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Attorney ethics and unenforceable employment contracts

By Robert C. Fellmeth

Increasing numbers of workers are handed fine-print employment contracts. They govern everything from salary and benefits to the location and conditions of work. And they include how disputes with their employer are to be resolved.

These contracts are usually drafted by lawyers for the corporate employer who know (or should know) how the law works. And they are typically presented to new workers who lack attorney representation or review, are unlikely to understand it fully, and are confronted with a "take it as it sits or lose the job" setting. In other words, archetype adhesion.

Many millions of workers are subject to this process, most of them drafted by attorneys-at-law. A large number of them commonly include provisions that violate the law, and as such are either voidable or cannot be enforced in good faith. These and other attorney drafting decisions create ethical dilemmas I encountered often while serving as the California State Bar Discipline Monitor from 1987 to 1992 — able to review all bar complaints and investigative documents. What are the obligations of counsel in a setting where a client would benefit from an unlawful or unenforceable provision? Does it matter if the source of its inclusion is the attorney herself or whether it is insisted upon by the client? The easy hypothetical is where the client is entirely uninformed and suffers a financial setback when the contract is tested in court and found to be unenforceable — and perhaps also a basis for client damage liability. The more difficult and typical circumstance is where the client insists upon it, even where advised that it will not fly if tested, and that it may create liability exposure for violation of labor or unfair competition laws.

Including such provisions violates the Rules of Professional Conduct, even if the client demands it. Of course, counsel owes an important duty to a client, but that does not include arranging the imposition of unlawful terms and conditions as to third parties. Even where clients insist, that surrender is not part of any fiduciary duty and — quite apart from the stupidity of possible client self-sabotage — it violates a higher obligation of all counsel to comport with the law. We are all "attorneys-at-law."

Accordingly, we at the Center for Public Interest Law have just submitted a letter to the California Bar asking for an ethics opinion on point so we might bring our profession into compliance with applicable ethical standards.

This is not a theoretical problem. In 1992, only 5 percent of the nonunion private sector workforce in the United States was subject to an employment contract requiring arbitration of workplace disputes. Yet according to a recent study, the number by 2018 had risen to over 55 percent of workers.

While the U.S. Supreme Court has held that arbitration involves aspects of federal law and commonly upholds arbitration agreement enforcement, California has imposed some commonsense conditions. Employer contracts cannot force workers to pay unreasonable costs to have their claims heard. Importantly, they cannot require workers employed and working in California to be subject to mandatory arbitration in another state selected unilaterally by the employer. Nor can they arrange unfettered employer discretion to select the arbitrator. But these provisions appear commonly in attorney drafted employment agreements imposed on employees.

An even more alarming example are disturbingly common unlawful noncompete clauses. These contracts, which purport to restrict a worker's right to work for competing company after her employment has ended, are nearly always unenforceable under California law. Notwithstanding that rather profound status, California employees suffer common inclusion of such clauses. Certainly there may be circumstances where trade secrets or employer investment warrants some limitation on employee use, but the now-common "noncompete" clauses are not so limited. As a former state and federal antitrust prosecutor, I particularly worry about the damage from uncircumscribed limits on future employment and opportunity, particularly in our oligopolistic world where a small number of employers can often limit employee choice.

The damage here does not involve court test because few employees know such provisions, however broad, are unenforceable. But the damage is here visited upon employees not in a position to litigate as a practical matter, and who are not likely to know of such restraint of trade illegality. One of the leading scholars on such clauses is my respected colleague at the University of San Diego School of Law: Professor Orly Lobel. Her extensive research outlines how such policies not only depress wages and opportunities but are also an impediment to innovation and economic growth. See especially her book: "Talent Wants to be Free," as well as current articles.

Thus far, court sanctions have not sufficed to deter the inclusion of such unlawful measures. Even if a contract ends up in litigation for any number of reasons, the "severability clause" commonly allows a result that does not consider or specifically void them.

We all know that it is unethical for an attorney to file a clearly frivolous case, but the law as enforced is less clear on the ethics of an attorney drafting a clearly unenforceable contract — especially as they proliferate across the marketplace. Indeed, that commonality actually makes an attorney's desire to engage in lawful practice problematical. For a client might very well observe "well, you are refusing to include my advantageous terms that your attorney competitors obviously have no problem with…. so sayonara counsel." This dynamic commends a State Bar rule that allows attorneys seeking compliance with the law to explain to clients so demanding "I cannot do that, and others you think can do so, cannot either, see this Ethics Opinion." To my friends in the State Bar — we all know that a major purpose of an attorney — or of any member of any profession — is actually to remove the need for our services. A preventive measure to draw a clear line that prevents legal abuse may be your most sacrosanct obligation.

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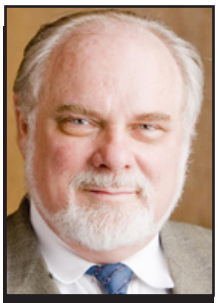

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