

Issue Presented: May a South Dakota lawyer ethically counsel, advise, provide legal services to, or represent a marijuana cultivator, processor, or seller when the sale of marijuana is legal under South Dakota law but illegal under federal law?

Answer: No

Rules Implicated: 1.2

FACTS AND APPLICABLE RULE

In November 2020, two South Dakota state ballot measures, Initiated Measure 26, legalizing marijuana for medical use by qualifying patients under certain conditions, and Constitutional Amendment A, legalizing the cultivation, processing, possession, use, and distribution of recreational marijuana subject to various restrictions, passed by a majority vote of the electorate.

Issues of substantive law are ordinarily outside the Committee’s purview, but here there is no doubt (and the Committee therefore assumes) that manufacturing, distributing, or dispensing marijuana, or possessing marijuana intending to do any of the foregoing, remain illegal under federal law. See 21 U.S.C. § 812(b) and (c) (defining marijuana as a Schedule I controlled substance) and 21 U.S.C. § 841(a) and (b) (proscribing certain conduct related to controlled substances and prescribing certain criminal penalties for violations).

Lawyer inquires whether the South Dakota Rules of Professional Conduct permit Lawyer to advise a client about licensing and other legal issues related to establishing, licensing, or otherwise operating a business to distribute or dispense marijuana.

Rule 1.2(d) of the South Dakota Rules of Professional conduct states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but 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.” SDCL Chapter 16-18 Appendix, Rule 1.2(d).

CONCLUSION

Rule 1.2(d) does not distinguish between client conduct that is illegal under South Dakota law and client conduct that is illegal only under federal law. It applies to any illegal client conduct. Consequently, Lawyer may not ethically provide legal services to assist a client in establishing, licensing, or otherwise operating a marijuana business. Lawyer may only advise a client considering this course of action about the potential legal consequences of doing so, under either state or federal law, or assist the client in making a good faith effort to determine the validity, scope, meaning, or application of the relevant state and federal law.