CENTER FOR PUBLIC INTEREST LAW
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110-2492
P: (619) 260-4806 / F: (619) 260-4753

www.cpil.org

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

Dear Mr. Tuft and COPRAC members:

On behalf of the Center for Public Interest Law, we write to request a formal ethics opinion on a topic of great importance to the Bar's mission of public protection and access to justice. Specifically, we seek an opinion on whether an attorney's participation in the drafting, review (without objection), approval, or execution of contractual language in an employment agreement that is unambiguously illegal or unenforceable is a violation of Rule 8.4(c), Rule 1.2.1, or any other rules of the California Rules of Professional Conduct.

Consider the following scenario. A lawyer is asked by his corporate client to draft an employment agreement to be used in California. The lawyer drafts an employment agreement that contains a non-compete provision. The lawyer also includes provisions in the employment agreement to require arbitration of all disputes and provides that (1) the employer unilaterally selects the arbitrator and (2) arbitration must occur in an out-of-state forum.

California law expressly states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Cal. Bus. & Prof. Code § 16600. The California Supreme Court has held that this statute, passed in 1872, prohibits all noncompete agreements in contracts of employment. *Edwards v. Arthur Anderson LLP*, 44 Cal.4th 937 (2008). Courts have even considered the use of an illegal noncompete agreement to be a violation of California's Unfair Competition Law, which prohibits *unlawful* and *fraudulent* conduct. *Dowell v. Biosense Webster, Inc.*, 179 Cal.App.4th 564, 575 (Ct. App. 2d Dist. 2009). What ethical concerns does the lawyer raise by including a non-compete provision in the employment agreement, although he knows or should know that these agreements are unambiguously illegal and unenforceable in California?

California courts have also explained that "an adhesive agreement that gives the employer the right to choose a biased arbitrator is unconscionable." *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1152 (2013), as are other contract terms that are clearly designed to disadvantage the non-drafting party. S*ee, e.g., Armendariz v. Found. Health Psychcare Servs.*, Inc., 24 Cal. 4th 83, 110-11 (2000). As such, what ethical concerns does the lawyer raise by drafting an agreement that permits the employer to unilaterally select an arbitrator, even though he knows or should know that these agreements are unambiguously unenforceable in California?

In 2016, Governor Brown signed SB 1241 (Wieckowski) (Chapter 632, Statutes of 2016), which added section 925 to the Labor Code. Of note, subdivision (a) of that statute states that "[a]n employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would . . . require the employee to adjudicate outside of California a claim arising in California." What ethical concerns does the lawyer raise by including an out-of-state venue for arbitration despite the fact that he knows or should know that an agreement to resolve disputes in an out-of-state venue is unambiguously illegal in California?

While we recognize that a drafting party can build into a contract a "margin of safety" that provides it with "extra protection for which it has a legitimate commercial need," *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1250 (2016), there is a sharp difference between a lawyer including terms that protect the drafter in the legal process (such as establishing a process for selecting an arbitrator) and including terms that are unambiguously unenforceable under existing law (such as providing for unilateral selection of an arbitrator). In the latter scenario, the term is included—although it would provide no actual protection if challenged in court—to deceive the non-drafting party into thinking that it is enforceable, causing her to change her behavior as a result. For example, an employee working in poor working conditions might feel unable to look for different work elsewhere if she is covered by an unenforceable non-compete agreement. Or an employee subject to sexual harassment at work may feel that there is no point consulting with a lawyer about whether she should pursue claims against her employer if there is an arbitration provision in her employee handbook that requires claims against the company to be resolved by an out-of-state arbitrator picked by her employer.

This impact on employee behavior is more than a theoretical possibility. Academic research shows that 19% of all California workers have signed an illegal noncompete agreement. Starr, Evan and Prescott, J.J. and Bishara, Norman D, Noncompetes in the U.S. Labor Force, MICH. J L & ECON RESEARCH, Paper No. 18-013 (2019). And 40% of noncompete signers cite their non-compete as a reason they turned down an offer from a competitor employer, *regardless of whether they live in a state that enforces the agreements*. Starr, *et. al.*, Noncompetes and Employee Mobility, MICH. J L & ECON, Paper No. 16-032 (2019). Statistics suggest this seemingly unethical practice has impacted millions of people in California.

A lawyer advising a client to adopt an illegal or unenforceable term, who knows or should have known about its unenforceability, would seem to be in violation of Rule 8.4(c) prohibiting conduct involving dishonesty, deception, and fraud. He would also seem to violate Rule 1.2.1, which prohibits counseling a client to engage in conduct that the lawyer knows is fraudulent or a violation of law, especially because it is a violation of California's Labor Code to "require any employee or applicant for employment to agree, in writing, to any term or condition which is known . . . to be prohibited by law." Labor Code § 432.5.

Accordingly, we respectfully ask COPRAC to publicly issue a formal opinion on whether drafting, reviewing (without objection), approving, and/or causing to be signed an employment contract or agreement between a business and worker that contains contractual provisions that the lawyer knows or should know are unambiguously illegal and unenforceable, violates Rule 8.4(c) of the California Rules of Professional Conduct, which prohibits "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation;" Rule 1.2.1, which prohibits "counsel[ing] a

client to engage, or assist[ing] a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule or ruling of a tribunal;" or any other ethical rule. We ask that the ethics opinion also make clear whether including noncompete agreements, clauses allowing the employer to unilaterally choose an arbitrator, out-of-state forum selection clauses, and other obviously unenforceable terms in employment contexts would violate the California Rules of Professional Conduct.

We are grateful for the good work COPRAC is doing, and we are hopeful that you will consider this important request.

Sincerely,

Robert C. Fellmeth
State Bar No. 49897
Executive Director
Center for Public Interest Law
Price Professor in Public Interest Law
University of San Diego School of Law

Former State Bar Discipline Monitor
1987-1992

Bridget Fogarty Gramme
State Bar No. 231953
Administrative Director
Center for Public Interest Law
University of San Diego School of Law