

1                                   **THE STATE BAR OF CALIFORNIA**  
2                                   **STANDING COMMITTEE ON**  
3                                   **PROFESSIONAL RESPONSIBILITY AND CONDUCT**  
4                                   **FORMAL OPINION NO. 2022-208**  
5

6   **ISSUE:**                   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 a  
8                                   violation of the law 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. As such, a lawyer shall not counsel or assist a  
12                               client in presenting as lawful a contract provision that the lawyer knows  
13                               violates the law, or otherwise defend the legality of the provision to a  
14                               third party. If the lawyer knows that the provision violates the law, the  
15                               lawyer should advise the client accordingly, may not recommend the use  
16                               of the provision, and must counsel the client not to use it. If the client  
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18                               advice, the lawyer may not participate in presenting the provision as  
19                               lawful or defending its legality to a third party. The lawyer is permitted to  
20                               withdraw from the representation if the client insists on using the  
21                               provision and, depending on the client's continued conduct and the  
22                               scope of the representation, may be required to do so. If the lawyer  
23                               concludes that the client's conduct is a violation of law reasonably  
24                               imputable to an organization and likely to result in substantial injury to  
25                               the organization, the lawyer 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:**       Rules 1.0.1(f), 1.1, 1.2.1, 1.4, 1.13, 1.16, 4.1, and 8.4(c) of the Rules of  
31                               Professional Conduct of the State Bar of California.<sup>1/</sup>

32                               Business and Professions Code section 6068, subdivision (d).

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## INTRODUCTION

34 Certain types of contract provisions are illegal under California law.<sup>2/</sup> For example, provisions in  
 35 employment contracts that impair the ability of employees to compete against their employers  
 36 following termination of employment have been found to be illegal and unenforceable, and the  
 37 use of these provisions violates California law, subject to specific, limited exceptions. See  
 38 *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945 [81 Cal.Rptr.3d 282]; *Robinson v.*  
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 43 contract violates the law as this raises an issue of law; instead, the committee confines its  
 44 discussion to the ethical issues presented by the factual scenarios below and assumes that the  
 45 contract provision in the hypothetical scenario violates the law at the time the agreement is  
 46 made and not potentially subject to an exception that would make the provision legal. The  
 47 opinion is not intended to address provisions that are legal, but against public policy,  
 48 unenforceable, voidable, or subject to some other prohibition. Nor is it intended to address  
 49 situations where the lawyer knows a court has held a provision to be unlawful, but nonetheless  
 50 has a good faith belief that the ruling was incorrect, another court in the controlling jurisdiction  
 51 has ruled or would rule otherwise, or the provision might be enforceable against the person  
 52 who is being asked to sign it under reasonably foreseeable circumstances. See rule 1.2.1,  
 53 Comment [3]; see also Cal. State Bar Formal Opn. 2020-202 (“Under the California Rules of  
 54 Professional Conduct, a California-licensed lawyer is permitted to advise and assist a client in  
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 57 lawyer informs the client of the conflict between state and federal law and does not advise or  
 58 assist the client in concealing or evading prosecution for that conduct.”); Bar Association of San  
 59 Francisco Legal Ethics Opn. 2015-1.

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## STATEMENT OF FACTS

61 Lawyer works for a large California corporation (“Company”) providing employment law advice  
 62 to the Human Resources department (“HR”) responsible for all nonexecutive hiring. Employees  
 63 hired through HR are presented with a standard form written employment agreement  
 64 (“Agreement”). This Agreement is presented by HR to all nonexecutive new hires in California  
 65 as a nonnegotiable agreement that must be signed as a condition of employment. Lawyer is  
 66 tasked with reviewing and updating the Agreement, which contains a material provision that  
 67 violates California law.

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## FACTUAL SCENARIOS

69 **Scenario 1**

Lawyer knows that the provision violates California law but advises HR to use the Agreement anyway, without informing HR that the provision violates California law.

## **Scenario 2**

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

## **Scenario 3**

Lawyer advises HR that the provision violates California law but does not recommend against including the provision.

## **Scenario 4**

Lawyer advises HR that the provision violates California law and recommends against including the provision. HR advises Lawyer that it understands the provision violates California law but would still like to include it in the Agreement for its chilling effect. HR then instructs Lawyer to include the provision in the Agreement as is and to assist HR in presenting the Agreement to its employees as a condition of their employment. HR also asks Lawyer to defend the legality of the provision if asked about it by any Company employees.

## **DISCUSSION**

### **A. Duty to Advise of an Illegal Contract Provision**

Rule 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)<sup>4/</sup> Both the California rule<sup>5/</sup> and the ABA Model Rule allow a lawyer

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<sup>4/</sup> 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.”

<sup>5/</sup> 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.”

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.<sup>6/</sup>

The California rule on its terms applies to every type of legal representation, including transactional work and negotiation. In the transactional context, a lawyer is “counsel[ing] a client to engage” or “assist[ing] a client in conduct” when the lawyer recommends the inclusion of a provision in a contract that the lawyer knows violates the law, or agrees to present or defend the legality of that provision to a third party. See ABA Model Rule 1.2, Comment [10] (“The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed.”); ABA Section of Litigation, *Ethical Guidelines For Settlement Negotiations* (August 2002), at pp. 46-47 (“A lawyer should not negotiate a settlement provision that the lawyer knows to be illegal.”).<sup>7/</sup>

In Scenario 1, Lawyer recommends the inclusion of a provision that Lawyer knows is illegal under California law in violation of rule 1.2.1(a) and potentially not subject to an exception that would make the provision legal.<sup>8/</sup> Rule 1.0.1(f) defines knows: “‘Knowingly,’ ‘known,’ or ‘knows’ means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Here, knows means Lawyer has actual knowledge that including the provision in question violates California law.

Conversely, in Scenario 2, Lawyer does not know that the specific type of contract provision is illegal under California law. Therefore, Lawyer does not violate rule 1.2.1.

However, in Scenario 2, Lawyer likely violated the duty of competence under rule 1.1(a) because Lawyer’s conduct reflects a deliberate or reckless disregard for the lawfulness of the specific provision. Knowing that the specific provision is illegal is likely to be reasonably necessary to provide competent legal advice to HR on employment law matters consistent with rule 1.1(b), particularly to the extent it is well-established that this type of provision is illegal and that including an illegal provision in an employment contract violates California law.<sup>9/</sup> Rule 1.1(c) allows a lawyer to fulfill the duty of competence by associating or consulting a lawyer the lawyer reasonably believes to be competent or acquiring sufficient learning and skill to become

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<sup>6/</sup> See generally Cal. State Bar Formal Opn. 2020-202 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).

<sup>7/</sup> 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 rule 1.0, Comment [4] (“Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered” for guidance on proper professional conduct.).

<sup>8/</sup> The committee would reach the same conclusion in all four scenarios if Lawyer was the original drafter of the agreement.

<sup>9/</sup> 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.)

competent before advising the client on a material legal provision. A lawyer's failure to do so might be reckless or grossly negligent under rule 1.1(a). See *In the Matter of Morse* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24 (Respondent's mass advertising without thoroughly researching relevant statute to evaluate exemption was "grossly negligent and could be characterized as reckless or intentional after he disregarded the later request from the Attorney General's Office that he stop mailing unlawful advertisements."); see also rule 1.1(b).

**B. Duty Not to Assist in the Use of an Illegal Contract Provision or Misrepresent the Legality of Provision**

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

In Scenario 3, Lawyer has a duty under rule 1.2.1 not only to advise the client or client constituent, HR, on the applicable law and the possible consequences of using the provision in question, but also to recommend against its use. 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 HR insists on including the illegal provision for its chilling effect contrary to Lawyer's advice, Lawyer must advise Company regarding the limitations on Lawyer's conduct, including that Lawyer will not represent Company in presenting the Agreement to Company employees or otherwise defend the legality of the provision. Rule 1.2.1, Comment [5]; rule 1.4(a)(4).

If Lawyer ultimately decides to assist Company by including the provision for its chilling effect and presenting it to Company employees as a condition of their employment, or otherwise vouching for the legality of the provision to those employees, Lawyer's conduct is a misrepresentation by omission or an affirmative misrepresentation that the provision is legal. See rule 4.1(a), Comment [1].<sup>10/</sup>

Rule 8.4(c) also states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation." Presenting a third party with a knowingly illegal provision in an employment agreement for its chilling effect<sup>11/</sup> would violate rule 4.1(a), rule 8.4(c), and Business and Professions Code section 6068, subdivision (d). See also California State Bar Formal Opinion 2015-194, where this committee

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<sup>10/</sup> The committee is not addressing the potential application of rule 4.1(b), which is fact-specific and involves an interpretation of legal issues concerning what constitutes a "fraudulent act" under applicable law.

<sup>11/</sup> The chilling effect includes situations where a client wants to include a term not just 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..

opined that a lawyer may not knowingly make false statements of fact or implicit misrepresentations of material fact during negotiations.<sup>12/</sup>

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 Cal. State Bar Formal Opn. 2015-194. In Scenario 4, if Lawyer presents employees with the employment contract containing a knowingly illegal provision for its chilling effect or otherwise defends the legality of a knowingly illegal provision, Lawyer's conduct goes beyond mere drafting of the agreement. In presenting the agreement with the knowingly illegal provision for its chilling effect, Lawyer would be making an implicit misrepresentation that the provision is legal. Moreover, in defending the legality of the illegal provision, Lawyer would be engaging in explicit misrepresentation of fact and dishonest or misleading conduct.

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 S.C. Bar Ethics Opn. 05-03 (2005) (lawyer for ex-wife sent letter to ex-husband falsely claiming that ex-husband was required under divorce decree to undergo drug testing; this conduct violated South Carolina Rules of Professional Conduct 4.1 and 8.4(c)); *In re Discipline of Attorney* (2008) 451 Mass. 131 [884 N.E.2d 450] (lawyer disciplined under Massachusetts Rules of Professional Conduct, 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). Here, Lawyer's defense of the legality of the provision would ratify the false statement of law made by the client in violation of rule 4.1(a).

### 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 HR chooses to use the illegal provision despite Lawyer's admonition. Even where the use of that contract provision is deemed fraudulent or criminal, withdrawal from representation is permissive, not mandatory. Rule 1.2.1, Comment [1]; rule 1.16(b)(1)–(3).<sup>13/</sup>

<sup>12/</sup> 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, subd. (a), and 6068, subd. (d)), and related California case law, but it also relied on ABA Model Rule 4.1 in support of its argument.

<sup>13/</sup> 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*

If, however, HR not only ignores Lawyer’s advice but insists that Lawyer be involved with presenting and defending the illegal contract provision to its employees, Lawyer would likely be required to terminate the representation of Company with respect to this requested matter.<sup>14/</sup> 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, active participation in presenting and defending the illegal contract provision would likely violate rules 1.2.1, 4.1, 8.4, and Business and Professions Code section 6068, subdivision (d).<sup>15</sup>

#### **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 Lawyer knows that HR’s conduct is illegal and the use and defense of a knowingly illegal contract provision for all nonexecutive new hires for its chilling effect is “likely to result in substantial injury to the organization.” See rule 1.13(b).<sup>16/</sup> 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 participate in presenting and defending the legality of the provision, reporting up would likely be in the best lawful interest of Company.

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*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.)*

<sup>14/</sup> 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 any negotiation, defense, or enforcement regarding 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.

<sup>15/</sup> 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 Bus. & Prof. Code, § 6068, subd. (e)(1). See also, Cal. State Bar Formal Opn. 2015-192, generally, for discussion on a lawyer’s duty to maintain confidential information when withdrawing from a client representation.

<sup>16/</sup> Company’s use of an illegal provision is likely to result in substantial injury to the organization. See, e.g., 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.”).

## CLEAN

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 counsel or assist a client in presenting as lawful a contract provision that the lawyer knows violates the law, or otherwise defend the legality of the provision to a third party. 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 defending the legality of the provision against a third party. The lawyer is permitted to withdraw from the representation if the client insists on using the illegal provision and, depending on the client’s continued conduct and the scope of the representation, may be required to do so.

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



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

**DIGEST:** A California lawyer has a duty not to counsel or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal. As such, a lawyer shall not counsel or assist a client in presenting as lawful a contract provision that the lawyer knows violates the law, or otherwise defend the legality of the provision to a third party. If the lawyer knows that the provision violates the law, the lawyer should advise the client accordingly, may not recommend the use of the provision, and must counsel the client not to use it. If the client insists on using a provision that violates the law against the lawyer’s advice, the lawyer may not participate in presenting the provision as lawful or defending its legality to a third party. The lawyer is permitted to withdraw from the representation if the client insists on using the provision and, depending on the client’s continued conduct and the scope of the representation, may be required to do so. If the lawyer concludes that the client’s conduct is a violation of law reasonably imputable to an organization and likely to result in substantial injury to the organization, the lawyer must report the actions of the client constituent to a higher authority within the organization, unless the lawyer reasonably concludes that it is not in the best lawful interest of the organization to do so.

**AUTHORITIES**

**INTERPRETED:** Rules 1.0.1(f), 1.1, 1.2.1, 1.4, 1.13, 1.16, 4.1, and 8.4(c) of the Rules of Professional Conduct of the State Bar of California.<sup>1/</sup>

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 45 contract provision in the hypothetical scenario violates the law at the time the agreement is  
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<sup>2/</sup> The use of the term “illegal” in this opinion refers to a provision that violates the law. ~~The opinion is not intended to address situations where the lawyer knows a court has held a provision to be unenforceable, 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].~~

<sup>3/</sup> In *Arthur Anderson*, the Supreme Court concluded that “section 16600 prohibits employee noncompetition agreements unless the agreement falls within a statutory exception . . . .” *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 946 [81 Cal.Rptr.3d 282, 289] (“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 stated 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] [such restraints on trade are ‘largely illegal’].)” *Ibid.* See also, *Brown v. TGS Management Co., LLC* (2020) 57 Cal.App.5th 303, 315 [271 Cal.Rptr.3d 303] (“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.]”).

The opinion is not intended to address provisions that are legal, but against public policy, unenforceable, voidable, or subject to some other prohibition. Nor is it intended to address situations where the lawyer knows a court has held a 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]; see also Cal. State Bar Formal Opn. 2020-202 (“Under the California Rules of Professional Conduct, a California-licensed lawyer is permitted to advise and assist a client in interpreting and complying with California law, including laws permitting and regulating commerce in cannabis, even if the client’s conduct violates federal law, provided that the lawyer informs the client of the conflict between state and federal law and does not advise or assist the client in concealing or evading prosecution for that conduct.”); Bar Association of San Francisco Legal Ethics Opn. 2015-1.

## STATEMENT OF FACTS

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## FACTUAL SCENARIOS

### Scenario 1

Lawyer knows that the provision violates California law but advises HR to use the Agreement anyway, without informing HR that the provision violates California law.

### Scenario 2

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

### Scenario 3

Lawyer advises HR that the provision violates California law but does not recommend against including the provision.

### Scenario 4

80 Lawyer advises HR that the provision violates California law and recommends against including  
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## DISCUSSION

### A. Duty to Advise of an Illegal Contract Provision

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89 conduct that the lawyer *knows* is criminal, fraudulent, *or a violation of any law, rule, or ruling of*  
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<sup>5/</sup> 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.”

<sup>6/</sup> See generally Cal. State Bar Formal Opn. 2020-202 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).

<sup>7/</sup> 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 rule 1.0, Comment

In Scenario 1, Lawyer recommends the inclusion of a provision that Lawyer knows is illegal under California law in violation of rule 1.2.1(a) and potentially not subject to an exception that would make the provision legal.<sup>8/</sup> Rule 1.0.1(f) defines knows: “‘Knowingly,’ ‘known,’ or ‘knows’ means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Here, knows means Lawyer has actual knowledge that including the provision in question violates California law.

Conversely, in Scenario 2, Lawyer does not know that the specific type of contract provision is illegal under California law. Therefore, Lawyer does not violate rule 1.2.1.

However, in Scenario 2, Lawyer likely violated the duty of competence under rule 1.1(a) because Lawyer’s conduct reflects a deliberate or reckless disregard for the lawfulness of the specific provision. Knowing that the specific provision is illegal is likely to be reasonably necessary to provide competent legal advice to HR on employment law matters consistent with rule 1.1(b), particularly to the extent it is well-established that this type of provision is illegal and that including an illegal provision in an employment contract violates California law.<sup>9/</sup> Rule 1.1(c) allows a lawyer to fulfill the duty of competence by associating or consulting a lawyer the lawyer reasonably believes to be competent or acquiring sufficient learning and skill to become competent before advising the client on a material legal provision. A lawyer’s failure to do so might be reckless or grossly negligent under rule 1.1(a). See *In the Matter of Morse* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 24 (Respondent’s mass advertising without thoroughly researching relevant statute to evaluate exemption was “grossly negligent and could be characterized as reckless or intentional after he disregarded the later request from the Attorney General’s Office that he stop mailing unlawful advertisements.”); see also rule 1.1(b).

#### **B. Duty Not to Assist in the Use of an Illegal Contract Provision or Misrepresent the Legality of Provision**

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

In Scenario 3, Lawyer has a duty under rule 1.2.1 not only to advise the client or client constituent, HR, on the applicable law and the possible consequences of using the provision in question, but also to recommend against its use. See also rule 1.4(b) (“A lawyer shall explain a

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[4] (“Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered” for guidance on proper professional conduct.).

<sup>8/</sup> The committee would reach the same conclusion in all four scenarios if Lawyer was the original drafter of the agreement.

<sup>9/</sup> 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.)

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

In Scenario 4, because HR insists on including the illegal provision for its chilling effect contrary to Lawyer’s advice, Lawyer must advise Company regarding the limitations on Lawyer’s conduct, including that Lawyer will not represent Company in presenting the Agreement to Company employees or otherwise defend the legality of the provision. Rule 1.2.1, Comment [5]; rule 1.4(a)(4).

If Lawyer ultimately decides to assist Company by including the provision for its chilling effect and presenting it to Company employees as a condition of their employment, or otherwise ~~defending~~vouching for the legality of the provision to those employees, Lawyer’s conduct is a misrepresentation by omission or an affirmative misrepresentation that the provision is legal. See rule 4.1(a), Comment [1].<sup>10/</sup>

Rule 8.4(c) also states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation.” Presenting a third party with a knowingly illegal provision in an employment agreement for its chilling effect<sup>11/</sup> would violate rule 4.1(a), rule 8.4(c), and Business and Professions Code section 6068, subdivision (d). See also California State Bar Formal Opinion 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.<sup>12/</sup>

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 Cal. State Bar Formal Opn. 2015-194. In Scenario 4, if Lawyer presents employees with the employment contract containing a knowingly illegal provision for its chilling effect or otherwise

<sup>10/</sup> The committee is not addressing the potential application of rule 4.1(b), which is fact-specific and involves an interpretation of legal issues concerning what constitutes a “fraudulent act” under applicable law.

<sup>11/</sup> The chilling effect includes situations where a client wants to include a term not just 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. ~~Such a practice would also likely be considered to be an unfair business practice under California law in violation of Business and Professions Code section 17200 and related cases.~~

<sup>12/</sup> 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, subd. (a), and 6068, subd. (d)), and related California case law, but it also relied on ABA Model Rule 4.1 in support of its argument.

defends the legality of a knowingly illegal provision, Lawyer’s conduct goes beyond mere drafting of the agreement. In presenting the agreement with the knowingly illegal provision for its chilling effect, Lawyer would be making an implicit misrepresentation that the provision is legal. Moreover, in defending the legality of the illegal provision, Lawyer would be engaging in explicit misrepresentation of fact and dishonest or misleading conduct.

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 S.C. Bar Ethics Opn. 05-03 (2005) (lawyer for ex-wife sent letter to ex-husband falsely claiming that ex-husband was required under divorce decree to undergo drug testing; this conduct violated South Carolina Rules of Professional Conduct 4.1 and 8.4(c)); *In re Discipline of Attorney* (2008) 451 Mass. 131 [884 N.E.2d 450] (lawyer disciplined under Massachusetts Rules of Professional Conduct, 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). Here, Lawyer’s defense of the legality of the provision would ratify the false statement of law made by the client in violation of rule 4.1(a).

### **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 HR chooses to use the illegal provision despite Lawyer’s admonition. Even where the use of that contract provision is deemed fraudulent or criminal, withdrawal from representation is permissive, not mandatory. Rule 1.2.1, Comment [1]; rule 1.16(b)(1)–(3).<sup>13/</sup>

If, however, HR not only ignores Lawyer’s advice but insists that Lawyer be involved with presenting and defending the illegal contract provision to its employees, Lawyer would likely be required to terminate the representation of Company with respect to this requested matter.<sup>14/</sup> Rule 1.16(a)(2) provides that withdrawal is mandatory if “the lawyer knows or reasonably

<sup>13/</sup> 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.)

<sup>14/</sup> 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~~any negotiation, defense, or decline the representation if HR sought to have Lawyer negotiate, defend, advocate, or litigate enforcement regarding 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.

should know that the representation will result in violation of these rules or of the State Bar Act.” Lawyer’s continued, active participation in presenting and defending the illegal contract provision would likely violate rules 1.2.1, 4.1, 8.4, and Business and Professions Code section 6068, subdivision (d).<sup>15</sup>

#### **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 Lawyer knows that HR’s conduct is illegal and [the use and defense of a knowingly illegal contract provision for all nonexecutive new hires for its chilling effect](#) is “likely to result in substantial injury to the organization.” See rule 1.13(b).<sup>16/</sup> 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 participate in presenting and defending the legality of the provision, reporting up would 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 counsel or assist a client in presenting as lawful a contract provision that the lawyer knows violates the law, or otherwise defend the legality of the provision to a third party. 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.

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<sup>15/</sup> 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 Bus. & Prof. Code, § 6068, subd. (e)(1). See also, Cal. State Bar Formal Opn. 2015-192, generally, for discussion on a lawyer’s duty to maintain confidential information when withdrawing from a client representation.

<sup>16/</sup> Company’s use of an illegal provision is likely to result in substantial injury to the organization. See, e.g., 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.”).



## REDLINE

215 If the client insists on using the illegal provision against the lawyer's advice, the lawyer shall not  
216 participate in presenting the illegal provision to the third party and shall not assist the client in  
217 defending the legality of the provision against a third party. The lawyer is permitted to  
218 withdraw from the representation if the client insists on using the illegal provision and,  
219 depending on the client's continued conduct and the scope of the representation, may be  
220 required to do so.

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