

OMAR FIGUEROA (SBN 196650)
omar@omarfigueroa.com
STACY HOSTETTER (SBN 306564)
stacy@omarfigueroa.com
LAUREN MENDELSON (SBN 311099)
lauren@omarfigueroa.com
LAW OFFICES OF OMAR FIGUEROA
7770 Healdsburg Avenue
Sebastopol, CA 95472
Telephone: 707.829.0215
Facsimile: 707.861.9187

Counsel for *Amici Curiae*
National Cannabis Bar Association *et al.*

F I L E D
Clerk of the Superior Court

SEP 08 2017

By: M. KNIGHT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
CENTRAL DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,)
Plaintiff,)

v.)

JESSICA CLAIRE MCELFRISH,)
Defendant.)

Court Number: CD272111

**APPLICATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF AND BRIEF
OF AMICI NATIONAL CANNABIS
BAR ASSOCIATION *ET AL.* IN
SUPPORT OF DEFENDANT'S
MOTIONS TO NARROW SCOPE OF
SEARCH WARRANT AND ASSERT
ATTORNEY-CLIENT PRIVILEGE**

Date: September 27, 2017
Time: 1:30PM
Dept: 36

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

In conformity with California Rules of Court, rule 8.882(d), *Amicus curiae* briefs, the National Cannabis Bar Association, Reason Foundation, Law Enforcement Action Partnership, Henry

1 Wykowski, and the Association of Cannabis Professionals (collectively, “Amici” or “National
2 Cannabis Bar Association *et al.*”) respectfully request permission to file the accompanying
3 *amicus curiae* brief in support of Defendant Jessica McElfresh’s Motions to Narrow Scope of the
4 Search Warrant and Assert Attorney-Client Privilege.

5 The proposed *amicus curiae* brief discusses California’s attorney-client privilege as well
6 as an attorney’s duty of confidentiality. The brief addresses concerns held by the National
7 Cannabis Bar Association *et al.* regarding the prosecution’s position on access to the Defendant’s
8 clients who are not themselves a party to the instant case and the chilling effect that would occur
9 should that position be adopted by the court.

10 The National Cannabis Bar Association *et al.* are interested in this matter because it
11 implicates the essential interest of attorneys’ ability to effectively counsel their clients on the
12 complex framework of state and local cannabis laws and regulations.

13 The National Cannabis Bar Association *et al.* are well-versed in the issues presented and
14 its members are likely to be directly affected by the outcome of this case.

15 The National Cannabis Bar Association *et al.* believe that this proposed *amicus curiae*
16 brief can provide the Court with helpful analysis on the issues presented and believes there is a
17 need for additional argument on the issues beyond what the parties can present. For these
18 reasons, the National Cannabis Bar Association *et al.* respectfully request permission to file the
19 attached *amicus curiae* brief.

INTEREST OF THE *AMICI CURIAE*

Amicus National Cannabis Bar Association (NCBA) is a California non-profit corporation, formed in 2015 by a group of lawyers who saw a need to educate and connect with other cannabis industry lawyers for the purpose of providing excellent, ethical, and advanced legal assistance to this growing industry. Our interest in this case primarily concerns the DA's position regarding the attorney-client privilege and the chilling effect a ruling countenancing that position would have on the ability of our members, and other industry lawyers, to be able to provide quality counsel, advice, and representation to cannabis businesses. We view the prosecution of any attorney based on their providing legal advice to a client that has chosen to engage in a state-regulated cannabis industry as an assault on our organization, our members, and indeed the vital underpinnings of **legal representation nationally**. Prosecutions like this one will undoubtedly serve to discourage **lawyers** from representing clients in the cannabis industry for fear they, too, may be prosecuted.

Amicus Reason Foundation is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant legal and constitutional issues.

Amicus Law Enforcement Action Partnership (LEAP) is a nonpartisan criminal justice public policy organization founded in 2002. LEAP's mission is to advance justice and promote public safety solutions in support of drug policy and criminal justice reforms. LEAP advances its mission through public education campaigns and outreach in the media and other platforms. To further our commitment to a fair and just criminal justice system LEAP selectively participates as amicus curiae in cases raising significant legal and constitutional issues.

1 Amicus Henry Wykowski is an attorney based in San Francisco, California. He began his
2 career as an Assistant United States Attorney. Mr. Wykowski has represented some of the
3 country's largest and oldest licensed medical cannabis dispensaries, including Harborside Health
4 Center and Berkeley Patients Group. He regularly represents cannabis businesses in federal court
5 and in actions brought by the Internal Revenue Service. He is also counsel to the National
6 Cannabis Industry Association (NCIA), a nonpartisan and nonprofit cannabis trade association
7 founded in 2010. NCIA has nearly 1,400 member businesses and works to promote the growth of
8 a responsible and legitimate cannabis industry nationwide and for a favorable social, economic,
9 and legal environment for the cannabis industry. Mr. Wykowski selectively participates as
10 amicus curiae in cases that raise significant legal issues for his clients. Mr. Wykowski believes
11 his clients and all in the cannabis industry are entitled to attorney-client privilege and need to
12 have access to legal counsel to comply with state and local laws and to remit their taxes to local,
13 state, and federal agencies.

14 Amicus Association of Cannabis Professionals (ACP) is a nonpartisan and nonprofit local
15 cannabis trade group based in San Diego, California. The organization was founded in 2014.
16 ACP promotes best local practices for cannabis businesses and advocates that local governments
17 should institute regulations, zoning restrictions, and licensing for the cannabis industry. ACP
18 promotes its mission through its website, educational events, public functions, and member
19 meetings. ACP believes its members and all in the cannabis industry are entitled to attorney-
20 client privilege and need to communicate freely and confidentially with legal counsel to function
21 as legitimate, legal businesses and navigate state and local laws.

22 Amici support that the Court intended for the search of paper documents and electronic
23 devices be narrowly tailored to those individuals and entities named in the warrant. We also
24 support the Court's statements that a search of electronic devices by the defendant's name alone
25 would be beyond the scope of the warrant and would invade the attorney-client privilege of
26 clients entirely unrelated to this case. For the reasons stated in the accompanying brief, the
27

1 Defendant's requests should be granted.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

BRIEF OF NATIONAL CANNABIS BAR ASSOCIATION *ET AL.*
AS *AMICI CURIAE* IN SUPPORT OF ATTORNEY-CLIENT PRIVILEGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Table of Contents

Table of Authorities.....7

ARGUMENT.....9

**I. The History and Purpose of the Attorney-Client Privilege
Support a Finding in Favor of Ms. McElfresh.....9**

**II. California’s Strong Privilege and Confidentiality Rules Caution
Against Unnecessary Disclosure of Client Information, and the
Prosecution’s Position Would Have a Chilling Effect on the
Provision of Legal Services.....12**

**III. The Crime-Fraud Exception is Inapplicable to the
State-Compliant Cannabis Industry.....14**

**IV. Special Care Must be Taken when Conducting Law Office
Searches in Order to Protect the Privacy of Non-Defendant
Clients and Prevent the Unauthorized Disclosure of
Privileged Information.....17**

**V. The Procedures Utilized by the Court Must Appropriately
Safeguard the Privacy of Counsel’s Clients.....20**

CONCLUSION.....22

Table of Authorities

Cases:

Page(s):

<i>Baird v. Koerner</i> (9th Cir. 1960) 279 F.2d 623.....	11
<i>BP Alaska Exploration Inc. v. Superior Court</i> (1988) 199 Cal.App.3d 1240.....	17, 18
<i>Burrows v. Superior Court</i> (1974) 13 Cal.3d 238.....	22
<i>City and County of San Francisco v. Superior Court</i> , 37 Cal.2d 227.....	11
<i>Costco Wholesale Corp. v Superior Court</i> (2009) 47 Cal.4th 725, 734.....	9
<i>Gordon v. Superior Court</i> (1997) 55 Cal.App.4th 1546.....	9, 10
<i>In re Grand Jury Proceedings</i> (9th Cir. 1996) 87 F.3d 377.....	17
<i>In re Grand Jury Subpoenas Dated December 10, 1987</i> (9th Cir. 1991) 926 F.2d 847.....	17
<i>In re Jordan</i> (1974) 12 Cal.3d 575.....	10, 13
<i>Klitzman, Klitzman and Gallagher v. Krut</i> (3d Cir. 1984) 744 F.2d 955.....	18, 19
<i>Mitchell v. Superior Court</i> (1984) 37 Cal. 3d 591, 601.....	10, 11
<i>National City Trading Corp. v. United States</i> , (2d Cir. 1980) 635 F.2d 1020.....	17
<i>People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.</i> (1999) 20 Cal.4th 1135.....	9
<i>People v. Flores</i> (1977) 71 Cal.App.3d 559.....	11
<i>People v. Superior Court (Bauman & Rose)</i> (1995) 37 Cal.App.4th 1757.....	17, 20
<i>Roberts v. City of Palmdale</i> (1993) 5 Cal. 4th 363.....	11
<i>United States v. McIntosh</i> (9th Cir. 2016) 833 F.3d 1163.....	14
<i>United States v. Zolin</i> (1989) 491 U.S. 554.....	17
<i>Upjohn Co. v. U.S.</i> (1981) 449 U.S. 383.....	11

Statutes and Rules:

Cal. Business and Professions Code section 6068.....	10, 12
Cal. Evidence Code § 954.....	9, 10
Cal. Evidence Code § 955.....	10

1	Cal. Evidence Code § 910.....	11
2	Cal. Rules of Professional Conduct 3-100.....	12, 13
3		
4	Constitutions:	
5	U.S. Const., amendments 1, 4, 5, and 6.....	9
6	Cal. Const., art. 1, §1.....	9
7		
8	Bar Association Opinions:	
9	San Francisco Bar Assn. Ethics Comm. Op. 2015-1 (2015).....	16
10	Los Angeles Co. Bar Assn. Prof. Resp. and Ethics Comm. Op. 527 (2015).....	16
11	Colo. Ethics Comm. Formal Op. 125 (2013).....	16
12	Ariz. Ethics Comm. Op. 11-01 (2011).....	16
13		
14	Other Sources:	
15	58 American Jurisprudence, Witnesses, § 516.....	18
16	Hannan, <i>Criminal Prosecution of California Cannabis Attorney</i>	
17	<i>Raises Concerns</i> (2017) Injustice Today.....	14
18	McArthur, <i>The Search and Seizure of Privileged Attorney-Client Communications</i>	
19	(2005) 72 Univ. of Chicago L. Rev. 729.....	9
20	McCormick, Evidence (2d ed. 1972) § 87.....	9
21	Restatement (Third) of the Law Governing Lawyers, § 68.....	11
22	U.S. Dept. of Justice, United States Attorneys' Manual (1997)	20, 21
23	U.S. Dept. of Justice, Searching and Seizing Computers and Obtaining Electronic	
24	Evidence in Criminal Investigations (2009).....	21
25	8 Wigmore, Evidence (McNaughton rev., 1961) § 2290.....	9
26		
27		

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27

2
3

4
5
6
7
8
9
10
11
12
13
14
15
16
17

18
19
20
21
22
23
24
25

26

1 While some version of attorney-client privilege is present in every state, California has
2 one of the most protective in the nation. California gives the concept of “confidential
3 communication” such a broad construction that “[n]either the statutes articulating the attorney-
4 client privilege nor the cases which have interpreted it make any differentiation between ‘factual’
5 and ‘legal’ information.” (*Mitchell v. Superior Court* (1984) 37 Cal. 3d 591, 601; *In re Jordan*
6 (1974) 12 Cal.3d 575, 580 (finding attorney-client privilege attached to cases and law review
7 articles sent by an attorney to a client).) In California, the privilege “covers the transmission of
8 documents which are available to the public,” and “not merely information in the sole possession
9 of the attorney or client.” (*Mitchell, supra*, at 600.)

11 Asserting attorney-client privilege is not a mere option available to Ms. McElfresh, but an
12 ethical and legal mandate that must be upheld even if the assertion were to her own detriment.
13 California Business and Professions Code section 6068, subdivision (e)(1), states that an attorney
14 shall “maintain inviolate the confidence, and at every peril to himself or herself to preserve the
15 secrets, of his or her client.” While Evidence Code Section 954, subdivision (c), states that an
16 attorney *can* assert privilege on behalf of a client, Section 955 mandates that a “lawyer who
17 received or made a communication subject to the [attorney-client] privilege under this article
18 shall claim the privilege whenever he [or she] is present [and] when the communication is sought
19 to be disclosed.” (Emphasis added.) The interest belongs not to the attorney to assert on his or
20 her own behalf, but to the client: “a client – whether or not he is a party to a particular proceeding
21 – has a privilege to refuse to disclose and to prevent another from disclosing a confidential
22 communication to or from the lawyer – and it is the lawyer’s duty to claim the privilege on his
23 client’s behalf whenever necessary to prevent an unauthorized disclosure.” (*Gordon, supra*, 55
24 Cal.App.4th at p. 1557.)
25
26
27

1 The purpose behind the attorney-client privilege is to “safeguard the confidential
2 relationship between clients and their attorneys so as to promote full and open discussion[.]”
3 (*People v. Flores* (1977) 71 Cal.App.3d 559, 563.) It is “no mere peripheral evidentiary rule, but
4 is held vital to the effective administration of justice.” (*Roberts v. City of Palmdale* (1993) 5 Cal.
5 4th 363, 380.) The state values the attorney-client privilege so highly because it ensures “the
6 right of every person to freely and fully confer and confide in one having knowledge of the law,
7 and skilled in its practice, in order that the former may have adequate advice and a proper
8 defense.” (*Mitchell, supra*, 37 Cal. 3d at p. 599 (quoting *Baird v. Koerner* (9th Cir. 1960) 279
9 F.2d 623, 629).) Given the utmost importance in ensuring the availability of legal counsel to the
10 public, “where the attorney-client privilege is concerned, hard cases should be resolved in favor
11 of the privilege.” *Upjohn Co. v. U.S.* (1981) 449 U.S. 383 at 393.

13 Deference to attorney-client privilege reflects recognition that in some circumstances, the
14 social and moral values of privacy and protection of the attorney-client relationship outweigh the
15 interest in discovering the truth. (See Restatement (Third) of the Law Governing Lawyers, section
16 68.) The Editor’s Note to California Evidence Code Section 910 states:

18 Most rules of evidence are designed for use in courts. Generally, their purpose is to
19 keep unreliable or prejudicial evidence from being presented to the trier of fact.
20 Privileges are granted, however, for reasons of policy unrelated to the reliability of
21 the information involved. *A privilege is granted because it is considered more*
22 *important to keep certain information confidential than it is to require disclosure*
of all the information relevant to the issues in a pending proceeding. Thus, for
example, to protect the attorney-client relationship, it is necessary to prevent
disclosure of confidential communications made in the course of that relationship.

23 (Emphasis added.) Said another way, “the privilege is given on grounds of public policy in the
24 belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes
25 result from the suppression of relevant evidence.” (*City and County of San Francisco v. Superior*
26 *Court*, 37 Cal.2d 227, 235.)

1 **II. California's Strong Privilege and Confidentiality Rules Caution Against**
2 **Disclosure of Client Information, and the Prosecution's Position**
3 **Would Have a Chilling Effect on the Provision of Legal Services.**

4 While not identical, California's approach to the duty of confidentiality is telling when
5 interpreting the scope of attorney-client privilege. A lawyer's duty of confidentiality, which is
6 codified in Section 6068(e)(1) of the Business and Professions Code and contained in California
7 Rules of Professional Conduct 3-100, requires that attorneys in California "maintain inviolate the
8 confidence, and at every peril, preserve the secrets, of his or her client." There is only one
9 exception to this rule in the State of California, which is that an attorney may, but is not obligated
10 to, reveal confidential information relating to representation of a client in order to prevent a
11 criminal act that is likely to result in death or substantial bodily harm. (Business and Professions
12 Code §6068(e)(2); California Rule of Professional Conduct 3-100.) The ABA Model Rules, by
13 contrast, contain *six* exceptions to the duty of confidentiality. Thus, California has recognized a
14 duty of confidentiality that is far broader than the duty set forth in the ABA Model Rules, which
15 have been adopted in some form in every state in the nation other than California. Thus, it follows
16 that courts in California should recognize a broader, more protective attorney-client privilege as
17 well. While not synonymous, the duty of confidentiality and the attorney-client privilege share a
18 common aim: to make sacred the relationship of attorney and client such that members of the
19 public feel secure that their confidences, secrets, and other disclosures to legal counsel will not be
20 disclosed.
21

22 For example, the widely adopted ABA Model Rules contain exceptions that allow a
23 lawyer to reveal confidential information relating to the representation of a client in order to
24 prevent the client from committing a crime or fraud that is reasonably certain to result in
25 substantial injury to the financial interests or property of another or to comply with other law or a
26
27

1 court order. California notably refuses to include even these arguably baseline exceptions to the
2 duty of confidentiality, which should give some indication of the utmost value California accords
3 to the public's ability to trust an attorney's safeguarding of confidential information.

4 The Discussion for California Rule of Professional Conduct 3-100 states:

5 A member's duty to preserve the confidentiality of client information involves
6 public policies of paramount importance. (In *Re Jordan* (1974) 12 Cal.3d 575, 580
7 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information
8 contributes to the trust that is the hallmark of the client-lawyer relationship. The
9 client is thereby encouraged to seek legal assistance and to communicate fully and
10 frankly with the lawyer even as to embarrassing or legally damaging subject matter.
11 The lawyer needs this information to represent the client effectively and, if
12 necessary, to advise the client to refrain from wrongful conduct. Almost without
13 exception, clients come to lawyers in order to determine their rights and what is, in
14 the complex of laws and regulations, deemed to be legal and correct.

15 Thus, both the statutory and common law attorney-client privilege, as well as the ethical
16 duty of confidentiality, weigh in favor of exercising extreme care when contemplating forcing an
17 attorney to disclose information relayed to him or her in confidence. Not only would such
18 disclosure contravene the reasonable expectations of the client whose confidences have been laid
19 bare, but it also compromises the trust necessary for others in need of legal assistance to seek
20 counsel in the first place. The law allows for, and even anticipates that some relevant evidence is
21 on occasion suppressed to preserve the ability of Californians to seek legal counsel in good faith
22 without fear of disclosures of potentially embarrassing, unflattering, or incriminating secrets.

23 The potential for a chilling effect on legal counsel is especially pronounced in this case
24 given the prosecution's ill-defined requests and the general nascence of the cannabis industry.
25 Cannabis was first legalized in California in 1996, but only for medical use and eventually subject
26 to a complex set of laws that decriminalized but failed to regulate. Non-medical cannabis was
27 legalized in California only last year and is also, as of yet, not fully regulated. While many cities
and counties are proposing or implementing local ordinances and, in some cases, even issuing
permits and other authorizations for commercial cannabis activities, the state is still in the process

1 of promulgating its regulations for the industry. In addition, while cannabis remains illegal under
2 federal law, proof of “strict compliance” with state laws designed to implement medical cannabis
3 programs will result in the dismissal of a federal prosecution. (*United States v. McIntosh* (9th Cir.
4 2016) 833 F.3d 1163.) These circumstances create what may well be one of the country’s most
5 difficult legal structures to navigate in the country right now. As such, this industry is in special
6 need of legal counsel.

7 These concerns are also voiced by organizations other than Amici. While commenting on
8 this very case, a member of the San Diego Bar Ethics Committee is quoted stating, “[a]n attorney
9 needs to feel that they can freely give advice on areas that are murky in the law.” (Hannan,
10 *Criminal Prosecution of California Cannabis Attorney Raises Concerns* (Aug. 28, 2017) Injustice
11 Today.com.) An attorney representing the political action committee Citizens for Patient Rights
12 expressed concern that this case may result in clients not trusting their lawyers, making it harder
13 to provide effective assistance. *Id.* Amici’s concerns are rooted not in the fate of a single
14 attorney’s case files, but in preserving the integrity of the judicial system and equal access to that
15 justice system for all, even (if not perhaps more so) those formerly criminalized for what is now
16 recognized by the state as lawful and acceptable behavior. Thus, the implications of this case
17 reach beyond merely the cannabis industry.

20 **III. The Crime-Fraud Exception is Inapplicable to** 21 **the State-Compliant Cannabis Industry.**

22 The prosecution evidently argues that the potential of a crime-fraud exception being
23 applicable to a single matter handled by a particular attorney creates a crime-fraud exception
24 warranting access and disclosure to every client file worked on by that attorney. The
25 prosecution’s efforts would result in the prying open of confidential information in contravention
26 of the significant protection meant to be afforded to the attorney-client privilege for entities not a
27

1 party to the present case. Leveraging terms so common as to be almost inevitably present in the
2 case file of any company in the industry, whether a client of Ms. McElfresh or any other attorney,
3 defies not only California's extensive protection of confidential disclosures established at law but
4 also the policy underlying the protection. In describing why loose papers labeled with the name of
5 a non-defendant client were seized, the prosecution states that it "is reasonable to suspect that if
6 these papers are related to marijuana activities, it may contain evidence related to the target
7 companies, person, or the Defendant's prior knowledge or M.O." (People's Points and
8 Authorities in Opposition to Return of Property (filed June 29, 2017), page 6.) Similarly, in
9 describing the propriety of seizing and searching what are admittedly client files other than those
10 of the target company, the prosecution offers only that "suffice it to say, several of these seem
11 facially related to marijuana" or "other files appear to be related to marijuana endeavors."
12 (People's Points and Authorities in Opposition to Return of Property (filed June 29, 2017), page
13 7.) If such speculative connections are allowed to eviscerate the attorney-client privilege, every
14 company within a given industry that shares a particular attorney will be subject to a search of its
15 confidential files in the event a completely different client of said attorney is accused of
16 misconduct – irrespective of whether such companies have ever interacted with or even heard of
17 one another.
18

19
20 If the prosecution's argument were taken to its logical end, then no attorney would be able
21 to provide confidential legal advice to individuals and businesses in the cannabis industry, and the
22 quality of legal services provided would not only suffer, but potentially evaporate. Even those
23 attorneys continuing in the field as a commitment to justice and serving those in greatest need of
24 legal services would be left either with a lack of clientele (caused by an inability to inspire
25 sufficient confidence of confidentiality) or bogged down in personal prosecutions such as that
26
27

1 seen in this case, under the guise that *any* cannabis activity is sufficient sign of conspiracy or
2 wrongdoing. Were one to replace references to “cannabis” and “cannabis attorneys” with
3 “trademark” and “intellectual property attorneys,” respectively, the overly broad effects are as
4 unjustifiable as in the present case. Even were one to hypothesize that a crime or fraud was
5 perpetuated amongst an intellectual property attorney and a particular client seeking to infringe a
6 registered trademark, access to every client file of that attorney cannot be granted to investigate
7 further evidence of crimes or frauds simply for, on their face, involving possible trademarks.
8

9 It is well established that the federal prohibition on cannabis activities does not mean that
10 an attorney in the State of California advising clients regarding compliance with cannabis laws
11 promulgated by the State of California, or its counties and cities, is engaged in a crime or fraud.
12 To the contrary, an attorney advising clients on how to *comply* with local and state laws is the
13 very essence of the faithful discharge of the duties of an attorney and counselor at law – enabling
14 members of the public to ascertain and abide by the laws of their chosen vocation. Moreover,
15 such counsel is expressly permitted by numerous bar associations in jurisdictions that have
16 legalized cannabis for medical or adult use. (See, e.g., San Francisco Bar Assn. Ethics Comm.
17 Op. 2015-1 (2015); Los Angeles Co. Bar Assn. Prof. Resp. and Ethics Comm. Op. 527 (2015);
18 Colo. Ethics Comm. Formal Op. 125 (2013); Ariz. Ethics Comm. Op. 11-01 (2011).)
19

20 This all goes without saying that an attorney who happens to specialize in cannabis
21 compliance could in fact be assisting a client in matters unrelated to commercial cannabis
22 activity, such as defending a past crime or discussing past conduct that may arguably violate the
23 law. These activities would all be subject to attorney-client privilege and not subject to a crime-
24 fraud exception premised on the mere assertion that the client happened to consult with an
25 attorney specializing in cannabis compliance or that the client appears to have a connection with
26
27

1 cannabis activities. (See *In re Grand Jury Proceedings* (9th Cir. 1996) 87 F.3d 377, 381 (“but the
2 exception does not sweep so broadly that it discourages clients from “mak[ing] full disclosure to
3 their attorneys of *past* wrongdoings, in order that the client may obtain the aid of persons having
4 knowledge of the law and skilled in its practice.”) (Quoting *United States v. Zolin* (1989) 491
5 U.S. 554, 563.))

6 **IV. Special Care Must be Taken when Conducting Law Office Searches**
7 **in Order to Protect the Privacy of Non-Defendant Clients and Prevent**
8 **the Unauthorized Disclosure of Privileged Information.**

9 Given the importance of protecting the confidentiality of the attorney-client relationship,
10 courts have recognized that “special care” must be taken when engaging in a search of a law
11 office. (See, e.g., *National City Trading Corp. v. United States*, (2d Cir. 1980) 635 F.2d 1020,
12 1026 (“[A] law office search should be executed with special care to avoid unnecessary intrusion
13 on attorney-client communications”); *In re Grand Jury Subpoenas Dated December 10, 1987* (9th
14 Cir. 1991) 926 F.2d 847, 856 (“The Government agrees that special care should be taken when a
15 search of an attorney's office is involved”). Moreover, “[t]he fact that the attorney is suspected of
16 criminal activity does not lessen the client's interest in the confidentiality of his or her files, or
17 obviate the privilege with respect to those files.” (*People v. Superior Court (Bauman & Rose)*
18 (1995) 37 Cal.App.4th 1757, 1766).

20 In line with California’s unrivaled protection of attorney-client confidentiality, even when
21 the crime-fraud exception is applicable, only those communications that are reasonably related to
22 the fraud at issue in a particular case are discoverable. *BP Alaska Exploration Inc. v. Superior*
23 *Court* (1988) 199 Cal.App.3d 1240, 1270. “[A] *prima facie* showing of fraud cannot open
24 defendant’s files or give plaintiffs carte blanche with respect to attorney-client communications.
25 The document in question must have a reasonable relation to the ongoing fraud to be discoverable
26
27

1 under the crime-fraud exception.” (*Id.*, at 1269.) Moreover, “[t]he mere charge of illegality will
2 not defeat the privilege. There must be *prima facie* evidence that the illegality has some
3 foundation in fact.” (58 American Jurisprudence, Witnesses, section 516, page 289.)

4 Thus, even if the people are able to make a *prima facie* showing of crime or fraud as to
5 one privileged communication, only the client files of *that particular client* that are reasonably
6 related to *that crime or fraud* can be accessed by the opposing party. It seems clear then that the
7 prosecution cannot be granted access to files belonging to entirely unrelated, non-defendant
8 clients. These third-party clients are not mentioned in the search warrant and are not “reasonably
9 related” to any crime or fraud the prosecution alleges Med-West engaged in simply by virtue of
10 utilizing the legal services of a common attorney. The mere coincidence of hiring an attorney who
11 has represented or later represents other clients charged with criminal acts is insufficient to
12 constitute a *prima facie* showing of illegality with regards to the non-suspect, non-defendant
13 clients. Moreover, the Prosecution cannot overcome the attorney-client privilege attached to non-
14 defendant clients not named in the search warrant merely by asserting that review of this
15 privileged information *may* reveal evidence of some illegal activity that may or may not bear any
16 relation to the criminal activity alleged in the instant case. There must be *prima facie* evidence of
17 a related crime or fraud in each instance—a blanket assertion that some of Ms. McElfresh’s
18 clients may have committed crimes by virtue of being a medical cannabis company, a legal
19 business endeavor in the State of California, simply does not suffice. To hold otherwise would not
20 only eviscerate the concept of attorney-client privilege in the emerging cannabis industry, but it
21 would also erode California’s unparalleled protections for the confidentiality of attorney-client
22 communications.
23
24
25

26 \\\

1 The search that took place in this case is akin to that which occurred in *Klitzman, Klitzman*
2 *and Gallagher v. Krut* (3d Cir. 1984) 744 F.2d 955, where the prosecution interpreted a search
3 warrant as authorizing the seizure of essentially all files in a particular law office. The court in
4 *Klitzman* held that the government's actions had "completely disregarded any concept of the
5 attorney-client privilege":

6 No one can deny that the government's action in this case completely disregarded
7 any concept of the attorney-client privilege. *The materials the postal inspectors*
8 *searched for and seized pursuant to the warrants constituted the existing records*
9 *of an entire law practice. The government made no attempt to limit the seizure to*
10 *files of clients who may have alleged that their medical bills were overstated or to*
11 *materials involving the medical personnel allegedly involved in the fraudulent*
12 *scheme under investigation. Rather, this government rampage potentially or*
13 *actually invaded the privacy of every client of the Klitzman firm. The government*
14 *well knew, prior to the search, that the client files contained privileged*
15 *communications, yet the government took not one step to minimize the extent of*
16 *the search or to prevent the invasion of the clients' privacy guaranteed by the*
17 *attorney-client privilege.*

18 *Id.* at 964 (emphasis added).) A similar disregard for the attorney-client privilege has taken place
19 in the present case. The prosecution seized what amounts to the existing records of Ms.
20 McElfresh's entire law practice, and seeks to search these files and devices which it knows to be
21 privileged. No attempt was made to limit the search to files of the target companies or such
22 additional client files that may be involved with the *specific* unlawful scheme posited in this case.
23 Rather, the prosecution asserts that files belonging to non-defendant clients of Ms. McElfresh
24 should not receive the protection of the attorney-client privilege on the chance that they may
25 contain evidence supporting any crime-fraud exception, related or not. The prosecution
26 rationalizes this egregious disregard for attorney-client privilege by pointing to nothing more than
27 the uncontested fact that Ms. McElfresh represents cannabis businesses and that cannabis is
illegal under federal law. While this fails to bear any nexus to the specific crime or fraud at issue
in this case, as noted above, counseling clients regarding state and local cannabis laws is lawful
conduct and not a violation of law subject to the crime-fraud exception.

1
2 **V. The Procedures Utilized by the Court Must Appropriately**
3 **Safeguard the Privacy of Counsel's Clients.**

4 The National Cannabis Bar Association *et al.* support the procedures proposed by the
5 Court for protecting the attorney-client privilege of non-defendant clients as well as target
6 entities. First, an electronic search of the documents using appropriate search terms should be
7 used to create a search log, to be held by the special master. Documents found are to be provided
8 to the Defense so that a privilege log may be created. A complete privilege log shall be provided
9 to the Court; a redacted privilege log shall be provided to the prosecution. The prosecution will
10 have the opportunity to respond to and contest the privilege log on an item-by-item basis, as it
11 deems appropriate. The Court shall make the ultimate ruling on the applicability of attorney-client
12 privilege without reviewing the contents of the documents, but through a review only of the title
13 and description of each document. In the event that a document is held to be privileged, the
14 prosecution must prove evidence of a crime or fraud with regards to each individual document
15 sought based on extrinsic evidence. Finally, should sufficient extrinsic evidence be provided, the
16 court may choose to review the applicable documents *in camera* for purposes of establishing
17 whether the crime-fraud exception applies.
18

19
20 It is worth emphasizing that the Court, and not the special master, makes the final decision
21 as to whether a particular communication is privileged and whether the crime-fraud exception
22 applies to a particular communication. Any recommendations from the special master are simply
23 that—advisory recommendations—which cannot be substituted for the court's decision. (*People*
24 *v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1769.)

25 While not controlling, we also note that the U.S. Department of Justice has issued a policy
26 related to searches and seizures of law offices, specifically, which discusses how to conduct a
27

1 search of a premise belonging to a suspect attorney. (U.S. Dept. of Justice, United States
2 Attorneys' Manual (1997) Section 9-13.420) (hereinafter "USAM"). The Department of Justice
3 emphasizes that even in situations involving a lawyer suspected of a crime, the interest in
4 protecting the lawyer's clients' privacy remains tantamount:

5 There are occasions when effective law enforcement may require the issuance of a
6 search warrant for the premises of an attorney who is a subject of an investigation,
7 and who also is or may be engaged in the practice of law on behalf of clients.
8 Because of the potential effects of this type of search on legitimate attorney-client
relationships and because of the possibility that, during such a search, the
government may encounter material protected by a legitimate claim of privilege, it
is important that close control be exercised over this type of search.

9 (*Id.*) The Manual recommends that "[p]rocedures should be designed to ensure that
10 privileged materials are not improperly viewed, seized or retained during the course of the
11 search" and that "the search warrant should be drawn as specifically as possible, consistent with
12 the requirements of the investigation, to minimize the need to search and review privileged
13 material to which no exception applies." The Manual also recommends that the government
14 explain its procedures intended to protect the attorney-client privilege in the affidavit in support
15 of the search warrant. (USAM 9-13-420.) When searching computers and electronic devices, a
16 related Manual emphasizes that "[a]gents must exercise special care when planning a computer
17 search that may result in the seizure of legally privileged documents such as medical records or
18 attorney-client communications" to ensure that "no breach of privilege occurs." (U.S. Dept. of
19 Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal
20 Investigations (2009).)

21 Amici are particularly concerned with the vague and overly common terms that the
22 prosecution attempts to leverage, such as "ethanol based THC extraction" – a common process in
23 the industry, which could be contained in a communication to or from any of Ms. McElfresh's
24 numerous clients. This is only slightly more tailored than using Ms. McElfresh's name as a search
25
26
27

1 term—a term that the prosecution knows from common sense is included in virtually every
2 communication Ms. McElfresh is a party to, whether digital, on paper, or verbally. (see *Burrows*
3 *v. Superior Court* (1974) 13 Cal.3d 238, 248 (holding that search of a law office and seizure of
4 documents related not only to people in the warrant, but also related to the lawyer, was
5 overbroad). The use of such common terms increases the likelihood of reviewing privileged
6 material that is not subject to an exception and endangers the privacy of Ms. McElfresh's clients.
7 One client's alleged query regarding a practice such as ethanol based THC extraction cannot
8 allow the government to conduct a fishing expedition into every one of Ms. McElfresh's client
9 files simply because they, too, may have inquired about a term that, by itself, does not even
10 demonstrate a planned crime or fraud.

12 CONCLUSION

13
14 The National Cannabis Bar Association and other Amici strongly believe that attorneys
15 representing cannabis clients should not be bereft of the privacy and confidentiality normally
16 afforded to clients merely because they serve as first responders to an emerging industry that
17 happens to be caught in the crosshairs of conflicting state and federal law. The importance of the
18 attorney-client privilege cannot be overstated, as it forms the foundation of the trust that clients
19 need if they are to seek legal counsel. A ruling in favor of Ms. McElfresh would reinforce the
20 sanctity of the attorney-client privilege and respect the privacy rights not only of Ms. McElfresh's
21 non-defendant clients, but also of other law-abiding individuals who happen to share legal
22 counsel with individuals facing criminal allegations. In contrast, ruling adverse to Ms. McElfresh
23 would have a chilling effect on the provision of legal services to the burgeoning and complex
24 cannabis industry by licensed attorneys, and would erode California's unparalleled protections for
25 client confidentiality.
26
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Respectfully submitted,

LAW OFFICES OF OMAR FIGUEROA

/s/ Omar Figueroa
/s/ Stacy Hostetter
/s/ Lauren Mendelsohn

Dated: September 8, 2017

By: _____

OMAR FIGUEROA, ESQ.
STACY HOSTETTER, ESQ.
LAUREN MENDELSON, ESQ.

On Behalf of *Amici Curiae*
National Cannabis Bar Association
Reason Foundation
Law Enforcement Action Partnership
Henry Wykowski, Esq.
Association of Cannabis Professionals