

Issue Presented: Whether Section 9 of Constitutional Amendment A precludes a court or the Disciplinary Board from taking disciplinary action against a lawyer who provides legal services to a marijuana business notwithstanding Rule 1.2(d) of the Rules of Professional Conduct?

Answer: This question calls upon the Committee to interpret and then apply substantive law which is outside of the Committee's purview

FACTS AND APPLICABLE RULE

This Opinion issues immediately after (and likely because) Opinion 2020-7 was issued. To provide background, 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.

As noted in the issue statement, issues of substantive law are ordinarily outside the Committee's purview, but it appeared the inquiring Lawyer in Opinion 2020-07 (and substantially all of the other members of the Bar) agreed manufacturing, distributing, or dispensing marijuana, or possessing marijuana intending to do any of the foregoing, remain illegal under federal law.

The Lawyer inquired whether the South Dakota Rules of Professional Conduct permitted 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.

Citing Rule 1.2 (d) of the South Dakota Rules of Professional conduct, the Committee opined:

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.

The day after Opinion 2020-07 was published, a different Lawyer contacted the State Bar of South Dakota and noted that Section 9 of Constitutional Amendment A provides, in part:

A holder of a professional or occupational license is not subject to professional discipline for providing advice or services related to marijuana licensees or applications on the basis that marijuana is prohibited by federal law.

Lawyer questions why Section 9 of Constitutional Amendment A was not addressed in Opinion 2020-07. Lawyer believes that unless Constitutional Amendment A is invalidated, Section 9 would preclude disciplinary action against any attorney who provides legal services to a marijuana business notwithstanding Rule 1.2(d); and that Opinion 2020-07 should either be “corrected,” or the Committee should explain why Opinion 2020-07 should not be “corrected.”

DISCUSSION

Lawyer’s inquiry highlights an important but oft-overlooked limitation on the Committee’s purview. Since at least as early as Ethics Opinion 96-7, the Committee has stated “this committee cannot answer questions of substantive law.” This is because the Committee’s opinions are not judicial or disciplinary opinions. They do not have the force of law. They are purely advisory opinions or guidance from a bar committee with a limited purpose, i.e., ethically guiding and providing a potential “good faith” defense against discipline for inquiring attorneys who accurately state the facts of their ethical dilemma and then follow the recommendations of the Committee. The Committee arrives at those recommendations by examining the facts as presented under the South Dakota Rules of Professional Conduct as written. A body with jurisdiction to issue legally-binding ethics determinations, such as a court or disciplinary board, obviously could reach a different conclusion later. That decision would have the actual force of law.

So the Committee’s opinion that a particular course of conduct is ethical under the Rules (or not) does not make it ethical (or not). For example, attorneys may disagree with the Committee’s Opinion 2020-07 and elect to proceed otherwise. They will not necessarily be acting unethically. They will only be proceeding at their own risk that the Committee’s guidance is correct. Likewise, had the Committee opined the inquired-upon conduct was ethical; this would not have made that conduct ethical. It would have only provided a potential defense to discipline for those attorneys who acted in good-faith reliance upon it, at least until an adjudicative body with jurisdiction rendered an opinion informing and binding lawyers in their future conduct.

These general principles explain why the Committee issued Opinion 2020-07, applying the Rules of Professional Conduct, without discussing Section 9 of Constitutional Amendment A, a substantive rule of law, (or for that matter, without discussing any other substantive legal issues that might apply). It also explains why, as briefly noted above, the Committee still cannot issue an opinion regarding what Section 9 of Constitutional Amendment A portends for attorney discipline. In fact, Lawyer’s inquiry does not present an ethical question at all. Whether Section 9 of Constitutional Amendment A affords attorneys with some sort of immunity from discipline for assisting clients with setting up and licensing marijuana-distribution businesses does not concern the Rules of Professional Conduct. It is not within the Committee’s purview, and does not change the Committee’s analysis. The conduct at issue is either ethical under the Rules or it is not.

Whether the Rules should be changed to obtain a different result is a policy question this body cannot answer. Similarly, whether an attorney can be disciplined for proceeding in a manner inconsistent with Opinion 2020-07 was not before the Committee when it issued that opinion; and the Committee has no authority to answer that question now that it has been posed.

CONCLUSION

The Committee's purview is limited and Opinion 2020-07 was similarly limited. In the Committee's opinion, Rule 1.2(d) is unambiguous: Attorneys may not ethically provide legal services to assist a client in establishing, licensing, or otherwise operating a marijuana business. Opinion 2020-07 does not have the force of law, so South Dakota attorneys can still proceed however they wish, understanding they do so at their own risk of any consequences.

Whether a body with constitutional authority to change Rule 1.2(d) or having the power to interpret it differently but with the force of law should do so is outside this Committee's purview, as is Lawyer's question whether Section 9 of Constitutional Amendment A affords attorneys immunity from discipline.