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Marijuana Business Attorneys and the Professional Deference Standard*

INTRODUCTION

Imagine that you practice as an attorney in the State of Arkansas. A client solicits your advice about opening a marijuana dispensary or cultivation center.¹ The client might want you to assist him in filing a dispensary application with the State. On the other hand, she might want you to negotiate a commercial lease or to provide services to ensure compliance with municipal zoning laws. Although Arkansas voters approved a constitutional amendment permitting medical marijuana sales,² you provide a clear warning to your client: possessing, manufacturing, selling, and distributing marijuana remains a federal crime.³ After these precautions, however, you proceed to business as usual, providing a routine legal service just as you would for any other client.

This hypothetical prompts an important question. Even when a legal service is permissible under state law, are lawyers

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1. In March 2018, a Circuit Court judge enjoined Arkansas' Medical Marijuana Commission from issuing cultivation permits. *See Arkansas Supreme Court to hear medical marijuana case*, ASSOCIATED PRESS (May 7, 2018), <https://apnews.com/3305440416974708b9fda59938cf9332> [<https://perma.cc/PZE7-KKU3>] (also available at <http://www.arkansasonline.com/news/2018/may/07/arkansas-supreme-court-hear-medical-marijuana-case/> [<https://perma.cc/PC7N-AQ7V>]). The Arkansas Supreme Court reinstated the licensing process when it reviewed this matter on appeal. *See Ark. Dep't of Fin. & Admin. v. Naturalis Health, LLC*, 2018 Ark. 224, at 10, 549 S.W.3d 901, 908.

2. *2016 General Election and Nonpartisan Runoff Election Results, Official County Results, Issue No. 6: Arkansas Medical Marijuana Amendment of 2016*, ARK. SEC'Y OF STATE (Feb. 28, 2017, 1:08 PM), <http://results.enr.clarityelections.com/AR/63912/184685/Web01/en/summary.html> [<https://perma.cc/FJ2M-7FSU>].

3. 21 U.S.C. §§ 812 (b)(1), 812(c)(c)(10), 841(a)(1) (2012).

criminally liable under federal law for providing services to marijuana-related clients (“MRCs”)? In many cases, the answer is probably yes.⁴ During the Obama Administration, federal enforcement of marijuana laws was primarily a matter of prosecutorial discretion.⁵ The Ogden Memo, released by the U.S. Department of Justice (“DOJ”) in October 2009, instructed federal prosecutors to refrain from focusing “federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing *state* laws.”⁶ A subsequent 2013 memorandum, known as the Cole Memo, stated that the DOJ would not challenge state marijuana laws so long as the state laws did not interfere with federal enforcement priorities, which included:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.⁷

4. *Infra* Sections I.B., I.C.

5. *See generally* Memorandum from Deputy Att’y Gen. David W. Ogden on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana to Selected United States Attorneys, U.S. DEPT. OF JUSTICE OFFICE OF THE DEPUTY ATT’Y GEN., at 1-2 (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/BY25-63T5>].

6. *Id.* (emphasis added).

7. Memorandum from Deputy Att’y Gen. James M. Cole on Guidance Regarding Marijuana Enforcement to All United States Attorneys, U.S. DEPT. OF JUSTICE OFFICE OF

After these memos were issued, the United States experienced the birth of a rapidly growing commercial marijuana industry. Currently, thirty states and the District of Columbia have legalized medical or recreational marijuana.⁸ In 2016, consumers spent approximately \$6.7 billion on marijuana, and market researchers project that sales will reach \$20.2 billion by 2021.⁹ Like any other business, MRCs require legal assistance for a variety of issues,¹⁰ yet they cannot operate as traditional business entities. Federal law restricts their access to banking services,¹¹ contract enforcement remains unpredictable,¹² and MRCs bear heavier tax burdens because of their status as drug traffickers.¹³ Furthermore, it is virtually impossible for MRCs to obtain federal legal protection from courts regarding potential bankruptcy and intellectual property issues.¹⁴

THE DEPUTY ATT'Y GEN., at 1-2 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/3PYV-G4XG>].

8. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGIS. (June 6, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/3Q6S-96DF>]

(providing a state-by-state guide of current medical marijuana laws and programs).

9. Debra Borchart, *Marijuana Sales Totaled \$6.7 Billion In 2016*, FORBES (Jan. 3, 2017, 9:00 AM), <https://www.forbes.com/sites/debraborchart/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/#32a2f2d175e3> [<https://perma.cc/6NGE-UJHC>].

10. See Ally Marotti, *As Marijuana gains acceptance, law firms cultivate new pot-specific practices*, CHI. TRIB. (Apr. 19, 2017, 10:02 AM), <http://www.chicagotribune.com/business/ct-medical-marijuana-lawyers-0420-biz-20170418-story.html> [<https://perma.cc/7WSA-LSZJ>].

11. Daniel J. Beck, *Banking and Medical Marijuana in Arkansas – It's Still Illegal*, THE ARK. BANKER 12, at 8 (Dec. 2016), <http://www.qgtlaw.com/wp-content/uploads/2016/12/Banking-Medical-Marijuana-in-Arkansas-DJB.pdf> [<https://perma.cc/UJ4H-M2TP>].

12. See, e.g., *Hammer v. Today's Health Care II*, Nos. CV2011-051310, CV2011-051311, 2012 WL 12874349, at *3 (Maricopa Cty. Super. Ct. Apr. 17, 2012).

13. 26 U.S.C. § 280E (2012); see, e.g., *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1197 (10th Cir. 2018) (dispensary unsuccessfully sought tax refund after the IRS denied the dispensary's request for business tax deductions); see also Peter J. Reilly, *Marijuana Industry Faces Challenging Tax Regime*, FORBES (July 19, 2018, 5:39 PM), <https://www.forbes.com/sites/peterjreilly/2018/07/19/marijuana-industry-faces-challenging-tax-regime/#122a17f52174> [<https://perma.cc/VE4Y-X325>].

14. See, e.g., *In re Arenas*, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015) (stating that a debtor in the marijuana business could not obtain relief in federal bankruptcy court); Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges For the Marijuana Industry*, 73 WASH. L. REV. 217, 220 (2016) ("Because the bulk of IP law is federal, the federal marijuana prohibition means that much of IP law is unavailable or effectively inaccessible to the marijuana industry. Worse yet, marijuana businesses are denied the regulatory benefits of IP law while remaining subject to its burdens.").

Essentially these restrictions recognize that, within the eyes of the law, the actions of medical and recreational marijuana businesses are considered criminal conduct.¹⁵ Federal law designates marijuana as a Schedule I drug under the Controlled Substances Act (“CSA”).¹⁶ This means that all uses of marijuana (except for government research)¹⁷ are criminalized.¹⁸ Schedule I classification denotes drugs that presumably have a high potential for abuse with no accepted medical benefit.¹⁹ Because marijuana remains a Schedule I drug, many attorneys justifiably fear that providing legal services and advice to MRCs (although permissible under state law) might subject them to criminal liability. In January 2018, Attorney General Jeff Sessions rescinded the non-enforcement memorandums from the Obama Administration, evidencing potential governmental intent to enforce federal marijuana laws.²⁰

Potential criminal liability creates a chilling effect on attorneys wishing to provide legal services to MRCs.²¹ Professional legal ethics rules dictate that attorneys cannot counsel clients to engage in criminal conduct.²² Regardless of these concerns, the legal community now faces an ethical conundrum facilitated by federalism. State law might invite an attorney to provide her services to an MRC, yet federal criminal law lingers in the background. The current legal landscape needs a standard of liability allowing attorneys to provide their services when doing so is permitted by state law. At the same time, an applicable standard must be tempered by the fact that several states have not legalized medical or recreational marijuana.

15. Erwin Chemerinsky, Jolene Forman, Allen Hopper, & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 97 (2015).

16. 21 U.S.C. § 812(c)(10) (2012).

17. 21 U.S.C. §§ 872(a), (e) (2012).

18. Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics In The Movement To Legalize Marijuana*, 119 PENN ST. L. REV. 333, 335 (2014).

19. 21 U.S.C. §§ 812(b)(1)(A)-(B) (2012).

20. Memorandum from Att’y Gen. Jefferson B. Sessions on Marijuana Enforcement to All United States Attorneys, U.S. DEP’T OF JUSTICE OFFICE OF THE DEPUTY ATT’Y GEN. (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/UDG3-TZD2>].

21. See Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 202 (2016).

22. See MODEL RULES OF PROF’L CONDUCT r. 1.2(d) (AM. BAR ASS’N 1983, amended 2016).

Two cases from the United States Supreme Court's 2009 term addressed restrictions similar to those faced by marijuana attorneys.²³ Both *Milavetz v. United States* ("Milavetz")²⁴ and *Holder v. Humanitarian Law Project* ("Humanitarian Law Project")²⁵ spurred questions on whether the First Amendment protects legal services and attorney advice.²⁶ Although neither case directly confronted this question,²⁷ the Supreme Court acknowledged that the practice of law seems to incorporate elements of both speech and conduct²⁸—meaning that the legal profession receives some degree of First Amendment protection.²⁹

This article proposes that attorneys dealing with MRCs might rely on the First Amendment as a source of protection. A coherent attorney advice standard is needed as states continue to experiment with marijuana legalization.³⁰ At the core of adopting a workable standard is the fact that attorney services maintain a special and elevated status due to their relationship with governmental power.³¹ Legal services enable MRCs to either invoke the protection of the law, or to avoid the power of the government.³² For example, the transactional attorney protects and secures her clients' property rights.³³ Litigators file court

23. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-27 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 232 (2010).

24. 559 U.S. at 232.

25. 561 U.S. at 25-27.

26. See Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 641-48 (2011); Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1262-64 (2016); Margaret Tarkington, *A First Amendment Theory For Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 30 (2011).

27. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005); see also Tarkington, *supra* note 26, at 30.

28. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-26 (2010) (stating that it would be an extreme position to categorize attorney advice as conduct).

29. The question as to how much protection is provided remains undecided. See Tarkington, *supra* note 26, at 36.

30. Tarkington, *supra* note 26, at 36; see Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1034 (2016) ("Just as the Court has narrowly cabined restrictions on crime-advocating speech . . . so courts need to come up with rules indicating which restrictions on crime-facilitating speech are permissible and which are forbidden.").

31. Tarkington, *supra* note 26, at 37.

32. Tarkington, *supra* note 26, at 38.

33. Tarkington, *supra* note 26, at 40-41.

documents on behalf of their clients to enforce rights and challenge the application of existing laws.³⁴ Administrative law attorneys assist their clients in petitioning the government.³⁵

The standard of liability proposed in this article advocates for judicial deference to state ethics rules. This article will refer to the proposed standard as the “professional deference standard.” First, the professional deference standard would only apply in jurisdictions where there is a conflict between state and federal marijuana laws. Second, it would only apply when an attorney’s services comply with applicable state ethics rules.³⁶ The author realizes the professional deference standard is in tension with federal marijuana laws, which is why Part I of this article addresses the contours of federal criminal liability and focuses on the prospect of providing legal services and advice to MRCs. In spite of this tension, the *Milavetz* and *Humanitarian Law Project* cases demonstrate that the Supreme Court has wrestled with circumstances where statutory law prohibits attorneys from providing legal services.³⁷ Part II, therefore, briefly explains why

34. Tarkington, *supra* note 26, at 38.

35. Tarkington, *supra* note 26, at 62-63. The right to petition one’s government extends to administrative agencies and courts. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”).

36. Several rule-making bodies in medical and recreational jurisdictions have been reluctant to modify ethics rules that would permit attorneys to represent MRCs. See, e.g., Me. Bd. of Overseers of the Bar Prof’l Ethics Comm’n, Op. 199 (2010) (*available at* http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134 [<https://perma.cc/9348-VJC8>]), *rev’d*, Me. Bd. of Overseers of the Bar Prof’l Ethics Comm’n, Op. 215 (2017) (*available at* http://www.mebaroverseers.org/attorney_services/opinion.html?id=734620 [<https://perma.cc/ZMZ8-RJSS>]); see also Justice J. Brooks, *The Ethics of Representing Marijuana-Related Businesses*, 52 THE ARK. LAWYER 2, 22 (Spring 2017) (*available at* <http://www.qgtlaw.com/wp-content/uploads/2017/06/The-Ethics-of-Representing-Marijuana-Related-Business-JJB.pdf> [<https://perma.cc/X8HK-L4QU>]) (noting that while Arizona’s Ethics Commission interpreted its ethics rules to permit marijuana business services, Ohio’s Board of Professional Conduct Committee expressly came to a different conclusion).

37. See cases cited *infra* Sections II.B, II.C and accompanying text; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (holding that a statute prohibiting government funded attorneys from challenging the validity of existing welfare laws “exclude[s] from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider”); *In re Primus*, 436 U.S. 412, 436-39 (1978) (overturning reprimand of an ACLU attorney when she was disciplined for soliciting clients to pursue litigation as a mechanism of political advocacy); *NAACP v.*

attorney advice is deserving of constitutional protection. It also examines the Supreme Court's inconsistent application of deference to professional ethics standards. Although the Court has expressed its disfavor for statutes that insulate certain issues from legal challenges,³⁸ this inconsistency is apparent by comparing *Milavetz* and *Humanitarian Law Project*. In *Milavetz*, the Court held that a bankruptcy provision prohibiting attorneys from advising clients to acquire additional debt (before filing for bankruptcy) could not be read in a way to prohibit such advice when rendered to help clients achieve *lawful* purposes.³⁹ However, the *Humanitarian Law Project* decision charted a different course. The Court upheld a statute that categorically prohibited attorneys from providing their services to foreign terrorist organizations, even when the services were provided for otherwise lawful means such as seeking humanitarian aid and negotiating peace treaties.⁴⁰

The *Milavetz* and *Humanitarian Law Project* decisions demonstrate the Supreme Court's inconsistent application of deferring to professional ethics standards.⁴¹ Accordingly, reliance on professional standards is far from a slam-dunk defense for marijuana business attorneys. But in light of the fact that most routine legal services seem to violate federal criminal law when provided to MRCs,⁴² the First Amendment could and should provide a conceivable defense. For that reason, Part III explains why courts should recognize the professional deference standard. As applied to legal advice and services rendered to MRCs, adoption of the professional deference standard would allow attorneys to provide their services without fear of federal prosecution, and it would protect attorneys within medical and recreational marijuana jurisdictions. Most importantly, it would provide clarity to the pressing issue of when an attorney can represent an MRC.

Button, 371 U.S. 415, 428-29 (1963) (“We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession . . .”).

38. See *Velazquez*, 531 U.S. at 546-47.

39. See case cited *infra* Section II.B and accompanying text (emphasis added).

40. See case cited *infra* Section II.C and accompanying text.

41. See cases cited *infra* Sections II.B, II.C and accompanying text.

42. *Infra* Section I and accompanying text.

I. FEDERAL CRIMINAL LIABILITY

Manufacturing, distributing, or selling marijuana constitutes a felony under federal law.⁴³ Violating the CSA can incur a maximum penalty of five years and a \$250,000 fine.⁴⁴ Entities are fined \$1 million for violating the CSA.⁴⁵ If more than one thousand kilograms or one thousand marijuana plants are involved in a CSA violation, the offense can carry a mandatory minimum penalty of ten years and maximum fines of \$10 million for individuals or \$50 million for non-individuals.⁴⁶ Currently, a congressional appropriations rider provides limited protection to those associated with legalized marijuana operations.⁴⁷ However, the rider is a funding mechanism that does not displace substantive federal law.⁴⁸ MRCs are still likely to engage in activities that violate the CSA. Because of this fact, attorneys remain subject to potential liability as accomplices and co-conspirators for providing MRC services.⁴⁹

A. THE ROHRBACHER AMENDMENT

The Rohrabacher Amendment is a congressional appropriations rider that prohibits the DOJ from prosecuting marijuana activities if an MRC's actions comply with applicable state laws.⁵⁰ This provision only applies to medical marijuana

43. 21 U.S.C. § 841(a)(1) (2012).

44. 21 U.S.C. § 841(b)(1)(D) (2012).

45. *See id.*

46. 21 U.S.C. § 841(b)(1)(A)(vii) (2012).

47. TSA Office of Inspection Accountability Act of 2015, Pub. L. No. 114-53, §§ 101(a)(2), 103, 129 Stat. 502, 505-06 (2015) (providing appropriations as specified for Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)).

48. *United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016).

49. Accomplice and conspiracy liability are distinct and separate crimes. *See, e.g., United States v. Zafiro*, 945 F.2d 881, 884 (7th Cir. 1991) (“Suppose someone who admired criminals and hated the police learned that the police were planning a raid on a drug ring, and, hoping to foil the raid and assure the success of the ring, warned its members—with whom he had had no previous, or for that matter subsequent, dealings—of the impending raid. He would be an aider and abettor of the drug conspiracy, but not a member of it.” (citing *United States v. Lane*, 514 F.2d 22, 27 (9th Cir. 1975))).

50. TSA Office of Inspection Accountability Act of 2015, Pub. L. No. 114-53, §§ 101(a)(2), 103, 129 Stat. 502, 505-06 (2015) (providing appropriations as specified for Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)).

operations—it does not apply to recreational marijuana.⁵¹ In 2016, the Ninth Circuit buttressed protection derived from the Rohrabacher Amendment. It held that the DOJ could not prosecute state-approved cultivators and sellers who were in strict compliance with state law.⁵² In order to determine whether the defendants complied with state law, the Court stated that establishing a medical marijuana prosecution would require an evidentiary hearing.⁵³ Despite this protection, the Court noted that the Rohrabacher Amendment merely provided temporary protection against criminal prosecution.⁵⁴ Congress could, at any moment in time, authorize funds to prosecute medical marijuana crimes.⁵⁵

The Rohrabacher Amendment does not provide a predictable safeguard against criminal prosecution. Its continuation is contingent upon congressional reauthorization,⁵⁶ and Attorney General Jeff Sessions is an outspoken critic of the amendment.⁵⁷ Repeal of the amendment would probably allow the DOJ to pursue federal prosecution.⁵⁸ Attorneys should, therefore, be aware of the potential to incur criminal liability as a result of providing legal representation to MRCs.

51. *Id.*

52. *McIntosh*, 833 F.3d at 1178.

53. *Id.* at 1179.

54. *Id.*

55. *Id.*

56. At the present moment, the Rohrabacher Amendment is set to expire on September 30, 2018. *See Trump signs spending bill that includes medical marijuana protections*, MARIJUANA BUSINESS DAILY (Mar. 23, 2018), <https://mjbizdaily.com/trump-signs-spending-bill-includes-medical-marijuana-protections/>; *see also* *United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016). (“Congress could appropriate funds for . . . [marijuana] prosecutions tomorrow.”).

57. Matt Ferner, *Senators Defy Jeff Sessions And Vote To Extend Medical Marijuana Protections*, HUFFINGTON POST (July 27, 2017), https://www.huffingtonpost.com/entry/senators-vote-to-extend-medical-marijuana-protections-in-defiance-of-jeff-sessions_us_597a4177e4b02a4ebb7420a1 [<https://perma.cc/WV49-GGAS>] (quoting Jeff Sessions: “I believe it would be unwise for Congress to restrict the discretion of the Department to fund particular prosecutions, particularly in the midst of an historic drug epidemic and potentially long-term uptick in violent crime.”).

58. *See, e.g., United States v. Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039, 1047-48 (N.D. Cal. 2015) (“[A]s long as Congress precludes the Department of Justice from expending funds in the manner proscribed by Section 538 [of the Continuing Appropriations Act], the permanent injunction will only be enforced against MAMM insofar as that organization is in violation of California [s]tate laws . . .”) (internal quotations omitted).

B. AIDING AND ABETTING LIABILITY

Federal aiding and abetting law imposes liability on those who assist in the commission of others' crimes. It contains two components: a defendant must (1) take an affirmative act in furtherance of the principal's underlying offense, and (2) she must act with the intent to facilitate the commission of the principal's crime.⁵⁹ Although aiders and abettors do not commit the actual underlying criminal offense, the aiding and abetting statute punishes defendants as if they were principals, i.e., the perpetrators of the actual crime.⁶⁰ The statute states that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."⁶¹ Because this provision eliminates the distinction between the principals and the accomplice,⁶² attorneys who counsel their clients in violation of the CSA could be punished in the same manner as their clients.⁶³

The statute does not require aiders or abettors to participate in every aspect of a principal's crime.⁶⁴ Participation in any part of a CSA violation may be sufficient to establish aiding and abetting liability.⁶⁵ In helping the principal commit a criminal offense, aiders and abettors must possess a sufficiently culpable mental state.⁶⁶ They need to have advanced knowledge of the fact that a principal will commit a criminal offense.⁶⁷ Such knowledge would provide the defendant with sufficient notice to refrain from participating in an activity that assists the principal.⁶⁸

In light of the intent requirement, courts have struggled to determine whether convicting an aider and abettor requires a standard of actual knowledge or purpose.⁶⁹ An actual knowledge

59. *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014).

60. 18 U.S.C. § 2(a) (2012).

61. *Id.*

62. See Baruch Weiss, *What Were They Thinking? The Mental State of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1355 (2002).

63. 21 U.S.C. §§ 841(b)(1)(B)(vii), 841(b)(1)(D) (2012).

64. *Rosemond*, 134 S. Ct. at 1247.

65. *Id.*

66. *Id.* at 1248.

67. *Id.* at 1249.

68. *Id.*

69. See Weiss, *supra* note 63 at 1378; see also G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 *AM. CRIM. L. REV.* 1345, 1410-

standard (i.e., knowing assistance or encouragement) means that prosecutors must merely look to see if the defendant possessed knowledge that her activity would facilitate an illegal action.⁷⁰ Under this standard, a blameworthy state of mind is often implicit in the fact that the defendant associated with the principal in a criminal activity.⁷¹ On the other hand, the traditional formulation for the purpose-based standard requires: (1) that a defendant associated herself with an illegal venture, (2) that she participated in the venture as something she wished to bring about, and (3) that she desired to make the venture succeed.⁷²

There is very little authority addressing when a lawyer's involvement in an illegal action constitutes liability under aiding and abetting law.⁷³ As with any regular business, MRCs need attorneys for a range of services. Examples include negotiating contracts and leasehold agreements, as well as compliance with municipal zoning laws and administrative regulations.⁷⁴ Culpability that merely requires knowledge would be easy to establish in each of these situations because an attorney will likely know that her services enable clients to commit a CSA violation.⁷⁵ For example, negotiating a lease for a marijuana business most likely reflects the attorney's knowledge that his client desires to either grow, possess, sell, or distribute

11 (1996) (“The course of judicial decisions on the meaning of ‘willfully’ does not run straight.”); Rory Little, *Opinion Analysis: Justice Kagan Writes a Primer on Aiding and Abetting Law*, SCOTUSBLOG (Mar. 6, 2014, 9:04 AM), <http://www.scotusblog.com/2014/03/opinion-analysis-justice-kagan-writes-a-primer-on-aiding-and-abetting-law/> [https://perma.cc/HVF6-YQT2] (“[W]hether a defendant must have ‘knowledge’ or ‘purpose’ to facilitate the crime is not clearly answered . . .”).

70. See Blakey & Roddy, *supra* note 69, at 1411-13.

71. See Kit Kinports, Rosemond, *Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 136 (2015).

72. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

73. Jens David Olin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 212 n.118 (2002).

74. See generally Mark J. Fucile, *The Intersection of Professional Duties and Federal Law as States Decriminalize Marijuana*, 23 THE PROF. LAW. 1, 3 (2015), https://www.americanbar.org/content/dam/aba/publications/professional_lawyer/volume_23_number_1/ABA_PLN_v023n01_003_the_intersection_of_professional_duties_and_federal_law_as_states_decriminalize_marijuana.authcheckdam.pdf [https://perma.cc/KF2L-FWHK]. A mistaken belief that a client's conduct is lawful will not help a defendant escape aiding and abetting liability. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 167 (5th ed. 2009).

75. See Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 903 (2013).

marijuana.⁷⁶ To put it simply, the attorney probably knows that her client is utilizing the space for those very purposes,⁷⁷ and it is irrelevant as to whether she intends for her client to violate the CSA.

In comparison to a mere knowledge standard, a standard requiring purpose examines if the aider and abettor engaged in conduct aimed at facilitating a CSA violation. Providing even a routine legal service seems to cross this threshold.⁷⁸ Because federal law does not recognize any form of commercial marijuana use, providing a transactional legal service likely reveals a lawyer's specific intent to help a client violate federal marijuana law. In other words, the lawyer herself would desire for her client to succeed in their plan to grow, possess, sell, or distribute marijuana.⁷⁹

Regardless of the standard of intent applied for a criminal conviction, lawyers wishing to avoid liability should refrain from encouraging clients to violate the CSA.⁸⁰ They should also refrain from encouraging clients to engage in actions aimed at circumventing criminal prosecution.⁸¹ In order to avoid the appearance of intending to violate the CSA, a marijuana business attorney would need to limit her advice to informing clients about the legal consequences of their proposed courses of action.⁸² Nevertheless, most of the legal services provided to an MRC stray far from this type of theoretical advice and would likely constitute proof of aiding and abetting liability.⁸³

C. CONSPIRACY LIABILITY

Conspiratorial liability is more far-reaching than aiding and abetting liability. The federal conspiracy statute states that:

76. See 21 U.S.C. § 841(a)(1) (2012).

77. See 21 U.S.C. § 856(a)(1) (2012).

78. See Olin, *supra* note 73, at 212 n.118 (noting that most accomplice liability cases involving lawyers are those with attorneys engaged in transactional work).

79. See, e.g., Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002) (noting that a medical marijuana prescription written by a physician would reveal the physician's "specific intent to provide a patient with the means to acquire marijuana.>").

80. A. Claire Frezza, *Counseling Clients on Medical Marijuana: Ethics Caught in Smoke*, 25 GEO. J. LEGAL ETHICS 537, 552-53 (2012).

81. *Id.*

82. See Bruce E. Reinhart, *Up in Smoke or Down in Flames? A Florida Lawyer's Legal and Ethical Risks in Advising a Marijuana Industry Client*, 90 FLA. B.J. 21, 26 (2016).

83. See Kamin & Wald, *supra* note 75, at 907.

[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.⁸⁴

In comparison to an aiding and abetting conviction, the finding of a conspiracy does not require that a principal party complete an underlying offense.⁸⁵ Under the *Pinkerton* conspiracy liability doctrine, an attorney working with MRCs could be liable as a co-conspirator, as well as for the federal violation itself pursuant to the CSA.⁸⁶ All that conspiracy liability requires is an agreement between the attorney and a client to commit a criminal offense.⁸⁷

An attorney likely enters a criminal conspiracy as soon as she agrees to perform a service in furtherance of an MRC's legitimate business needs.⁸⁸ Successive actions taken on behalf of the client will probably further the object of the client's conspiracy, i.e., to commit an action in violation of the CSA.⁸⁹ As for the defendant's state of mind, most jurisdictions require that a co-conspirator act with the purpose to bring about a criminal offense.⁹⁰ As with aiding and abetting liability, performing even a routine legal service becomes problematic as an attorney helps a client acquire a stake in the success of a marijuana business.⁹¹ For example, if a lawyer forms an attorney-client relationship with an MRC for the purpose of providing a transactional service, this would probably demonstrate strong evidence of culpable intent.⁹² Similarly, advice regarding administrative compliance

84. 18 U.S.C. § 371 (2012).

85. See *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) ("The agreement to do an unlawful act is . . . distinct from the doing of the act.").

86. *United States v. Gadson*, 763 F.3d 1189, 1214 (9th Cir. 2014).

87. *United States v. Fenton*, 367 F.3d 14, 19 (1st Cir. 2004).

88. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 358 (1998)

89. *Id.*

90. See Kamin & Wald, *supra* note 75, at 913 (citing *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)).

91. See, e.g., *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) ("Petitioner's stake here was in making the profits which it knew could come only from its encouragement of Tate's illicit operations.").

92. *Id.*

on the state level would not escape the fact that the CSA trumps the existence of state marijuana regulatory regimes.⁹³ Accordingly, such services are likely to implicate conspiratorial liability and thus, provide a basis for criminal prosecution.

D. TENSION BETWEEN FEDERAL CRIMINAL LAW AND A LAWYER'S PROFESSIONAL DUTIES

An attorney should tread with extreme caution when providing counsel to clients involved in the medical and recreational marijuana industries. Even though the Rohrabacher Amendment provides an important limitation to the DOJ's ability to prosecute medical marijuana cases, the risk of federal liability persists. Many of the services provided during the attorney-client relationship are ongoing, which provides an extended basis for prosecutors to establish criminal liability.⁹⁴ However, it is clear that the prospect of federal prosecution chills attorneys from rendering services to MRCs.⁹⁵ This consideration is particularly troublesome when considering that lack of federal enforcement during the Obama Administration encouraged the growth of the commercial marijuana industry.

Attorneys now face an ethical conundrum facilitated by federalism. It is well established within the legal community that "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's . . . activities."⁹⁶ Even if an attorney

93. *Gonzalez v. Raich*, 545 U.S. 1, 39 (2005) (holding that Congress possesses the authority to regulate marijuana through the Commerce Clause); *see also* *Waldon v. Cincinnati Pub. Sch.*, 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013) (stating that compliance with state law was not a proper defense for violating Title VII).

94. *See, e.g., United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003). In *Hamilton*, the Second Circuit upheld a police officer's aiding and abetting conviction for providing protection to a crack house operation. *Id.* at 173. The Court held it was irrelevant that an illegal drug transaction did not occur before the officer spoke to a government informant. *Id.* at 180. Providing protection to the crack house constituted an ongoing activity. *Id.*

95. *See, e.g., Ohio Bd. Prof'l Conduct*, Adv. Op. No. 2016-6 (Aug. 5, 2016); *Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n*, Op. 199 (2010) (available at http://www.mebraoverseers.org/attorney_services/opinion.html?id=110134 [https://perma.cc/9348-VJC8]), *rev'd*, *Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n*, Op. 215 (2017) (available at http://www.Mebraoverseers.org/attorney_services/opinion.html?id=734620 [https://perma.cc/ZMZ8-RJSS]).

96. MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 1983, amended 2016).

learns of her client's present or future criminal plans, the attorney is not obligated to disclose them.⁹⁷ Instead, the attorney is obligated to refrain from facilitating clients' present and future criminal enterprises,⁹⁸ and she must withdraw from representations in violation of the law.⁹⁹

The ethical implications of representing an MRC remain ambiguous. It is conceivable for an attorney to be prosecuted for representing a client when the client's actions are in full compliance with state law.¹⁰⁰ The attorney herself could fully comply with the applicable state ethics code,¹⁰¹ and the focus of the attorney's efforts might center on determining the validity and application of existing marijuana laws.¹⁰² The prospect of criminal prosecution, however, is a powerful disincentive against representing MRCs. Potential criminal liability creates a legal environment where attorneys are apprehensive to provide their services to an industry legitimized by state law and popular opinion. Chilled representation inhibits a client's ability to operate within the eyes of the law. In a regulatory environment with sparse legal representation, MRCs would have little guidance in navigating existing laws. Regulatory compliance in the commercial marijuana industry will require representation by an attorney.¹⁰³ Despite the public's growing acceptance of marijuana, government authorities will continue to maintain an interest in regulating when, where, and how marijuana can be manufactured and sold. Chilled representation, therefore, is not desirable, especially as states continue to experiment with legalizing and regulating medical and recreational marijuana.¹⁰⁴

97. *See id.* at 1.6(a), (b).

98. *See id.* at 1.2(d).

99. *Id.* at 1.16(a)(1).

100. Hull, *supra* note 18, at 351.

101. *See, e.g.*, COLO. R. PROF'L CONDUCT r. 1.2 cmt. 14 (2018); CONN. R. PROF'L CONDUCT r. 1.2(d) (2018); WASH. R. PROF'L CONDUCT r. 1.2 cmt. 18 (2014).

102. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983, amended 2016).

103. *See* Tarkington, *supra* note 26, at 61 (advocating an access-to-justice theory where First Amendment protection would be provided when attorney speech is "essential to the proper functioning of . . . [the] justice system").

104. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its

II. FOUNDATIONS OF THE PROFESSIONAL DEFERENCE STANDARD

Perhaps the only effective defense for counseling MRCs is to rely on the professional deference standard. This standard advocates judicial deference to professional state ethics rules.¹⁰⁵ The Supreme Court's application of such deference is inconsistent,¹⁰⁶ but prior case-law indicates that courts might be willing to hold that marijuana attorneys are obligated to advise clients in a competent manner, even when federal law conflicts with professional standards.¹⁰⁷ This section will briefly analyze why attorney speech merits First Amendment protection. Then, it will examine how the professional deference standard might operate by analyzing *Milavetz* and *Humanitarian Law Project*. These cases did not address situations where federal and state law conflicted with one another, but similar to federal aiding or abetting and conspiracy laws, the relevant statutes operated in a way that restricted attorneys from rendering legal services to their clients.

A. ATTORNEY ADVICE AS PROTECTED SPEECH

In response to state laws that have legalized medical or recreational marijuana, several state bar associations and ethics boards have liberalized Rule 1.2(d) of the Model Rules of Professional Conduct.¹⁰⁸ Liberalization ensures that an attorney does not violate her professional duties when representing MRCs so long as the attorney complies with applicable state law.¹⁰⁹ The prospect of representing an MRC might pose a situation where lawyers are torn between their professional duties and their duty

citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

105. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”); but see Haupt, *supra* note 26, at 1281-82 (noting that courts have retreated from providing deference to professional norms in attorney advertising cases).

106. See cases cited *supra* Sections II.B, II.C and accompanying text.

107. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 245-47 (2010); see also *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002).

108. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983, amended 2016); see, e.g., COLO. R. PROF'L CONDUCT r. 1.2 cmt. 14 (2018); CONN. R. PROF'L CONDUCT r. 1.2(d) (2018); WASH. R. PROF'L CONDUCT r. 1.2 cmt. 18 (2014).

109. See Brooks, *supra* note 36, at 23.

to avoid criminal wrongdoing.¹¹⁰ So long as there is variation between the federal marijuana laws and professional codes of conduct, it appears possible that state ethics rules will not encompass current criminal law on the basis that the criminal law is too restrictive.¹¹¹ However, when viewed alongside the Model Rules of Professional Conduct, the criminal law might function as an external source of regulating the legal profession. Accordingly, it is possible for the criminal law to sanction conduct that would otherwise be permissible within the profession, i.e., permitted by accepted professional rules and standards.¹¹²

When courts address situations where the criminal law regulates conduct in the legal profession, the Restatement on the Law of Governing Lawyers states that courts should consider “[t]he traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code”¹¹³ Although professional codes do not supersede statutory law, the Restatement acknowledges the desirability to construe a criminal statute so as “to make it consistent with . . . [the] applicable lawyer-code provision.”¹¹⁴ The Restatement acknowledges that courts have “limited authority to interpret criminal provisions to accommodate professional norms.”¹¹⁵ It seems to presuppose that professional standards might provide a basis for how courts determine the scope of lawyer misconduct when evaluating violations of substantive law.

The Supreme Court has expressed its willingness to provide some deference to professional legal standards when analyzing constitutional issues.¹¹⁶ In cases where a statute restricts a client’s

110. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 8 (AM. LAW INST. 2000) (“[A] lawyer is guilty of an offense for an act committed in the course of representing a client to the same extent and on the same basis as would a nonlawyer acting similarly.”).

111. See Green, *supra* note 88, at 391.

112. See Green, *supra* note 88, at 329.

113. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 8 (AM. LAW INST. 2000).

114. *Id.* at § 8 cmt. c.

115. Green, *supra* note 88, at 382.

116. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010) (“We long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable’ Although they are ‘only guides,’ and not ‘inexorable commands,’ these standards may be valuable measures

ability to challenge existing laws through prohibiting attorney advice or legal services, Supreme Court precedent seems to generally choose outcomes avoiding suppression of the advice or service.¹¹⁷ The current conflict between federal and state marijuana laws presents an opportunity for the Court to clarify how it can utilize professional standards in interpreting statutory bans on attorney advice and legal services. More fundamentally, the conflict might present an opportunity to recognize advice rendered during the attorney-client relationship as a distinct form of speech protected by the First Amendment.¹¹⁸

Despite the fact that the Court has not directly addressed whether attorney advice merits First Amendment protection, *Milavetz* and *Humanitarian Law Project* scratched the surface of this issue.¹¹⁹ Both cases illustrated the possible impact that professional standards might have in determining the appropriate level of protection for legal advice. *Milavetz* demonstrated the Court's willingness to defer to the Model Rules of Professional Conduct.¹²⁰ On the other hand, *Humanitarian Law Project* produced a holding that contradicted the Model Rules.¹²¹ Therefore, as demonstrated below, the level of deference placed on the Model Rules could play a critical role in determining the permissibility of an attorney advice prohibition.¹²²

B. MILAVETZ, GALLOP & MILAVETZ, P.A. V. UNITED STATES

The *Milavetz* case involved regulations promulgated under a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).¹²³ Under these regulations,

of the prevailing professional norms of effective representation . . .”) (internal citations omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Bobby v. Van Hook* 558 U.S. 4, 7-8 (2009)).

117. See *Knake*, *supra* note 26, at 672; see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001); *In re Primus*, 436 U.S. 412, 439 (1978); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963).

118. *Tarkington*, *supra* note 26, at 98 (advocating a First Amendment standard that protects advice rendered to an attorney's clients).

119. *Tarkington*, *supra* note 26, at 33.

120. See case cited *supra* Section II.B and accompanying text (emphasis added).

121. See case cited *supra* Section II.C and accompanying text.

122. See *Knake*, *supra* note 26, at 656.

123. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231-32 (2010).

a “debt relief agency”—a term that encompassed attorneys¹²⁴—is precluded from advising clients to acquire additional debt before filing for bankruptcy.¹²⁵ A law firm contended the prohibition comprised an unconstitutional restriction under the First Amendment.¹²⁶ It argued that BAPCPA operated in a manner that would have prevented otherwise lawful and beneficial advice.¹²⁷

The Eighth Circuit agreed, noting that the ban prohibited attorneys from “advising *any* . . . person to incur *any* additional debt in contemplation of bankruptcy.”¹²⁸ The court said the prohibition was not sufficiently tailored under the First Amendment because the prohibition banned beneficial bankruptcy advice not aimed at circumventing, abusing, or undermining bankruptcy laws.¹²⁹ For example, beneficial advice could have included advising debtors to refinance a home mortgage to lower mortgage payments, or to incur additional debt so that a debtor may purchase a reliable vehicle.¹³⁰ Such practices would not have harmed creditors in a menacing manner, and therefore, it was both lawful and advisable for debtors to acquire additional debt in these situations.¹³¹

The Supreme Court, however, unanimously reversed the Eighth Circuit’s decision on grounds of statutory interpretation, not on a constitutional basis.¹³² The Court’s analysis concluded that BAPCPA adequately protected attorney-client discussions when clients possessed valid reasons for incurring additional debt.¹³³ The prohibition against advising clients to incur additional debt only applied to advice that recommended debtors

124. A “debt relief agency” included “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration . . .” 11 U.S.C. § 101(12A) (2012).

125. *Milavetz*, 559 U.S. at 233.

126. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 792 (8th Cir. 2008).

127. *See* Brief for Petitioners at 24, *Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229 (2010).

128. *Milavetz*, 541 F.3d at 793 (emphasis added).

129. *Id.* at 794.

130. *Id.* at 793-94.

131. *Id.*

132. *See Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 248 (2010). Because the Court evaluated the restriction as a matter of statutory interpretation, it did not consider the provision’s First Amendment implications. *Id.*

133. *Id.* at 243 (concluding the statute prohibited acquiring more debt *because* of one’s status as a debtor, as opposed to a valid purpose).

acquire more debt *because* they were about to file for bankruptcy.¹³⁴

Even if statutory interpretation did not resolve the issue of whether BAPCPA prohibited beneficial legal advice, the Court suggested in dicta that it would have reached the same conclusion based on what comprises an attorney's professional obligations.¹³⁵ The Court indicated that interpreting the prohibition as inconsistent with Model Rule 1.2(d) "serves no conceivable purpose within [BAPCPA's] statutory scheme."¹³⁶ The Model Rule states that attorneys cannot counsel and assist their clients to engage in criminal or fraudulent activity.¹³⁷ In a footnote, the Court said that reading the prohibition to forbid lawful advice would have seriously undermined the attorney-client relationship and the discussion inherent in such a relationship.¹³⁸

In sum, the Supreme Court looked to professional standards in examining a prohibition on attorney speech.¹³⁹ Specifically, the Court indicated its willingness to defer to the Model Rules as guidance for determining the scope of an attorney's professional duties when those duties were framed by BAPCPA's statutory scheme.¹⁴⁰ But shortly after the *Milavetz* decision, the Supreme Court reversed course and declined to defer to professional standards when presented with another situation that involved a prohibition on attorney advice.¹⁴¹

C. HOLDER V. HUMANITARIAN LAW PROJECT

In *Holder v. Humanitarian Law Project*,¹⁴² the Court examined a statute that imposed criminal punishment on anyone who provided "'material support . . .'" to certain foreign

134. *Id.* (emphasis added).

135. *Id.* at 246.

136. *Id.*; see also Knake, *supra* note 26, at 651-52; MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983, amended 2016).

137. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983, amended 2016).

138. *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 246 n.5 (2010).

139. *Haupt*, *supra* note 26, at 1263.

140. *Id.*

141. *Supra* Section II.C and accompanying text.

142. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 1 (2010).

organizations that engage in terrorist activity.”¹⁴³ The issue in this case was whether legal services provided by Humanitarian Law Project (“HLP”) amounted to such “material support.”¹⁴⁴ HLP was a human rights organization that sought to help the Kurdistan Workers’ Party (“PKK”) and the Liberation Tigers of Tamil (“LTTE”) utilize international law to negotiate peace agreements.¹⁴⁵ The material support statute applied to the PKK and LTTE because both groups were designated as foreign terrorist organizations (“FTOs”) by the United States Department of State.¹⁴⁶

In contrast to its approach in *Milavetz*, the Court analyzed the material support prohibition as a First Amendment issue.¹⁴⁷ The statute did not prohibit generalized, non-specialized advice to FTOs.¹⁴⁸ Instead, it barred providing specialized knowledge, such as how to petition the United Nations, or how to utilize international law.¹⁴⁹ Although the Court applied a First Amendment standard that was “more demanding” than “the kind of intermediate . . . standard” that applies to non-speech restrictions,¹⁵⁰ it concluded the material support prohibition did not violate HLP’s freedom of speech.¹⁵¹

Unsuccessfully, HLP attempted to distinguish advice that was meaningful and legitimate under federal law, as opposed to advice that undermined the government’s interest in countering terrorism.¹⁵² This argument is consistent with the Supreme Court’s opinion in *Milavetz*, which demonstrated that the Court was unwilling to interpret BAPCPA in a way that prohibited otherwise lawful legal advice, i.e., advice that would not have

143. *Id.* at 7 (citing 18 U.S.C. § 2339B(a)(1) (2012)).

144. *Id.* at 11.

145. *Id.* at 14-15.

146. *Id.* at 9.

147. *Humanitarian Law Project*, 561 U.S. at 27-28.

148. *Id.* As applied to HLP, the Court concluded that the material support provisions barred “training” PKK and LTTE members on how to use humanitarian and international law, as well as providing “expert advice or assistance” to these groups. *Id.* at 21-22.

149. *Id.* at 27.

150. *Id.* at 45 (Breyer, J., dissenting) (internal citations omitted). In *O’Brien*, the Court established a First Amendment test addressing situations where the government attempts to regulate something other than speech, but the effect of the restriction incidentally affects speech. *See United States v. O’Brien*, 391 U.S. 367, 377 (1968).

151. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010).

152. *Id.* at 29.

abused the protections of the bankruptcy system.¹⁵³ The material support statute prohibited unthreatening, beneficial advice with respect to its ban on providing services intended to help FTOs.¹⁵⁴ Despite similarities as to how these provisions affected attorney advice, the Court agreed with the government.¹⁵⁵ It concluded that services aimed at promoting peaceful activities might further terrorism through legitimizing FTOs within the public sphere.¹⁵⁶

Justice Breyer's dissent appreciated the consequence of the Court's failure to recognize a line between lawful advice and advice that aided a client's criminal activity.¹⁵⁷ He noted that the Court's ruling produced a "chill[ing]" effect on counseling these organizations—that it permitted criminalizing speech that would have otherwise received First Amendment protection.¹⁵⁸ Regardless of this reasoning, the Court's majority held that the material support statute did not violate HLP's freedom of speech.¹⁵⁹ Rather than distinguishing between advice that an attorney could and could not render, *Humanitarian Law Project* upheld a ban that conclusively prohibited and criminalized the formation of the attorney-client relationship between an attorney and a designated FTO.¹⁶⁰ Deference to Model Rule 1.2(d) would have meant legal advice pertaining to the lawful use of international law and humanitarian aid should have been protected.¹⁶¹ In the majority opinion, however, Justice Roberts emphasized the narrow application of the Court's holding.¹⁶² He

153. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 246 (2010).

154. See Knake, *supra* note 26, at 713.

155. *Humanitarian Law Project*, 561 U.S. at 30-39.

156. *Id.* at 30. The Court noted several examples. The existence of HLP's legal services might strain the United States' relations with its allies and consequently undermine international efforts to combat terrorism. *Id.* at 32. Likewise, HLP's capability to provide advice to FTOs might allow these groups to take advantage of legitimate legal services for illicit objectives, e.g., the PKK could utilize peace negotiations as a means to buy time for short-term military setbacks; the LTTE might redirect tsunami-related aid to violent activities. *Id.* at 37.

157. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40-41 (2010) (Breyer, J., dissenting).

158. *Id.* at 27, 50, 55 (Breyer, J., dissenting).

159. *Id.* at 38.

160. See 18 U.S.C. §2339B (2012); see also Tarkington, *supra* note 26, at 79.

161. Knake, *supra* note 26, at 656. Model Rule 1.2(d) prohibits counseling clients in a way that furthers criminal or fraudulent conduct. See MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 1983, amended 2016).

162. *Humanitarian Law Project*, 561 U.S. at 39.

stated that future applications of the material support statute might not survive First Amendment scrutiny.¹⁶³ He also suggested that a similar prohibition might not extend to advice offered to domestic organizations.¹⁶⁴

III. THE PROFESSIONAL DEFERENCE STANDARD AND MARIJUANA BUSINESS ATTORNEYS

*As lawyers, speech is our stock in trade Our tools are books and not saws or scalpels. Our product is argument, persuasion, negotiation, and documentation, so speaking (by which I include writing) is not only central to what the legal system is all about, and not only the product of law as we know it, but basically the only thing that lawyers and the legal system have.*¹⁶⁵

Questions surrounding the constitutional parameters of attorney advice linger following the *Milavetz* and *Humanitarian Law Project* decisions.¹⁶⁶ *Humanitarian Law Project* acknowledged that the legal profession receives some degree of First Amendment protection.¹⁶⁷ Unfortunately, neither *Milavetz* nor *Humanitarian Law Project* provided helpful guidance on how to address statutory provisions that limit the availability of legal advice.¹⁶⁸ The *Milavetz* decision was consistent with and deferential to the Model Rules of Professional Conduct.¹⁶⁹ *Humanitarian Law Project* provided a holding inconsistent with the Model Rules.¹⁷⁰

The notion that deference can be provided to professional ethical standards should be implicit in recognizing attorney advice as a category of protected speech.¹⁷¹ A constitutional

163. *Id.*

164. *Id.*

165. Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 ARK. L. REV. 687, 688 (1997).

166. Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 656 (2011).

167. *See* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

168. Knake, *supra* note 26, at 656.

169. *Supra* Section II.B.

170. *Supra* Section II.C.

171. *See* Knake, *supra* note 26, at 683-84 (2011) (“[A]n appreciation of the ABA standards is important not only because they reveal how legislative advice bans compromise the duties and obligations demanded by the attorney-client relationship, but because those standards can offer a meaningful measure of constitutional rights.”); Haupt, *supra* note 26,

protection for attorney speech might be necessary to ensure that marijuana businesses can make a good faith effort in attempting to invoke or avoid the authority of the law.¹⁷² Judicial deference to the Model Rules of Professional Conduct would provide a basis for attorneys to represent these clients.

Within states that have legalized medical or recreational marijuana, several professional ethics bodies have responded to legalization by limiting Model Rule 1.2(d)'s application to violations of *state* law.¹⁷³ For example, Arizona's Ethics Commission has stated:

[W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits.¹⁷⁴

In states similar to Arizona, attorneys who are in compliance with state law are professionally protected from representing marijuana businesses. Federal marijuana law, however, prohibits them from providing services that would otherwise be legal.¹⁷⁵ Due to this fact, several state ethics boards within medical marijuana jurisdictions have been reluctant to liberalize Rule 1.2(d) because of the prospect that an attorney could incur criminal liability under federal law.¹⁷⁶

at 1241-42 (contending for a First Amendment standard protecting professional speech based on deference to professional institutions, i.e., knowledge communities); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 489 (1995) (pointing out that lawyers "alone have the specialized knowledge to understand the unique nature of their profession's problems and hence, to apply effective cures").

172. See Tarkington, *supra* note 26, at 84 (stating that an access-to-justice theory justifies First Amendment protection for attorney speech).

173. See, e.g., COLO. R. PROF'L CONDUCT r. 1.2 cmt. 14 (2018); CONN. R. PROF'L CONDUCT r. 1.2(d) (2018); WASH. R. PROF'L CONDUCT r. 1.2 cmt. 18 (2014) (emphasis added).

174. State Bar of Ariz. R. of Prof'l Conduct Comm'n, Formal Op. 11-01 (2011) (available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710> [<https://perma.cc/5Y6Q-LH56>]) (internal quotations omitted).

175. *Supra* Sections I.B and I.C and accompanying text.

176. See, e.g., Sup. Ct. of Ohio Bd. of Prof'l Conduct Comm., Informal Op. 2016-6 (2016); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 199 (2010) (available at http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134

Criminalizing an attorney's ability to represent an MRC ignores the reality that states have elected to undertake a bold experiment in federalism—and that the federal government has been permissive in allowing these states to proceed. Because of the fact that states are unlikely to reverse course on medical and recreational marijuana, significant policy concerns justify a solution to the issue of MRC representation. A constitutional protection for attorneys representing MRCs would provide clarity to the issue of marijuana representation.¹⁷⁷ A standard reliant on judicial deference to professional norms is ideal.

Members of a profession maintain interests in speaking in a manner consistent with the values and standards of the profession.¹⁷⁸ Conceivably, a professional deference standard that protects marijuana business attorneys would contain two key features. First, it would entail deference to state rules of professional conduct as a way to protect attorneys within medical or recreational marijuana jurisdictions from federal prosecution. Second, it would only apply when attorneys are in compliance with applicable state laws and ethics rules.

Most likely, a constitutional standard reliant on professional deference would encourage state bar associations and ethics boards to proceed with rulemaking in a manner consistent with state law.¹⁷⁹ The standard would also balance an attorney's role as a representative of his client's interests, as well as his role as an officer of the legal system.¹⁸⁰ A professional deference standard, moreover, would recognize the need to resolve questions on when a statute can impose a prohibition on attorney

[<https://perma.cc/9348-VJC8>]), *rev'd*, Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n, Op. 215 (2017) (*available at* http://www.Mebraoverseers.org/attorney_services/opinion.html?id=734620 [<https://perma.cc/ZMZ8-RJSS>]).

177. See Knake, *supra* note 26, at 645 (noting that there is not a clear standard protecting attorney advice).

178. Haupt, *supra* note 26, at 1272-73 (“The professional speaker has a unique autonomy interest in communicating her message according to the standards of the profession to which she belongs, precisely in order to uphold the integrity of its knowledge community. Physicians, for instance, should not be compelled to speak in a way that undermines their profession's scientific insights.”).

179. See, e.g., Brooks, *supra* note 36.

180. Kamin & Wald, *supra* note 75, at 931.

advice and legal services.¹⁸¹ Federal criminal law prohibits marijuana business attorneys from engaging in services that might be consistent with applicable professional norms and rules of conduct.¹⁸² Currently, attorneys are prohibited from rendering otherwise lawful advice, i.e., they cannot lawfully provide routine legal services when state law permits them to do so. There exists a strong interest in minimizing the discrepancy between a lawyer's legal obligations and her professional duties. Adoption of the professional deference standard would ensure that a marijuana business attorney could operate within the eyes of the law.

CONCLUSION

The professional deference standard might function as a potential defense for circumventing federal liability. Judicial deference to state rules of conduct might limit liability with regard to providing routine legal services. Furthermore, adoption of the professional deference standard might help courts delineate distinctions between permissible and impermissible services rendered on behalf of MRCs.¹⁸³

At this point in time, the author cautions readers from relying on the First Amendment as a mechanism for protecting attorney advice. It is practically certain that most routine legal services provided to MRCs cross the line into aiding or abetting and conspiracy liability. Deference to professional standards is by no means a definitive principle to rely on. While *Milavetz* illustrated that the Supreme Court was willing to provide deference to the Model Rules of Professional Conduct, *Humanitarian Law Project* ruled contrary to the Model Rules when the Court reviewed another attorney advice prohibition. The Court's inconsistency, therefore, demonstrates that the First Amendment and professional deference is an imperfect defense to federal liability. Notwithstanding this consideration, such an argument is quite

181. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 246-47 (2010); but see *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34, 36, 39 (2010).

182. See, e.g., *Humanitarian Law Project*, 561 U.S. at 42 (Stevens, J., dissenting) ("All the activities [at issue] involve the communication and advocacy of political ideas and lawful means of achieving political ends."). See also *Green*, *supra* note 88, at 391.

183. See *Volokh*, *supra* note 30, at 1034.

possibly the only realistic defense for attorneys wishing to represent marijuana business entities.

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