seek to undercut that mobility. Second, because unenforceable non-compete provisions remain widespread in employment contracts in California, we need clear ethical guidance to prohibit the participation of attorneys in formulating or promoting any such unlawful contract provisions.

California’s Longtime Public Policy Favoring Employee Mobility and the Prohibition and Unenforceability of Non-compete Agreements

With limited exceptions, non-compete agreements – i.e., agreements to restrain former employees from working for competitors or beginning their own competing businesses – are unenforceable in California. This has long been the law. California Business & Professions Code section 16600 expressly states that, “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” (Cal. Bus. & Prof. Code § 16600.) In harmony with section 16600, California Labor Code section 432.5 provides that “[n]o employer shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer to be prohibited by law.” (Cal. Lab. Code § 432.5.)

In interpreting and enforcing these statutory provisions, California courts have consistently underlined the longstanding public policy of a free labor market in California. In the seminal case of *Edwards v. Arthur Andersen LLP*, the California Supreme Court stated that “[i]n the years since its original enactment as Civil Code section 1673, our courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility.” (*Arthur Andersen* (2008) 44 Cal.4th 937, 946.) The court underscored this point by continuing, “[t]he law protects Californians and ensures ‘that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice[,]’” and “[i]t protects ‘the important legal right of persons to engage in businesses and occupations of their choosing’” (*Id.* (internal citations omitted).)

In accord with this public policy of protecting the right of workers to engage in the work of their choosing, this office entered into a series of stipulated judgments with various fast food restaurants to eliminate the inclusion of so-called “no-poach” provisions in franchise agreements.¹ While distinct from non-compete provisions, the no-poach franchise agreement clauses at issue operated to effect a similar result: limited worker mobility. The ability of California workers to freely seek economic opportunities in the job market remains an important policy goal for the State.

The Proposed Opinion Is Necessary to Address the Ongoing Inclusion of Non-compete Provisions in Employment Contracts

The Proposed Opinion addresses an urgent and ongoing issue affecting California workers. Despite the unenforceability of non-compete agreements in California, a December 2019, Economic Policy Institute report found that “45.1% of establishments in California,”

¹ See e.g. “Attorney General Becerra Announce Multistate Settlements Targeting ‘No-Poach’ Policies that Harm Workers,” (Mar. 12, 2019), available at <https://bit.ly/3ovllnv>.

include non-compete clauses or provisions in employment contracts.² And while the inclusion of non-compete provisions is more common in contracts for more-educated or higher-wage workers, the same Economic Policy Institute report found that over a quarter of businesses where the average wage rate was less than \$13 per hour nevertheless imposed contractual non-compete provisions on all workers.³ Similarly, non-competes were used for all workers in over a quarter of businesses where the typical worker had only a high school diploma.⁴

Despite their general unenforceability, a growing body of research suggests that some employers take advantage of a worker's unfamiliarity with non-compete agreements by including them in employment contracts.⁵ A recent report by the U.S. Department of Treasury's Office of Economic Policy opined that, "workers are often poorly informed about the existence and details of their non-competes, as well as the relevant legal implications. Some employers appear to be exploiting this lack of understanding in ways that harm workers without producing corresponding benefits to society."⁶ The Proposed Opinion is vital to ensure that attorneys uphold their ethical obligations not to contribute to the proliferation of such unlawful provisions.

In sum, I reiterate my support for the Committee's Proposed Opinion. The Proposed Opinion is consistent with longstanding California law and public policy, my office's mission to protect the rights of workers and law-abiding businesses, and a commitment to addressing an ongoing issue impacting California workers.

Sincerely,



ROB BONTA
Attorney General

² Alexander J.S. Colvin & Heidi Shierholz, Econ. Policy Inst., "Non-compete agreements: Ubiquitous, harmful to wages and to competition, and part of a growing trend of employers requiring workers to sign away their rights," at 5 (Dec. 10, 2019), available at <https://files.epi.org/pdf/179414.pdf>.

³ Colvin & Shierholz at 6-7.

⁴ Colvin & Shierholz at 7-8.

⁵ Jane Flanagan, American Const. Society, "No Exit: Understanding Employee Non-Competes and Identifying Best Practices to Limit Their Overuse," at 7 (Nov. 2019), available at <https://bit.ly/30FJnDh> ("This very real effect on behavior makes employers more likely to 'overreach under the radar' based on the logical assumption that doing so 'might have the benefit of keeping employees from leaving and moving to competitors [even] when they are [legally] entitled to do so.'") (alterations in original).

⁶ U.S. Dept. of the Treasury Office of Econ. Policy, "Non-compete Contracts: Economic Effects and Policy Implications," at 24 (Mar. 2016), available at <https://bit.ly/3pAAi70>.

December 22, 2021

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC)

Re: Comments from Worker and Consumer Advocates, Attorneys, and Labor Organizations in Support of Draft Formal Opinion No. 19-0003

VIA Online Portal

Dear Committee on Professional Responsibility and Conduct,

In June 2021, we submitted extensive comments in strong support of Draft Formal Opinion No. 19-0003, *Advising Client on Illegal Contract Provisions* (“Draft Opinion”). We write now to express respectful disagreement with the comments made by former COPRAC member Neil Wertlieb at the December COPRAC meeting, *see* Part A, *infra*, and to urge the Committee to make minor changes to the opinion to clarify the confusing distinction it now draws between “unenforceable” and “illegal terms,” *see* Part B, *infra*. The Committee should also clarify that its Draft Opinion covers non-compete agreements and other illegal or unenforceable contractual terms that can trap a worker in their job. *See* Part C, *infra*.

(A) The Draft Opinion Addresses “Conduct” within Rule 1.2.1.

In remarks to the Committee on December 3, 2021, Neil Wertlieb argued that the Draft Opinion is “fundamentally flawed,” seemingly because an illegal term in a contract is not “conduct,” according to Wertlieb, and therefore, the activities described in the Draft Opinion are not subject to Rule 1.21. CRCP 1.2.1(a) (addressing “conduct that . . . is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal”). This assertion is incorrect as a matter of logic and California law.

First, it is difficult to see how assisting a client to draft an illegal or unenforceable contractual term for the purpose of presenting it to potential counterparties is not “counsel[ing] the client to engage, or assist[ing] the client in *conduct*. . .” *Id.* (emphasis added). Dictionary definitions of “conduct” are broad and include “personal behavior; way of acting; deportment,” Random House Webster’s College Dictionary (1997), and “[t]he way a person acts; behavior,” The American Heritage Dictionary of the English Language (1981). Presenting and entering into a contract fall within these broad definitions.

Presenting and entering into a contract is also clearly “conduct” when considering the consequences of engaging in these activities—consequences that arise whether or not the drafting party ever takes any additional affirmative steps to enforce the contract. As courts have recognized, drafting parties that present and enter into illegal and unenforceable contracts gain a substantial benefit because “the drafters of such unenforceable provisions are often rewarded [by the] chilling effect they have. . .” *Kooiman v. Siwell, Inc.*, 2021 WL 899095, at *5 (C.D. Cal. Jan. 4, 2021).

California law also recognizes that entering into an unenforceable or illegal contract is conduct that violates the law. For example, maintaining non-compete agreements that are unenforceable under California law is an illegal unfair method of competition under Business & Professions Code § 17200. *See, e.g., Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 575, 102 (2009); *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 908 (1998). Under the Labor Code, it is illegal for an employer to “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.” Lab. Code § 432.5. And courts have stated that it is an “unfair” practice to include unconscionable provisions in standard form contracts. *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 516 (2002), as modified on denial of reh’g (Jan. 16, 2003); *cf. Mo. Code Regs. Ann. tit. 15, § 60-8.080* (unenforceable acts, practices, or contract terms are unfair practices).

There should be no doubt that a lawyer counseling a client to engage in an unfair method of competition, Labor Code violation, or unfair or deceptive practice is engaging in unethical conduct, and no reason that the Draft Opinion cannot address a lawyer’s role in drafting and encouraging a client to enter into a contract when doing so can itself amount to a violation of these or other legal protections.

(B) The Draft Opinion Injects a Confusing Ambiguity into Its Analysis by Drawing a Distinction between an “Illegal” and an “Unenforceable” Term.

The Draft Opinion is important and reflects a common-sense application of basic rules of professional ethics. We urge COPRAC to adopt the Draft Opinion in close to its current form.

We recommend, however, that COPRAC remove the confusing distinction between “illegal” and “unenforceable” contract terms—a distinction that the Committee recently added into the Opinion. The current Draft Opinion includes a new footnote two that states:

The use of the term “illegal” in this opinion refers to a provision that is illegal under the law of the jurisdiction applicable to the transaction. The opinion is not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition . . .

Draft Formal Interim Opinion 19-0003 at p. 2, note 2.

The Committee recognizes that unenforceable terms whose inclusion in contracts could cause harm to non-drafting parties, including non-compete agreements, are “illegal” contractual terms. Indeed, as explained above, there is ample case law concluding that entering into and maintaining an unenforceable non-compete agreement is illegal in California. *See, e.g., Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 575, 102 (2009); *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 908 (1998). And requiring an employee to agree to a contractual term “prohibited by law” can amount to an independent violation of the Labor Code. Lab. Code. § 432.5.

The suggestion, however, that there may be other kinds of terms that are “legal, but against public policy, unenforceable or subject to some other prohibition” is both unsupported by California law and risks undermining the core purposes of the Draft Opinion. The discussion in footnote two leaves open the possibility that an attorney could counsel a client to use a clearly unenforceable term in a standard form contract with the likely purpose of deceiving the non-drafting party but then argue that their conduct does not fall within the Draft Opinion because the term is not “illegal,” even if it is clearly “unenforceable.”

The Committee should remove the second sentence of footnote two and to clarify the issue should replace any reference to “illegal” in the Draft Opinion with “illegal or unenforceable.”

First, nothing in the Rules of Professional Conduct suggests a meaningful distinction between “illegal” and “unenforceable” contractual terms. Rule 1.2.1, for example, covers terms that are “in violation of any law, rule, or ruling of a tribunal.” Even if a term were merely “unenforceable” and not “illegal,” it would be in violation of the law or rule that proscribes its enforceability.

Second, the difference between illegal and unenforceable terms is irrelevant to whether the attorney’s conduct is ethical. It is unclear what the purpose could be of advising a client to use a term the attorney *knows* to be unenforceable except to deceive the non-drafting counterparty. Indeed, courts in California and elsewhere have recognized that unambiguously unenforceable contractual terms are likely to deceive non-drafting parties about their rights. *Leardi v. Brown*, 474 N.E.2d 1094, 1100 (Mass. 1985), declined followed on other grounds by *Tyler v. Michaels Stores, Inc.*, 984 N.E.2d 737, 744 (Mass. 2013); *People v. McKale*, 25 Cal. 3d 626, 635 (1979). Therefore, counseling a client to use a term that is clearly unenforceable is unethical under Rule 1.2.1’s prohibition against counseling a client to engage in “fraudulent” conduct, whether or not it is also deemed to be “in violation of any law.”

Even if non-drafting parties are not always deceived by the inclusion of unenforceable terms in standard form contracts, the Draft Opinion’s focus on terms that an attorney *knows* to be in violation of law would help to draw a distinction between those unenforceable terms that are likely to deceive non-drafting parties and those that may not deceive drafting parties. In *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal. App. 4th 1284 (1993), the California Court of Appeals declined to apply *McKale*, 25 Cal. 3d 626, to conclude that it is a fraudulent practice to include a term in a standard form contract that is “entirely lawful on its face but, like many contract provisions, may be subject to certain defenses and exceptions in application,” 17 Cal. App. 4th at 1298. Unlike the clearly unenforceable terms at issue in *McKale*, the inclusion of the terms at issue in *Samura* had “no significant tendency to mislead.” *Id.* When an attorney *knows* a contractual term is unenforceable, however, that term does have a “significant tendency to mislead” and therefore counseling a client to enter into such a term is a violation of Rule 1.2.1 both because it is deceptive and because it violates California law pursuant to *McKale*.

There is also no risk that clearly bringing “unenforceable” terms within the Draft Opinion would render the Opinion ambiguous or difficult to apply in practice. It is true that unenforceability often raises fact-specific questions, especially in the unconscionability context,

but the Draft Opinion's repeated clarification that it only reaches contractual terms that the attorney *knows* are in violation of law provides broad protection for attorneys operating in good faith. For example, even with the expanded language we propose here, there is no threat that an attorney would be found to fall within the language of the Opinion merely by drafting a term that substantially benefits the drafting party and that *could* be unenforceable depending on how it is presented to the non-drafting party. The attorney in such a case would not *know* that such term would be unenforceable.

Finally, if the Committee has any concern that there may be non-deceptive reasons to enter into a clearly unenforceable contractual term with a counterparty bargaining at arm's length, the Committee could limit the application of the Draft Opinion to unenforceable terms in "standard form contracts." There may of course be disputes about what contracts amount to "standard form contracts," but there is substantial case law in California regarding "standard form contracts," *see, e.g., People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 516, 128 (2002), as modified on denial of reh'g (Jan. 16, 2003) ("... unfair business practices include unconscionable provisions in standardized agreements"); *Baker v. Sadick*, 162 Cal. App. 3d 618, 625 (1984), and in practice, that question is likely to be substantially less difficult to resolve than the question of whether a particular clearly "unenforceable" contractual term is also "illegal."

(C) The Committee Should Clarify that the Draft Opinion Specifically Applies to Non-Compete Agreements.

The Committee should promptly issue an opinion that covers the use of all contractual terms that an attorney knows to be unenforceable or illegal. However, the Committee should at the very least clarify that its opinion specifically addresses non-compete clauses and similar agreements like liquidated damages provisions and training-repayment agreements.

California law clearly prohibits agreements "by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind. . . ." Bus. & Prof. Code § 16600. And yet, agreements like these are ubiquitous in California's labor market. *See* June Comments at 2 (explaining that 19% of California workers may be covered by unenforceable or illegal non-compete agreements). These contractual terms can exert a substantial chilling effect that keeps workers trapped in their jobs, undermines worker bargaining power, and allows some businesses to gain an unfair competitive.

Where a lawyer counsels or otherwise assists a client in entering into non-compete agreements that the lawyer *knows* violate California law, the lawyer engages in unethical conduct that is likely to have substantial adverse consequences. It is imperative that COPRAC address this problem and that it do so promptly. We understand that COPRAC intends to address non-compete agreements in the Draft Opinion, but to ensure that there is no ambiguity about that question, we urge the Committee to specify that it is unethical for a lawyer to counsel or assist a client in entering into an illegal or unenforceable non-compete agreement.

* * *

The Opinion is exceptionally important, and it should be uncontroversial. In the era of fine-print contracting the Draft Opinion is essential to preserving the credibility of the legal profession—a profession that millions of people every day interact with mainly through the standard form contracts that lawyers draft and counsel their clients to present to workers and consumers.

We appreciate the Committee’s continued attention to this issue.

Sincerely,

Towards Justice
California Employment Lawyers Association
Open Markets Institute
People’s Parity Project
Justice Catalyst
Legal Aid at Work
National Consumer Law Center