INTELLECTUAL PROPERTY LAW

CALIFORNIA LAWYERS ASSOCIATION

presents

IP Cannabis Law Conference

Walk Don't Run: The Ethics of Cannabis Clients and IP

Wednesday, April 19, 2023
4:00 p.m. – 5:15 p.m.

MCLE: 1.25 Ethics

Speakers:

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Conference Reference Materials

The Intellectual Property Law Section presents

THE CANNABIS IP LAW CONFERENCE

Walk Don't Run: The Ethics of Cannabis Clients and IP

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April 19, 2023

California Rule of Professional Conduct 1.2.1: Advising or Assisting the Violation of Law

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(a) A lawyer shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal.

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

California Rule of Professional Conduct 1.2.1: Advising or Assisting the Violation of Law, Comment 6

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Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

They could be talking about something else…but probably not.

ABA Model Rule of Professional Conduct 1.2(d): Scope of Representation & Allocation of Authority Between Client & Lawyer

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Subsection (d) states that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law

ABA Model Rule of Professional Conduct 1.2(d): Scope of Representation & Allocation of Authority Between Client & Lawyer

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- This, of course, squarely pits federal law versus state law and begs the question of what a lawyer may advise a client of when it comes to a cannabis-based business, especially when it comes to intellectual property, which is governed by federal statutes.

State Bar of California's Standing Committee on Professional Responsibility and Conduct Opinion 2020-202

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- Expands on Comment 6 to Rule 1.2.1
- California lawyers can advise cannabis clients if they believe the clients are making a good faith effort to follow state law
  - Attorneys must focus on helping clients understand and follow California's cannabis laws – which includes drafting contracts, helping negotiate transactions, and licensing applications.
- Must advise clients about federal cannabis laws and the many penalties for violating federal law, including criminal prosecution and asset forfeiture
- Must inform clients of how the conflict between federal and state law could affect lawyers' duties to their clients.
  - For example, federal courts may not honor the attorney-client privilege for California lawyers and their cannabis clients.
  - Lawyers themselves must know federal authorities could investigate or prosecute cannabis lawyers in federal court alongside their clients.

How can this apply in the IP context?

- Trademarks – Because federal law still prohibits the sale of cannabis-containing products (except if derived from hemp and if the THC content is 0.3% or below), the USPTO will not register trademarks for non-conforming THC-containing products or their manufacture, sale, or distribution
- Use of a mark in commerce must be lawful use to be the basis for federal registration of the mark. *Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 526, 3 USPQ2d 1306, 1308 (Fed. Cir. 1987); *In re Stanley Bros. Soc. Enters.*, LLC, 2020 USPQ2d 10658, at *9 (TTAB 2020) (citing *In re PharmaCann LLC*, 123 USPQ2d 1122, 1124 (TTAB 2017); *In re Brown*, 119 USPQ2d 1350, 1351 (TTAB 2016)); *see* 15 U.S.C. §§ 1051, 1127; 37 C.F.R. § 2.69
- Qualifying hemp-based products under the CSA—e.g foods, beverages, dietary supplements, and pet treats containing CBD (even if hemp-derived)—may still not be registrable as unlawful. because they are not yet legal under the federal Food Drug and Cosmetic Act ("FDCA")

How can this apply in the IP context?

- Note also California Rule of Professional Conduct 3.3 and ABA Model Rule 3.3, which discuss candor with the Court
- Both use similar language. A few pertinent sections:
  - Section (a)(1): A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer
  - Section (a)(3): A lawyer shall not offer evidence that the lawyer knows to be false
  - Section (b): A lawyer who represents a client in a proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures

How can this apply in the IP context?

- How does this play out for trademark applications?
- Along with a trademark application, the lawyer must identify the international classes in which the goods and services claimed fall under
- Likewise, the application requires a written description of the claimed goods or services
- Lawyers must understand the client's business, structure and ownership, and what goods and services they will be offering and if approval under the FDCA is required (if hemp-based)
- As noted, goods and services related to the cultivation, manufacture, distribution, or sale of cannabis or cannabis-containing products are illegal under federal law and therefore cannot be registered with the USPTO
- The lawyer must therefore must be careful to advise clients of this and that any cannabis-related marks can only be for services that do not "touch" the plant
- Identifications that are meant to skirt these rules but identify unlawful goods or services could fall afoul of California Model Rule 1.2.1 and 3.3

What about patents?

- The Patent Act does not have the same morality/lawfulness requirements as trademarks
- There are quite a few utility patents in the cannabis space, from methods for vaporizing cannabis-containing products to plant cultivation techniques.
- There have also been a number of plant patents issued for particular strains of cannabis and hemp plants. But their protections are limited.
- These can be difficult to obtain and the CSA presents challenges.
- For example, because there is not a lot of archival information on prior strains of cannabis and hemp plants, it can be difficult to disclose prior art. However, if the lawyer is aware of prior art—even if it is not findable by the USPTO—failing to disclose that prior art could violate California Model Rule 3.3 for failure to disclose
- Utility patents and applications for a plant variety certificate under the Plant Variety Protection Act (PVPA) may require the physical deposit of seeds in Colorado or other locations within the U.S., which would likely constitute the unlawful transport of cannabis, in violation of federal law. This likely violates Rules 3.3 and potentially 8.4(b)
- Identifications that are meant to skirt these rules but identify unlawful goods or services could fall afoul of California Model Rule 1.2.1 and 3.3

Everyone's Favorite Question: Can I Go Into Business With My Client(s)?

California Rule of Professional Conduct 1.8.1: Business Transactions with a Client and Pecuniary Interests Adverse to a Client

- Lawyers will not go into business with a client or own a piece of them unless:
  - Transaction is fair and reasonable
  - Lawyer's role disclosed
  - Above is communicated in writing and client can understand it
  - Client has independent counsel or told in writing to seek independent counsel
  - After all this, client gives informed consent in writing

Conflicts of Interest Abound: When a Booming Industry, Competitive Licensing, and Limited Opportunity Combine

California Rule of Professional Conduct 1.7

Current Clients – Conflicts of Interest

- Cannot take on a new client, if conflicts with repsonsibilties to current client.
  - Directly adverse in same or separate matter
  - Significant risk representation will be materially limited by responsibilities to or relationships with another client, former, client, a third person, or the lawyer's own interest.
  - Relationship with other lawyer, party, or witness
- Exceptions: lawyer reasonably believes can competently and diligently represent both; representation not prohibited by law; not directly opposed in current matter; and each consents in writing.

Many Challenges and Limited Solutions

1. Learn to love your conflict waiver – and your ethics counsel

2. Some conflicts can be waived; some cannot

3. Consider carefully what clients you accept – your allegiance to them will continue for a long time (Remember CPRC 1.9)

What's Crime-Fraud Got to Do With It?

California Evidence Code Section 956(b)

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The crime-fraud exception, “**shall not apply to legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis**, and confidential communications provided for the purpose of rendering those services are confidential communications between client and lawyer, […] **provided the lawyer also advises the client on conflicts with respect to federal law**.”

Federal Law versus California Law

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Federal

- **Court is ultimate arbiter** of what is privileged *and* can review communications to decide if they are privileged or contain evidence of the crime-fraud exception.
  - *United States v. Zolin* (1989) 491 U.S. 554

California

- **Attorney is main decider** of what is priviliged and the court cannot review the communications themselves to determine if they are privileged or if evidence of crime-fraud exists.
  - *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725
  - *DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653

Federal Law

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Initial Standards

- Party seeking to defeat privilege must have some independent, nonprivileged evidence of crime-fraud
  - "Support a good-faith basis"
  - Specific showing and particularity
- Court can review communications themselves for evidence of crime-fraud before determining whether it occurred

Standard of Proof

- Not clearly defined
- Court can decline to conduct search even when facing some evidence of crime-fraud, or demand more
  - Look to specific facts of case, importance of privileged materials to case, and likelihood the review will produce evidence of crime-fraud

Who Makes Decisions and Do You Get a Hearing First

- Federal Rule of Evidence 104(a) – supports that judge is ultimate arbiter, but court can farm out review to special master or a taint team
  - Civil – likely entitled to hearing before any review
  - Criminal – not clear

California Law

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Initial Standards

- Party seeking to defeat privilege must have *prima facie* evidence of crime-fraud based entirely on independent, extrinsic, non-privileged evidence
- Court cannot review communications themselves to determine if crime-fraud occurred
- Cal. Evid. Code section 956(b)

Standard of Proof

- Standard of proof higher than for a search warrant, which is merely probable cause
- Very limited exception
  - If exception applies, is very narrow and applies only to matters related to the crime-fraud; is not a wholesale cancellation of privilege.

Who Makes Decisions and Do You Get a Hearing First

- Judge must conduct final review and make decisions about privilege – after receiving and reviewing your privilege log
  - This should never happen behind your or your client's back
  - Civil – some case law that court must hold a noticed, adversarial hearing

An Indictment or a Search Warrant is Not the End: Being Accused of a Crime Does Not Cancel Out Your Duty or Right to Assert Privilege

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Issue	Support	Authority
If Charged or Accused of a Crime, an Attorney Still Must Assert Privilege	The court that authorized a search or other examination of privileged materials, "has an obligation to consider and determine claims that materials seized pursuant to a search warrant, from attorneys suspected of criminal activity."	*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 720
Issuance of Search Warrant Does Not Cancel Attorney-Client Privilege	"Nothing in this section is intended to limit an attorney's ability to request an in-camera hearing pursuant to the holding of the Supreme Court of California in People v. Superior Court (Laff) (2001) 25 Cal.4th 703."	Penal Code section 1524, subdivision (i)
Issuance of Search Warrant Is Not Proof of Crime-Fraud	The standard for issuance of a search warrant is an, "*ex parte* presentation to the magistrate of an affidavit…requesting the magistrate to issue the warrant based on the probability, and not a *prima facie* showing of criminal activity. By contrast, in order to establish the crime/fraud exception to privilege, the party opposing the privilege must establish a *prima facie* case of fraud. [T]he party must also establish a reasonable relationship between the fraud and the attorney-client communication."	*People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1769

Privilege Logs: Your Best Chance for Dialogue

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California

- Must allow you to prepare a log – and law enforcement or court must wait while you do so
- Must receive access to seized materials
- Log goes to court for *in camera* review, per Evidence Code Sections 915(a) and 915(b)

Federal

- Do not have same automatic right to make a log – but you should push for it
- Allow the court to review privileged materials to determine if they are privileged or if evidence of crime-fraud exists; court can farm out to special master or taint team – but your log is still a dialogue with the Court or whomever is doing the review
- Even Department of Justice manuals state the government should strongly consider providing an attorney under investigation or their counsel copies of the seized materials and letting them prepare a privilege log

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THANK YOU

FOR JOINING US!

Cannabis, Conflicts, Crime-Fraud Exception, and More Ethical Issues
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for "Walk Don't Run: The Ethics of Cannabis Clients and IP" for the California Lawyers Association Intellectual Property Section Cannabis IP Law Conference – April 19, 2023

Cannabis attorneys are bound by the same rules of ethics as their non-cannabis law practicing lawyers, such as avoiding conflicts of interest, protecting privilege, and carefully weighing the pros and cons of possibly going into business with clients. However, for cannabis lawyers, these obligations can require greater care and attention for two reasons: one, cannabis law is relatively new practice, growing in states across the United States amid the backdrop of cannabis remaining a Schedule I Controlled Substance; and two, the business of cannabis is growing rapidly, resulting in knock-down drag-out fights for permits that repeat every time a new jurisdiction licenses cannabis businesses.

Is This Even Legal?

Though cannabis is legal under many circumstances in California, it remains illegal under federal law. Therefore, California lawyers looking to represent legal cannabis clients should look to Comment 6 to California Rule of Professional Conduct 1.2.1, Advising or Assisting the Violation of Law. The comment states that California lawyers may advise a client on complying with California laws, even if the client's actions may violate a conflicting federal law. However, in doing so, lawyers must inform clients of the conflicting federal law—and the perils of violating it.

Lawyers may fear that clients will run away if they begin the attorney-client relationship by disclosing that cannabis clients could face prosecution or more under federal law even if they follow California law perfectly, and that privilege may not exist in federal court. However, California's Rules of Professional Conduct mandate such disclosures, and lawyers who fail to advise a client of the risks of business decisions shirk their duties of competence, diligence, and candor.

The State Bar of California's Standing Committee on Professional Responsibility and Conduct provided its first detailed overview of the ethics of cannabis practice in Formal Opinion No. 2020-202. The opinion expands on Comment 6 to Rule 1.2.1 and states that California lawyers can advise cannabis clients if they believe the clients are making a good faith effort to follow California law. The opinion emphasizes that lawyers must diligently help clients understand California's cannabis laws and lawyers may help clients follow California's laws including drafting contracts, helping clients negotiate deals, and representing clients in licensing applications. However, similar to comment 6, the opinion is clear that cannabis lawyers must counsel clients about federal cannabis laws and the many penalties for violating federal law, including criminal prosecution and asset forfeiture. The opinion concludes that cannabis lawyers must inform their clients of how the conflict between federal and state law could affect lawyers' duties to their clients. For example, federal courts may not honor the attorney-client privilege for California lawyers and their cannabis clients. Lawyers themselves must know federal authorities could investigate or prosecute cannabis lawyers in federal court alongside their clients.

Conflicts of Interest

Per California Rule of Professional Conduct 1.7, lawyers cannot take on a client if the representation will create a concurrent conflict of interest. Law firms use conflict checks as part of screening. However, in cannabis practice, these conflict checks – and the decision whether to work with a client – will be constant, sticky, and at times, painful for the growth of the lawyer's practice.

The standard licensing process within a municipality in a large state, or in smaller states, the licensing process for an entire state, have the following in common, at least for the first-time applications are submitted:

1) The application period opens on the same date.
2) All applicants apply simultaneously or within the same initial time frame.
3) The government has some process to judge which applicants will receive a license, be it merit-based or scoring, lotteries, or more standard land-use applications that result in mad races to finish first.
4) The number of licenses is often limited, especially in retail.
5) For land-use applications, many applicants may compete within a small cluster of acceptable zoning for a single permit.

This means that for lawyers, conflicts of interest are rife and around every corner. Considerations include:

1) Do not represent clients competing for the same permit (yes, I know, this seems obvious, but it can get more complicated the longer you practice).
2) Do not represent a greater number of clients than you can represent ethically. For example, if a state is giving out six permits, how many applications can you represent?

These questions become more challenging the longer you practice cannabis law, and as your practice grows. What will inevitably occur is that your clients will want to apply for licenses in new jurisdictions. Given that new licensing processes bring the same conflict minefields, you may soon find that two of your clients are competing for the same permit. This will leave you with several unpalatable choices:

1) Sit out representing your clients as they compete against each other for a permit. However, this may not be good enough to avoid a conflict, since your representation could still be considered materially limited by your responsibilities to another client – especially in the eyes of the client who does not get the permit.
2) Lose one of your clients. The client you are losing or giving up must then consent in writing to your representing the competing application, as will the client you are sticking with.

The last conceivable option – represent them both in the same application process with written conflict waivers – should never be undertaken. You would never represent adverse parties in a lawsuit. You cannot do the equivalent in a land-use application.

This issue will continue to come up as you practice cannabis law, at least during these boom years of first time licensing processes. Remember, Rule 1.7 also states a concurrent conflict of interest can arise if "there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to…a former client…." Thus, remember that when you take on representing a client, you are taking on weighing the risk of a concurrent conflict of interest for the rest of your career. In cannabis, you will see that client again, even if they leave your business. Choose your clients carefully. You want to work with them for a long time, and you will still have a responsibility to them that will affect the growth of your practice even if they leave you for another firm.

As you navigate conflicts of interest, get informed written consent from all clients affected to anything that could even resemble a conflict. Work hard on your advisal letter and your retainer agreements, and have trusted colleagues or better yet, retain a legal malpractice lawyer to help you draft these documents.

Going Into Business with Clients

The most common question I get from new cannabis lawyers, or lawyers looking to get into cannabis, involves going into business with clients, accepting stock or other ownership as payment, or some similar variation. My answer is always the same: unless you plan to have a single cannabis client, and exclusively represent this client, going into business with clients is ethically sticky, a never-ending duty to disclose the conflict, and possibly a huge personal risk.

First, as we all know, cannabis remains illegal under federal law. When a lawyer goes from advising and representing a client – conduct that more states consider appropriate under their ethics rules if the attorney advises clients about federal law and works to help them obey state law – to owning part of a cannabis business, the lawyer is clearly participating in, and financially benefiting from, conduct violating federal law.

Second, if you own part of client's business, you likely need to disclose that to all of your other cannabis clients. This further complicates the minefield of conflicts that you will navigate as a cannabis lawyer during these early years of constant new licensing processes. If you fail to disclose your ownership in one client, or your seat on their board of directors, to all of your clients, you have failed to advise your clients – and get their informed, written consent – to a concurrent conflict of interest as defined by Rule 1.7: such a conflict exists if "there is a significant risk that the lawyer's representation of the client will be materially limited by … the lawyer's own interests."

Third, to go into business with a client, you must follow California's Rule of Professional Conduct 1.8.1, Business Transactions with a Client and Pecuniary Interests Adverse to a Client. You must ensure that the terms of your business arrangement with your client are fair and reasonable, and clearly explained and disclosed to your client in writing. You must tell your client in writing they should speak to independent counsel and give them plenty of time to do that. Last, your client must consent in writing to the transaction and the lawyer's role in it, including if the lawyer is also representing the business as an attorney. This is a tough mountain to climb, and to attempt it, both the lawyer and the client should have independent counsel.

Crime-Fraud Exception to Attorney-Client Privilege

As attorneys, we often believe that attorney-client privilege is sacrosanct. However, exceptions to, and ways to forcibly breach, privilege exist. One is the crime-fraud exception. Attorney-client privilege cannot shield a crime or a fraud. Courts, investigators, and prosecutors can force an exception to privilege, if they present evidence of a crime or a fraud. What does a prosecutor or opposing counsel have to present to a court to breach privilege? What are the duties of an attorney facing prosecution or a civil court order that seeks access to privileged materials and communications? What procedures do you ask the court to adopt, should you find yourself fending off an accusation that crime or fraud has occurred and justifies vitiating privilege?

The exact rules will vary state by state; below covers federal law and California, a state protective of attorney-client privilege even in the face of the crime-fraud exception.

<u>Federal Law</u>

1) Federal law lets the court examine privileged communications *in camera* to determine if privilege exists and if evidence of crime-fraud justifying an exception to privilege exists.

Under federal law, the court is the ultimate arbiter of whether something is privileged, per Rule 104(a) of the Federal Rules of Evidence. (*United States v. Zolin* (1989) 491 U.S. 554, 565.) As for determining if the crime-fraud exception applies, the court can review privileged communications as part of determining if crime-fraud occurred. (*Id*. at p. 568.) This is a much weaker standard than California's, which requires a court determine crime-fraud exists using extrinsic, nonprivileged evidence only before any possible *in camera* review of privileged materials. The court can farm out review of documents to a special master or a taint team, though Rule 104(a) seems to require the court to make final decisions about privilege. You must always push for the court to make the final decisions, even if a taint team or special master completes the initial review.

2) Before this examination can occur, the party seeking to defeat privilege must offer some evidence of crime-fraud and its relationship to items protected by privilege.

Though weaker than California's standards, *Zolin* does require the party seeking to defeat privilege to present some independent, nonprivileged evidence before a court can choose to review materials *in camera*. (*Id*. at pp. 574-575.) '"The judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." (*Id*. at p. 572 (citation omitted).) The party seeking to defeat privilege cannot rely on general claims of crime or fraud. Instead, they must make a "specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud." (*In re Bankamerica Corp. Securities Litigation* (2001 8th Cir.) 270 F.3d 639, 642.)

The United States Supreme Court said that once the party seeking to defeat privilege made this initial showing, courts could require more independent, nonprivileged evidence before embarking on *in camera* review. Courts should also consider the following factors before beginning *in camera* review:

> [F]acts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.

(*Zolin*, *supra*, 491 U.S. at p. 572.)

3) The evidentiary burden for crime-fraud is not clearly defined.

Attorney-client privilege can be breached, '"where the desired advice refers not to prior wrongdoing, but to future wrongdoing"' and privilege "does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." (*Zolin*, *supra*, 491 U.S. at pp. 562-563 (citations and emphasis omitted).)

The U.S. Supreme Court has stated the proof needed to justify *in camera* review to look for crime-fraud is lower than that required to determine crime-fraud exists and vitiates attorney-client privilege. (*Id*. at p. 572.) Various circuits have applied different evidentiary standards to determine crime-fraud. These include *prima facie* evidence the client was engaging in illegal or fraudulent activity when he sought legal advice (8th Circuit); reasonable cause to believe the client was using attorneys to further a crime or fraud (9th Circuit); and evidence sufficient for a

prudent person to reasonably suspect crime or fraud (6th Circuit). The standards ping pong between that the crime or fraud be established or presenting probable cause that a crime or fraud has occurred. (*In re Green Grand Jury* (2007 8th Cir.) 492 F.3d 976, 983.)

4) In federal court the process for how searches occur is less protective of privilege than in California, but still gives an attorney under investigation the chance to mark items as privileged for review by the court.

   For guidance on how a review of privileged materials would proceed, one can look to the United States Department of Justice's *Justice Manual*, specifically Section 9-13.420, "Searches of Premises of Subject Attorneys." First, the government should search an attorney's premises only as a last resort. Second, generally the United States Attorney or pertinent Assistant Attorney General must authorize seeking a search warrant for an attorney's premises. As part of justifying a search of an attorney's premises, investigators or prosecutors must state in detail why the search must occur and how it will be conducted using a standard form.

   Third, the government must set forth detailed procedures to protect privilege, including the use of a taint team as investigators seize items. The government must discuss who will review the materials seized. The choices are the court, a special master, or a taint team. Often the government prefers to use a taint team. The government must consider providing a copy of all materials seized to the attorney under investigation or their counsel to let them prepare a privilege log. "[P]roviding copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation." (JM, 9-13.420.)

   As for electronic records, the Department of Justice's *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* states the court, a special master, or a segregated taint team must review electronic files that may contain privileged materials before any are released to investigators. The publication also supports having defense counsel prepare a privilege log, even though the law does not require this step.

   The takeaway: always push for copies and the chance to make a privilege log. This is your chance to discuss with the court what is privileged and try to weigh in on the purported crime-fraud evidence.

5) Whether an attorney is entitled to an adversarial hearing in a criminal matter to determine whether the crime-fraud exception occurs is unclear.

   In a civil case, federal courts likely require granting the attorney asserting privilege an adversarial hearing to present evidence that a crime-fraud has not occurred, before any *in camera* review. (*Green Grand Jury*, *supra*, 492 F.3d at p. 984.) However, federal courts have not stated clearly whether an attorney is entitled to an adversarial hearing before the court embarks on *in camera* review in a criminal case or investigation. (*Id*. at p. 985.)

   You must always try to force an adversarial hearing, or at least, an opportunity to assert privilege before or during *in camera* review. Privilege logs and hearings let you explain to the court what is privileged and put purported evidence of crime-fraud in proper context.

California

1) Privilege continues after law enforcement obtains a search warrant or a civil court finds evidence of a crime or fraud justifying *in camera* review – and don't you ever forget this or stop fighting for it.

   California zealously protects attorney-client privilege. Under California Evidence Code section 915, typically a court "may not require disclosure of information claimed to be privileged […] to rule on a claim of privilege." In *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, the California Supreme Court agreed, holding "a court may not order disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege." (*Id*. at p. 739.) Similarly, in *DP Pham, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, the court held that, "A court, however, may not review the contents of a communication to determine whether the attorney-client privilege protects that communication. The attorney-client privilege is an absolute privilege that prevents disclosure, no matter how necessary or relevant to the lawsuit." (*Id*. at p. 659.)[1] Further, attorney-client privilege "attaches to all confidential communications between an attorney and a client regardless of whether the information communicated is in fact privileged." (*Ibid*.) The privilege "bars discovery of the entire communication, including unprivileged material." (*Id.* at p. 664.)

   Crime-fraud is a narrow exception to the attorney-client privilege, with a far higher standard of proof than required to obtain a search warrant. Further, the burden of proving crime-fraud for specific communications is on the prosecution or the party in a civil suit seeking to breach privilege, not the defense. "The crime-fraud exception is 'a very limited exception to the [attorney-client] privilege' and the 'proponent of the exception bears the burden of proof of the existence of crime or fraud.'" (*Action Performance Companies, Inc. v. Bohbot* (2006) 420 F.Supp.2d 1115, 1119 (quoting *Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174.)

   The party that wants to prove crime-fraud must rely on and present extrinsic evidence; they cannot rely on privileged communications themselves to prove crime-fraud. (*DP Pham*, *supra*, 246 Cal.App.4th at p. 660; *Cunningham v. Connecticut Mutual Life* (1994) 845 F.Supp 1403, 1413.) Instead, those seeking to defeat privilege using the crime-fraud exception must present a *prima facie* case of fraud, using extrinsic evidence. (*People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1768-1769; *Geilim v. Superior Court* (1991) 234 Cal.App.3d 166, 174-175.) This is a crucial difference between California and federal law in determining whether the crime-fraud exception exists.

   In California, we fortunately have explicit language at Evidence Code section 956, subdivision (b), that the crime-fraud exception "shall not apply to legal services rendered in compliance with state and local laws on medicinal cannabis or adult-use cannabis, and confidential communications provided for the purpose of rendering those services are confidential communications between client and lawyer, […] provided the lawyer also advises the client on conflicts with respect to federal law."

2) You have a lot of work to do. You, the attorney, must assert privilege, review all items covered within the scope of the warrant, and prepare a privilege log to be filed under seal with the court.

[1] *Zolin* notes that California's rule that attorneys, not courts, are the main judge of what is privileged is more stringent than Rule 104(a) of the Federal Rules of Evidence, which states the court is determines preliminary questions regarding the existence of privilege. (491 U.S. at p. 566.)

In *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, the California Supreme Court favorably cited *People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1766: '"The fact that the attorney is suspected of criminal activity does not lessen the client's interest in the confidentiality of his or her files, or obviate the privilege with respect to those files.... [A] suspect attorney no less than a nonsuspect attorney is entitled to assert the privilege on behalf of his or her client ...."' (*Id*. at p. 713.)

You must assert privilege and prepare a privilege log. You must have access to the materials seized or under scrutiny – and those who want to read your records must wait for you and the court to complete your analysis. In *State Compensation Insurance Fund v. Superior Court* (2001) 91 Cal.App.4th 1080, a California Court of Appeal ruled, "It will be necessary for the petitioners [attorneys under investigation for crimes] to have access to the seized materials so that they can catalog and number the documents and determine which, if any, are privileged." (*Id*. at p. 1089.) After the attorney can make such a log and objects to disclosure of documents, "the court should then hold an *in camera* hearing to determine the merits of petitioners' claims of privilege." (*Id.* at p. 1090.) last, the court noted that when "the scope of the search is focused on documents that are categorically attorney-client material, it is not unreasonable to request sealing of all documents when they are seized and to later obtain access to the documents to form discrete objections to inform the trial court of colorable claims of privilege." (*Ibid.*)

3) The court has a lot of work to do – and it cannot delegate the final work to a special master.

Once an attorney asserts privilege, the court that authorized a search or other examination of privileged materials "has an obligation to consider and determine claims that materials seized pursuant to a search warrant, from attorneys suspected of criminal activity." *Laff*, *supra*, 25 Cal.4th at p. 720. California Penal Code section 1524, subdivision (c), forbids the court from farming out the final determination of privilege to a special master.

4) The crime-fraud exception does not swallow privilege whole.

When found, the crime-fraud exception is very, very narrow and strictly limited to matters related to the fraud. "A *prima facie* showing of fraud cannot open defendant's files or give plaintiffs carte blanche with respect to attorney-client communications." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1269.) Instead, when crime-fraud is shown, "The documents in question must have a reasonable relation to the ongoing fraud to be discoverable under the crime-fraud exception." (*Ibid*.)

5) None of this should occur behind your, or your client's, back. Ever.

Any decision to invade attorney-client privilege merits careful consideration and an opportunity for all parties to be heard. In *Titmas v. Superior Court* (2001) 87 Cal.App.4th 738, plaintiffs argued the crime-fraud exception justified compelling the deposition of the defendant Titmas's attorneys. (*Id*. at p. 741.) Rather than giving the parties a hearing on Titmas's motion to quash, the court simply denied the motion. (*Ibid*.) The Fourth Appellate District, Division 3, held that when attorney-client privilege is at stake, "the trial judge must accord a full hearing, with oral argument, before considering the revelation of client confidences to the other side." (*Id.* at p. 740.) The court based this ruling on the importance of attorney-client privilege and that, "once lost, [it] can never be retained." (*Id*. at p. 744.) Further, when a party seeks to defeat a claim of privilege because of an alleged exception or waiver, that party must meet that burden, and the party claiming privilege should have a full hearing to defend privilege. (See *id.* at p. 745.) Denying or failing to hold a full hearing in such a situation likely violated due process: "Because

> of basic due process concerns, law and motion judges are always on shaky ground where they 'entirely bar parties from having a say.'" (*Id.* at p. 742, citations omitted.)

Conclusion

Though cannabis law is a rewarding practice, cannabis lawyers must deal with the same practice and ethical challenges every lawyer enjoys – with the added burden of the speed of the growth of the industry, hyper competitive licensing processes that repeat in jurisdiction after jurisdiction, and the specter of the Controlled Substances Act. Cannabis lawyers must take particular care in deciding what clients to represent. Given that license application processes will remain highly competitive for years to come, clients, potential clients, and former clients will cross paths repeatedly, complicating the lawyer's ability to build their book of business while satisfying their ethical obligations. Cannabis lawyers must also balance the temptation to go into business with clients or be paid with ownership. If a lawyer plans to have multiple clients, the lawyer must deal with explaining to new clients how they will treat all clients fairly, despite having a personal financial interest in one.

Last, cannabis lawyers may be especially vulnerable to accusations that their advice falls under the crime-fraud exception to attorney-client privilege. What seems academic or far-fetched to many lawyers can become real to cannabis lawyers. Though hopefully you will never need to know how to respond to an accusation of crime-fraud, you should know what to do in advance, rather than trying to learn while under attack.