



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

## Cannabis Corner: The Pot Lawyer Who Faced Felony Charges

By **Sam Reisman**

Law360 (November 27, 2019, 11:49 AM EST) -- One minute into an interview, Jessica McElfresh asked, "Do you know who I am?"

Any cannabis attorney in the U.S. likely knows who McElfresh is, or at least has heard of her case: a cautionary tale for the burgeoning field of cannabis law. She is quite possibly the first and only attorney to be charged with a felony simply because she advised a marijuana business as a client.



Jessica McElfresh

"There have been lawyers charged in the past, but those were different situations," she told Law360. "Those usually weren't people who were acting as lawyers. They were more directly participating in the actual business itself, like they had become cultivators."

In a case that garnered national attention from the cannabis bar, San Diego prosecutors charged McElfresh with concealing evidence about a marijuana client's operation from inspectors. They also sought a crime-fraud exception to the attorney-client privilege in order to access her files after they raided her office.

The charges were dropped in July 2018, when McElfresh pled guilty to an infraction. She still practices, and in October spoke at a cannabis law conference about how attorneys in the space can shield client communications against prosecutors asserting the crime-fraud exception.

She spoke to Law360 recently to discuss the case against her, what it means for other cannabis attorneys and why she's still in the business. This interview has been edited for length and clarity.

### **First of all, is there anything you're not allowed to discuss about the case?**

No. There are obviously aspects of the entire situation that are privileged, and I think I've made it pretty clear I put a premium on that.

### **What kind of risks should attorneys entering this space expect to take on, and how can they mitigate those?**

What I do not have — to be completely honest with you — is a lot of tips for other people. Because I can tell somebody how to go about safeguarding [privilege] and what to push for and what their duties are. And, truthfully, a lot of the things I'm talking about could come up in a civil context too. It doesn't have to be that you're being charged criminally. You could be in civil litigation, you could be facing an unfair subpoena. In some cases, it might even apply to a bar action. The crime fraud exception is not limited to cannabis.

In terms of overall risks, I would give any attorney thinking about getting into this area of law the same advice I've been giving clients — and for that matter, lawyers — for 10 years: You have to

make certain peace with the difference between federal law and state law. And you have to always be careful and you have to always keep these things in mind. Even more so than any other lawyer. For your clients' benefit and your own benefit. But if you cannot find a way to live with that difference, if it's just going to keep you up every damn night, freaking you out, don't do it. It's not worth it.

You're going to have to accept that some people are going to find this strange or offensive. At times your adversaries or opposing counsel may seek to take advantage of the situation. I've had civil lawyers who are very concerned about opposing counsel threatening them in different ways. I'm not aware of it happening all that much. You have to accept that there's a risk factor or a difficulty factor and you have to decide that you're willing to take that on and live with it.

### **Is there a risk that prosecutors will go after cannabis lawyers or try to access their files, even if they're advising clients within state law?**

When you're talking about state law, lawyers are licensed by various states — generally there are more and more state bar opinions about this. If people are following laws in their states and you're advising them how to follow laws in the states, as well as advising them of what federal law entails, generally your advice will not be deemed, as a blanket rule, subject to the crime fraud exception. And generally the bar should not be disciplining you. Now, those are broad principles. I think the intent is to treat this much the way you treat any other area of law. But it's a new area. It's a complicated one for people trying to reconcile state versus federal law. So yes, I think there is a bit more scrutiny here.

### **Have you continued to represent cannabis clients?**

Never stopped, not even for a minute. If you had asked around, they would have told you I'm one of the single most conservative lawyers they'd ever met in the cannabis space. My nickname was the "Queen of No." I've always hewed to the very conservative, very transparent: documentation up the wazoo. Anything that is gray, you do not do. You do not even get close to the black, so to speak. I've always lived by that, I'm going to continue to live by that. I'm really glad to live in a state that, whatever the complications and flaws in our system, we have a lot more regulation at the state level, as well as at the various local levels. I started doing this nearly 10 years ago. I have dedicated my career to working in and trying to reach that point.

### **How did you get into it?**

I graduated law school in 2009. I had intended to work for the government as a prosecutor. I had interned for an entire year at the DA's office. Needless to say, the government wasn't hiring anyone to do much of anything. After that, I had to try to figure things out like everybody else. I was doing a lot of contract work for criminal defense attorneys. I [began] doing some appearances for an out-of-town attorney who was representing some people being prosecuted in medical marijuana cases, and that was a time when the DA's office here was making a huge push, doing a lot of medical marijuana prosecutions.

I got more interested in the how the law behind the affirmative defense works. It seemed like there was a lot of gray and ambiguity. It was also a time when a lot of local jurisdictions were beginning to talk more aggressively about local licensing. I had some background in land use. My mother was a land use consultant. I had some knowledge of how that system worked.

It was something that, to me, belonged in a regulated civil sphere and did not belong in criminal court. And it was interesting. You don't get a chance to be a part of something that could have a broader effect on society in a really substantial way every day in your career.

### **What have been some of the ramifications of the criminal case against you?**

I can't speak for every conversation others may have had. I can tell you I heard from attorneys across the country, including ones I had never met, with messages of support and being afraid. I'm told it was very widely discussed in continuing legal education programs. People love to send them to me now. I'm not aware of any direct effect that it had on state law or policy.

In the months after it hit, the California Legislature passed a law that modified our evidence code to explicitly state that ... generally providing advice was not going to fall into the crime-fraud exception. I think that bill was already introduced and pending, but [my case] may have been something people raised when they were lobbying the Legislature: "See? This is a great example of why we need this and why we need greater clarity." It's clearly something the industry was aware of. And to the extent the industry lobbied for that bill, I'd be surprised if it didn't come up.

--Editing by Katherine Rautenberg.

---

All Content © 2003-2019, Portfolio Media, Inc.