

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 is 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).
 - California case law supports the notion that noncompete agreements are illegal or in violation of law absent an applicable exception. For example, in *Arthur Anderson*, the California Supreme Court concludes that “section 16600 prohibits employee noncompetition agreements unless the agreement falls within a

statutory exception.” *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 942, 946-47 (2008) (“Under the statute’s plain meaning, therefore, an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule.”). The Court also states that “following the Legislature, this court generally condemns noncompetition agreements. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 123, fn. 12 [99 Cal. Rptr. 2d 745, 6 P.3d 669] [such restraints on trade are “largely illegal”].)” *Id.* at 946.

- See also *Brown v. TGS Management Co., LLC*, 57 Cal. App. 5th 303, 315 (2020) (“An employer’s use of an illegal noncompete agreement also violates the UCL (§ 17200 [‘unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising’].) [Citations.]”).
- Even if a contract provision could be a violation of law or illegal, Rule 1.2.1(a) prohibits “conduct” that is in violation of law. A contract provision cannot constitute “conduct” for purposes of Rule 1.2.1(a). 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 Rule 1.2.1 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. The act of including an illegal provision in a contract must also be illegal, but there is no basis for reaching this conclusion under California law.
 - See Response to first comment above.
- The Conclusion asserts that “a lawyer shall not knowingly promulgate or enforce a contract provision ... that is illegal.” There is no basis for concluding that the “conduct” of promulgating or enforcing an illegal provision is in violation of the law. This may suggest a lawyer is violating Rules 3.1 or 3.4, but not Rule 1.2.1.
 - We should discuss, but Rules 3.1 or 3.4 do not appear to apply to our scenarios.
- The draft opinion assumes that if a lawyer knows a contract provision is illegal, 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.”
 - 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.
 - Agree. See response to Neil’s first comment.
- **Stanley Lamport**
 - Disagrees with the following conclusion: “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 including a provision in a contract to trigger a rule 4.1 violation because drafting an agreement does not necessarily affirm or vouch for the truthfulness of a representation made by the client.

- Here, we are not addressing a client misrepresentation of fact, but the lawyer knowingly promoting and enforcing a provision the lawyer knows is illegal. We should discuss whether to use another term instead of "promulgating" in the opinion if readers are confused by the meaning.
- 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.
 - Our draft opinion is focused on the lawyer's statements in promulgating and enforcing the contract provision, which could be interpreted as a representation that the knowingly illegal contract provision is legal. See comment above – should we use different term besides promulgating in opinion.
- 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 and provides no meaningful guidance. 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 opinion is not addressing providing mere advice to the client about enforcement and the first paragraph in Section A makes clear that a lawyer may discuss the legal consequences of any proposed course of action. We should discuss the use of the term "may" and whether to change to "must" or clarify why it depends on the circumstances.
- 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.
 - This is not correct. Scenario 4 and the body clearly address assisting a client with enforcement.

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

- **David McGowan**

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

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.

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

- This is consistent with Neil's and CLA's identical comments and Richard's first comment discussed above and we should discuss. This also appears to be based on the example provided which McGowan and others feels is limited to void or unenforceable contracts as opposed to illegal.
- 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(b); 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.
- Again, this seems based solely on the example. Our opinion is intended to focus only on illegal contract provision. If such provisions are clearly prohibited by

controlling California law, then wouldn't they be unlawful to promulgate or enforce?

- Disagrees with our conclusion that Rule 1.2.1 is broader than ABA Model Rule 1.2(d) because it forbids a lawyer from counseling or assisting in “a violation of any law, rule, or ruling of a tribunal.” He argues that under canons of interpretation, this phrase must be construed with reference to “criminal [and] fraudulent.” This rule should be limited to laws that forbid formation of an agreement, not laws declaring that a term will not be enforced.
 - David's interpretations would render the term “violation of any law, . . .” superfluous. His argument rests again on the premise that our opinion is only addressing an unenforceable contract provision, not an illegal provision.
- Disagrees with definition of fraud and following conclusion: “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).” He does not agree that promulgating (giving counterparty copy of the agreement without making any express representation regarding enforceability) a contract with a void provision would violate these rules. Claims that our conclusion appears to rest on unstated premise that noncompete is enforceable versus representation of what the law allows.
 - Again, this comment appears to rest on the mistaken premise that our opinion is addressing an unenforceable provision. We should reconsider the use of the term “promulgate” or clarifying what we mean to avoid any misunderstanding. Do we mean drafting, promoting or supporting? Per Merriam-Webster, this term is defined as “to make known to many people by open declaration,” “to make known or public the terms of” or “to put into action or force.” This 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).
- They agree with footnote 2 but claim the sole example in opinion is inconsistent.
 - These issues overlap with the comments addressed above.

- **Laurence Hummer**

- Disagrees with the conclusion that the lawyer's inclusion of a contractual term that is illegal or unenforceable is a misrepresentation by the lawyer to the other party that the provision is legal or enforceable.
 - This overlaps with comments addressed above.
- Refers to examples of real estate brokers or paralegals using form agreements that may contain unenforceable provisions.
 - The CRPC do not apply to real estate brokers or paralegals. If the lawyer uses a form agreement and does not know the provision is illegal, Rule 1.2.1 would not apply.

- **AG Rob Bonta**

- Supports Draft Opinion and emphasizing the need for this guidance, especially given 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.
- 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.

- **Peggy Kong**

- Supports Draft Opinion based on her personal experience of being presented with a contract that she claims was illegal and references State Bar complaint.

- **Worker and Consumer Advocates, Attorneys, and Labor Organizations (Towards Justice, California Employment Lawyers Association, Open Markets Institute People’s Parity Project Justice Catalyst, Legal Aid at Work, National Consumer Law Center)¹**

- Disagree with Wertlieb’s comments made at Dec. COPRAC meeting.
 - Wertlieb’s claim that assisting a client to draft an illegal or unenforceable contractual term for the purpose of presenting it to potential counterparties is not conduct within meaning of Rule 1.2.1 is in correct as a matter of logic and California law.
 - This overlaps with Zitrin’s comments and drafting/assisting a client in drafting an illegal contract term does appear to be “conduct” within meaning of the Rule. The Rule does not refer to the term “unenforceable” and we should follow the terms in the Rule as suggested by other public comments noted above.
 - Points to unpublished C.D. Cal. case for proposition that 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. . . .”
 - Also references California appellate court cases in unfair competition context and Labor Code section 432.5 for proposition that entering into an unenforceable or illegal contract is conduct that violates the law.

¹ The letter is unsigned.

- Suggests that the Committee should remove the second sentence of footnote two and replace any reference to “illegal” in the Draft Opinion with “illegal or unenforceable.”
 - Claims 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 unsupported by California law and risks undermining the core purposes of the Draft Opinion.
 - Nothing in the Rules of Professional Conduct suggests a meaningful distinction between “illegal” and “unenforceable.” Rule 1.2.1 covers terms that are “in violation of any law, rule, or ruling of a tribunal.” Even if a term were “unenforceable” and not “illegal,” it would be in violation of the law or rule that proscribes its enforceability.
 - 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. Courts in California and elsewhere have recognized that unambiguously unenforceable contractual terms are likely to deceive non-drafting parties about their rights. 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.”
 - Recognizes that the term “unenforceable” could be ambiguous or difficult to apply as it raises fact-specific questions, particularly in the unconscionability context, but claims this is avoided by clarification that attorney must know that the term is unenforceable. Also suggests that the Committee could limit opinion to unenforceable terms in standard form contract to avoid this confusion.
 - It would be preferable to use language directly from Rule 1.2.1. As these comments recognize, the term “unenforceable” does raise fact-specific issues regarding conscionability that aren’t necessary mitigated or avoided by the requirement that the attorney “know” the term is unenforceable or limiting the opinion to standard form contracts.
- Requests that the Committee clarify that its Draft Opinion specifically addresses non-compete clauses and similar agreements like liquidated damages provisions and training-repayment agreements.

- Notes ubiquitous use of illegal non-competes and their substantial chilling effect on employees.
 - We may not address issues of law. It is not clear that non-compete or similar agreements are illegal in all factual circumstances. We also don't want to limit the opinion to these types of agreements, and intend to broadly cover all agreements that might fall within the scope of Rule 1.2.1.