

Medical Board Says it Won't Investigate Doctors Just for Approving Cannabis use; So why is Tod Mikuriya, MD, Being Punished?

By Fred Gardner

At its Spring meeting the Medical Board of California voted unanimously to issue a "Statement" entitled "California Physicians & Medical Marijuana." It was duly posted on their website and mailed out to the approximately 100,000 physicians licensed by the Board in the July 2004 Action Report.

It opens with good news for doctors who do cannabis consultations:

"The Medical Board of California (MBC) developed this statement because medical marijuana is an emerging treatment modality."

"That in itself is a gratifying acknowledgment that marijuana is a safe and effective medicine," says Frank Lucido, MD, a Berkeley family practitioner who has been urging the Board to confirm the rights of California doctors to recommend or approve cannabis use by their patients.

The Statement goes on: "The Medical Board wants to assure physicians who choose to recommend medical marijuana to their patients, as part of their regular practice of medicine, they WILL NOT [all caps in original] be subject to investigation or disciplinary action by the MBC if they arrive at the decision to make this recommendation in accordance with accepted standards of medical practice. The mere receipt of a complaint that the physician is recommending medical marijuana will not generate an investigation absent additional information indicating that the physician is not adhering to accepted medical standards."

In the years since Prop 215 legalized marijuana for medical use in California, almost all the complaints against doctors who recommend it have come from law enforcement sources and have been "absent additional information." Lucido and other doctors and concerned citizens have pointed out this pattern to the Board and demanded that investigations be triggered only by substantial, unbiased complaints.

Two Board members and two staff members have told O'Shaughnessy's that the July Action Report was meant to reassure doctors who do cannabis consultations. And yet the very same Action Report contains this listing under "Administrative Actions," i.e., among the incompetents, perverts and quacks: "Mikuriya, Tod, H., M.D. (G9124) Berkeley, CA."

What did Mikuriya do and what shall be the status of his license to practice?

"Committed acts of gross negligence, repeated negligence, recommended and approved the use of a controlled substance without conducting a prior good faith examination, and failed to maintain adequate and accurate medical records in the care and treatment of 16 patients. Revoked, stayed, placed on 5 years probation with terms and conditions, including, but not limited to, obtain a practice monitor. Judicial review being pursued."

The Action Report doesn't mention the \$75,000 fine Mikuriya was ordered to pay

The Action Report doesn't mention the \$75,000 fine Mikuriya was ordered to pay to defray the cost of his own investigation and prosecution. Or that he has been denied the right to see patients at his home office in the Berkeley Hills.

"I've had a permit from the city to see patients here since 1970," says Mikuriya ruefully. "The office is on a separate floor from my residence and has its own entrance..."

"Dr. Tod"

Mikuriya, known with affection and respect as "Dr. Tod" to thousands of Californians, is a scholarly, 71-year-old psychiatrist who has spent his entire career studying the medical effects of cannabis. It is unlikely that his persecutors understand his stature.

He grew up in Eastern Pennsylvania and attended Quaker schools. "The Quakers were proprietors of the Underground Railway," he says. "The cannabis prohibition has the same dynamics as the bigotry and racism my family and I experienced starting on December 7, 1941, when we were transformed from normal-but-different people into war-criminal surrogates."

Mikuriya prepped at the George School, then attended Haverford College (briefly), and graduated from Reed. He went to Temple University School of Medicine, where he read through all the pre-prohibition literature on cannabis. He did a rotating internship at Southern Pacific General Hospital in San Francisco; specialized in psychiatry at Oregon State Hospital in Salem; and completed a residency at Mendocino State Hospital in Talmadge. In 1967

he became the first director of non-classified marijuana research at the National Institute of Mental Health. He left when he was instructed to look only for negative effects, and went into private practice.

In 1970 Mikuriya published a report in "Medical Times" on a patient who was using cannabis to reduce her alcohol intake — an early example of the approach now known as "harm reduction."

In 1972 having settled in Berkeley, Mikuriya self-published "Marijuana Medical Papers," an anthology of pre-prohibition journal articles devoted to cannabis.

He was a consultant in '72 to the National Commission on Marijuana and Drug Abuse — known as the Schafer commission — which advocated decriminalization and was ignored by former President Richard Nixon.

Through the long years of cultural and political rollback, Mikuriya served as physician and consultant to would-be reformers, and did what he could to educate the millions of Americans who smoked marijuana but knew nothing about its history as a medicine.

He worked as an attending psychiatrist at Gladman Hospital from 1970 through '91. He was chair of the Department of Psychiatry, Eden Medical Center, Castro Valley (1993-94); and attending psychiatrist at Laurel Grove, Vencor, Alameda County Medical Center, and San Leandro Hospital. He established the first methadone maintenance treatment program in Alameda County.

In the early 1990s, when Dennis Peron opened the first cannabis buyers club in San Francisco in response to the AIDS epidemic, Mikuriya saw "a unique research opportunity," signed on as medical coordinator, and began interviewing patients. For what conditions were people actually using marijuana? In what forms and at what dosages? What results were they reporting? How did this new data compare to reports in the medical literature from the years when cannabis was a legally prescribable drug?

Mikuriya developed a registration form designed to collect and organize the members' anecdotal evidence. It included a list of more than 50 conditions for which cannabis provided relief according to the pre-prohibition literature, updated to include "conditions that people who seemed to be credible had been treating with marijuana."

Based on the data Mikuriya had collected, Peron decided not to limit the initiative he drafted in '95 (which was placed on the ballot as Proposition 215) to a finite list of conditions, but to include the all-important phrase "...and any other condition for which marijuana provides relief."

After Prop 215 won at the polls in November '96, Mikuriya prepared "a protocol for buyers clubs," asking staffers to collect data on efficacy and dosage from as many members as possible. His

Action Report

Medical Board of California

California Physicians & Medical Marijuana

Immediately following the passage of the Compassionate Use Act of 1996, the Medical Board of California published an article in the January 1997 Action Report designed to assist physicians who wished to recommend medical marijuana to their patients. At its May 7, 2004 quarterly meeting, the Medical Board unanimously adopted the following statement on California physicians and medical marijuana, incorporating and expanding upon the 1997 Action Report article. The intent of the board at this time is to reassure physicians that if they use the same proper care in recommending medical marijuana to their patients as they would any other medication or treatment, their activity will be viewed by the Medical Board just as any other appropriate medical intervention. This statement is not intended to establish any standard of practice, nor to articulate a new standard of practice. Rather, it is intended to encourage physicians that when considering whether to recommend marijuana to a patient, they should adhere to accepted standards of medical responsibility.

A Statement by the Medical Board of California — May 7, 2004

On November 5, 1996, the people of California passed Proposition 215. Through this Initiative Measure, section 11362.5 was added to the Health & Safety Code. This law is also known as the Compassionate Use Act of 1996. The purposes of the Act include, in part:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where the medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or

any other illness for which marijuana provides relief; and

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

Furthermore, Health & Safety Code section 11362.5(c) provides strong protection for physicians who choose to participate in the implementation of the Act. "Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes."

(Continued on page 4)

THE MISSION OF THE MEDICAL BOARD OF CALIFORNIA
The mission of the Medical Board of California is to protect healthcare consumers through the proper licensing and regulation of physicians and surgeons and certain allied healthcare professions and through the vigorous, objective enforcement of the Medical Practice Act.

THE MEDICAL BOARD'S JULY 2004 ACTION REPORT featured a statement on "California Physicians and Medical Marijuana." Tod Mikuriya was found guilty of violating practice standards set forth in an earlier Action Report statement. The attorney handling Mikuriya's appeal says the Board is "illegally making policy by issuing statements that amount to 'underground regulations.'"

goal was to transform anecdotal evidence into serious epidemiological data.

The Infamous Chart

For his efforts, Mikuriya (CNN) was ridiculed on worldwide television (CNN) by federal officials. On December 30, Drug Czar Barry McCaffrey, flanked by US Attorney General Janet Reno, Secretary of Health & Human Services Donna Shalala, and director of the National Institute on Drug Abuse, Alan Leshner, mocked Mikuriya's claim that marijuana could be used in treating diverse conditions.

The Drug Czar stood alongside a large chart entitled "Dr. Tod Mikuriya's, (215 Medical Advisor) Medical Uses of Marijuana." (sic content and punctuation). Twenty-six conditions were listed in two columns. One of the conditions was misspelled — "Migranes." Three of them — "Removal of Corns," "Writer's Cramp," and "Recalling Forgotten Memories" — never appeared in the extensive list of conditions Mikuriya had advised cannabis buyers clubs to be tracking.

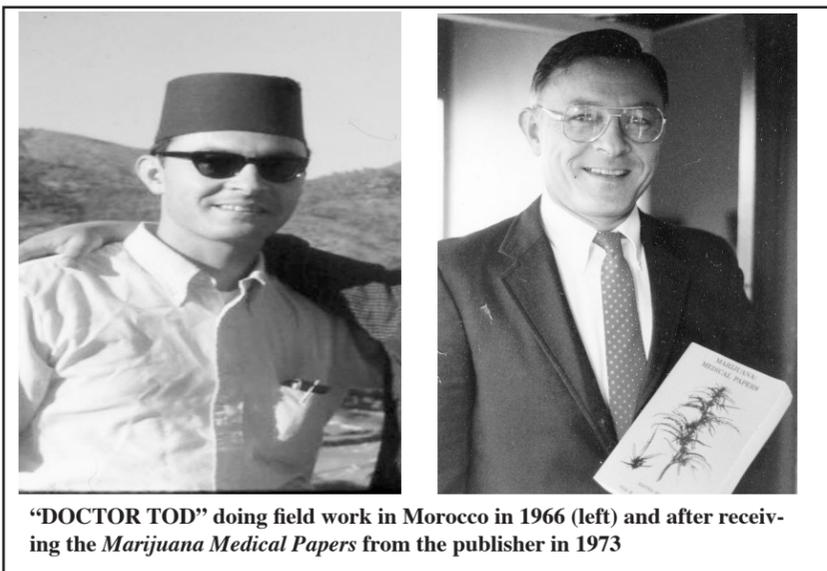
McCaffrey told the media, "This isn't medicine, this is a Cheech and Chong show." He and Reno warned that the use of marijuana violated federal law and would lead to reprisals, including the loss of prescription-writing privileges, for any doctor who recommended it to patients. Reno said that prosecutors would focus on doctors who were "egregious" in recommending marijuana.

Mikuriya commented at the time, "As doctors become more fearful, I'll obviously get more and more patients who are using cannabis or are considering it. Will that make it seem that there's something 'egregious' about my practice?"

He called the McCaffrey chart "a crude dirty trick — the kind of disinformation the U.S. military put out during the Vietnam War. Only in this case the 'enemy' is the people of California.

"What's saddest and most ominous is that the feds are not willing to challenge this new law on the basis of what it says. They could have chosen a condition that they consider to be in some gray area

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"DOCTOR TOD" doing field work in Morocco in 1966 (left) and after receiving the Marijuana Medical Papers from the publisher in 1973

Medical Board v. Mikuriya *from previous page*

—say, insomnia, or colitis— and questioned the appropriateness of marijuana as a treatment. But instead they chose to make up some ludicrous falsehoods.”

The chart was prepared by McCaffrey’s “Special Assistant for Strategy,” David Des Roches, a West Point graduate. His source was a version of Mikuriya’s “Marijuana Medical Handbook,” posted on a website. Des Roches acknowledged culling conditions with an eye towards “showing how ludicrous some of them were.”

What an irony! Documenting the diverse conditions for which marijuana provides relief is one of Mikuriya’s major contributions. His hypotheses as to why marijuana is so widely effective are taken seriously by the International Cannabinoid Research Society. And the narcs think he’s a scammer!

Cascade of Cases

Mikuriya was one of the very few doctors who publicly supported Prop 215. (It was opposed by the entire medical establishment, including the

People who had been self-medicating with cannabis and now wanted to do so legally visited his office from all over the state.

California Medical Association, former Surgeon General C. Everett Koop.) After it passed, except for AIDS and cancer specialists, very few California doctors, especially in the rural counties, were willing to approve cannabis use by their patients. Mikuriya became known as the doctor of last resort. People who had been self-medicating with cannabis and now wanted to do so legally visited his office from all over the state, and he spent many week-ends flying off to underserved communities, where he would see 20± patients a day at ad-hoc clinics.

During the first two years that marijuana was legal, i.e., through 1998, Mikuriya wrote some 4,000 letters approving cannabis use—an estimated 1/3 of the total written by all the doctors in California. Since then the number of doctors writing approvals has gradually increased, and 15-20 have begun specializing in cannabis consultations. Most of the specialists are members of a non-profit founded by Mikuriya in 1998, the California Cannabis Research Medical Group. [O’Shaughnessy’s is the CCRMG journal. Opinions expressed in signed articles are the author’s, not necessarily the CCRMG’s.]

Mikuriya’s supporters contend that not just the feds but law enforcers at the state and local levels have been out to get him because they opposed Prop 215, they resent his role in getting it passed and implemented, they resent not being able to prosecute marijuana growers and users as easily and successfully as they once did, they accept the California Narcotics Officers Association line that marijuana has no medical value, and they don’t respect the will of the people.

In 1997 the top aide whom Lungren had put in charge of dis-implementing Prop 215, Senior Deputy Attorney General John Gordiner, took the highly unusual step of sending an “Update” to all 58 California district attorneys asking them to notify him of any cases involving Mikuriya and one other doctor well known for doing cannabis consultations (Eugene Schoenfeld).

In 1998 the Medical Board, responding to complaints from a Napa County sheriff’s deputy, began investigating Mi-



Drug Czar Barry McCaffrey and HHS Secretary Donna Shalala ridicule “Tod Mikuriya’s... Medical Uses of Marijuana” at a Washington, D.C. press conference Dec. 30, 1996.

kuriya’s treatment of W.H, a bedridden, quadriplegic multiple sclerosis patient in his 40s. Mikuriya had paid a house call at the request of W.H.’s conservator, examined W.H., and formally approved his cannabis use. Neither patient nor doctor wanted to release the records but the Board subpoenaed them. A formal Accusation was filed in July 2000. Mikuriya was confident that he had acted properly and his lawyers were sure that he’d prevail.

Then, according to attorney Bill Simpich, “the hardcore anti-215 crowd in the AG’s office realized they were going to lose and decided to round up all the reports filed by DAs and cops who were ‘sore losers’ in Prop-215 cases and seek the records of the victorious patients.” Simpich says that Senior Investigator Tom Campbell built the Medical Board’s Accusation against Mikuriya by contacting rural California law enforcement officials who had lost marijuana possession and cultivation cases involving individuals whose cannabis use had been approved by Mikuriya.

As noted, the Board’s investigation into Mikuriya’s practice was based entirely on complaints from police officers, sheriffs, and district attorneys. Records were subpoenaed after the doctor and patients refused to provide them. The file swelled to 46 cases, but not a single patient alleged that Mikuriya had provided inadequate care, nor did any complainant allege that a patient had been harmed.

Mikuriya’s files were sent to the Board’s expert witness, Laura Duskin, MD, a psychiatrist employed by Kaiser. After reading 16 of the cases, Duskin concluded that the pattern of inadequate care was so consistent and blatant that there was no need to cite all 46. An “amended accusation” was filed in June 2002 alleging that Mikuriya had provided substandard care to 16 patients.

At a settlement conference in July, 2003, Mikuriya was told that if he did not accept the AG’s offer on behalf of the Board—seven years’ probation, remedial training, another doctor monitoring his practice, and fines in excess of \$30,000—a charge would be added stemming from his treatment of an undercover officer. As Mikuriya recalls that encounter, “A man I now know to be Detective Steve Gossett of the Sonoma County Task Force infiltrated a clinic in Oakland [organized by a third party]. He presented fraudulent I.D. as ‘Scott Burris’ and made deceptive statements on his intake form and to me about recurrent shoulder pain, which he said was relieved by cannabis. I recommended physical therapy and advised him to vaporize instead of smoking.” Mikuriya declined the deal and the Attorney General’s office kept its word by filing a “second amended accusation” adding the charge involving

Detective Gossett.

Through the looking glass

The Attorney General’s office prosecutes doctors on behalf of the Medical Board. To present the case against Mikuriya, AG Bill Lockyer assigned Deputy AGs Larry Mercer and Jane Zack Simon, who had been members of a task force created by Lungren (and headed by Gordnier) to limit the implementation of Prop 215. Mercer and Simon, with Gordnier, had prosecuted Dennis Peron in 1998.

Mikuriya’s hearing got underway Sept. 3 in a fluorescent courtroom at the state office building in Oakland. It was presided over by Administrative Law Judge Jonathan Lew, a trim, soft-spoken man with a businesslike air. The AG’s case relied entirely on the testimony of Laura Duskin, the expert witness.

Duskin said she had read 16 of Mikuriya’s patients’ records (which had been subpoenaed by the Medical Board after the doctor refused to hand them over) and determined that he had failed each patient—not by approving their use of cannabis, but by providing letters of approval stating that they were under his “supervision and care” for their given conditions. In the Court of Common Sense such phrasing—which implies an ongoing relationship instead of a one-time consultation—would be considered, at worst, a semantic error. Laura Duskin defined it as “an extreme departure from the standard of care.”

“From day one in medical school they teach us, ‘If you didn’t write it down, it didn’t happen.’” —Laura Duskin

In some of the 16 cases, according to Duskin, Mikuriya had failed to conduct an adequate exam, specify a treatment plan, or arrange proper follow-up. Duskin said she could adduce all this from the files because, “From day one in medical school they teach us, ‘If you didn’t write it down, it didn’t happen.’” She quoted this literally false dictum as if it were some sanctified truth, as if the paperwork really is more important than the actual interaction between doctor and patient. She never contacted any of the patients to question them about their treatment by Mikuriya.

The Cult of Documentation

Laura Duskin went to medical school at UC San Francisco. She did a residency in psychiatry there, and retained a UCSF affiliation while working at San Francisco General and, for 10 years, at Laguna Honda Hospital. She taught interviewing techniques to resident physicians at UCSF and still gives “the occasional lecture,” she said.

She is the personification of the San Francisco medical establishment in her attitude towards marijuana. Although she/they never challenged its prohibition, she/they now claim to believe in its relative safety and limited efficacy as medicine.

“Marijuana can be very helpful for certain conditions for certain patients,” Duskin testified (with Mercer and Simon nodding, as if in agreement).

On at least eight occasions during her day and a half on the stand, Duskin repeated her fair and balanced view. She said she had been favorably impressed by a talk she’d heard Mikuriya give in 1997 at a conference of addiction specialists, and also by his files on nine nursing-home patients that the Medical Board had once assigned her to review as part of a separate investigation.

There wasn’t the slightest self-critical edge to Duskin’s testimony. She didn’t acknowledge that she had been taught nothing about cannabis—zero, zip—during her pharmacy classes at UCSF. Nor did she reveal that during her years at Laguna Honda patients were denied access to cannabis.

Duskin acknowledged that she has never issued an approval for a patient to use marijuana, but she hopes that someday somebody will ask her to do so. (As Public Information Officer for the San Francisco District Attorney, I used to hear bitter complaints from Laguna Honda residents who had been punished for copping a smoke on the grounds. If only I’d known, I could have turned them on to Laura Duskin!)

Lying yes, swearing no

The prosecution called only one other witness, Steve Gossett, a deputy sheriff who heads Sonoma County’s marijuana investigations unit and is known as a zealous drug warrior. Gossett testified that he had visited Mikuriya at an office in Oakland in January ‘03 and obtained a letter of approval by claiming to suffer from stress, insomnia, and shoulder pain that had kept him from holding a job for several years. The stress, Gossett said he’d told Mikuriya, was exacerbated by a pending marijuana possession case (54 grams).

Gossett testified that he’d learned from a woman named Cathy Dobshinsky (who had been busted for cultivation along with her husband) that they had arranged to get their letters of approval updated at an office in Oakland “by simply paying 200 dollars cash and providing a valid California drivers license or medical card.”

Gossett said the only reason he’d visited that Oakland office was in connection with the Dobshinsky case, i.e., he had not targeted Dr. Mikuriya. But his cover story was concocted as if to confirm the thing about Mikuriya the Drug Warriors resent most of all: he even issues approvals to citizens who are facing charges. Gossett claimed that his reference to years of unemployment was meant as a hint to the doctor that he was a drug dealer!*continued on next page*

The Medical Board of California, which licenses physicians and certain other healthcare providers, has 21 members, 12 of them MDs, appointed by the governor to terms of two to four years. Its Enforcement Division employs more than 100 career investigators—gun-carrying “peace officers”—whose righteous mission is to roust quacks, lechers and profiteers from the medical profession.

Mikuriya Case from previous page

"I lied on a lot of issues and I told the truth on a lot of issues... It's hard to remember lies."

—Detective Gossett

In the course of testifying about the fake history he had provided to Mikuriya, Gossett said "I lied on a lot of issues and I told the truth on a lot of issues... It's hard to remember lies."

Which caused someone in the vicinity of the defense table to mutter "God damn!"

Which caused Gossett to stop talking and look pained. When asked by the judge to continue, Gossett said somberly, "Somebody just took the Lord's name in vain." After a few beats he gathered himself and resumed his recitation of the non-facts.

Denney for the Defense

On Friday, Sept. 5 the defense called its expert, Philip Denney, MD, an experienced family practitioner who, starting in 1999, had specialized in seeing cannabis patients.

Denney determined that Mikuriya had elicited enough information to justify approval of continued cannabis use.

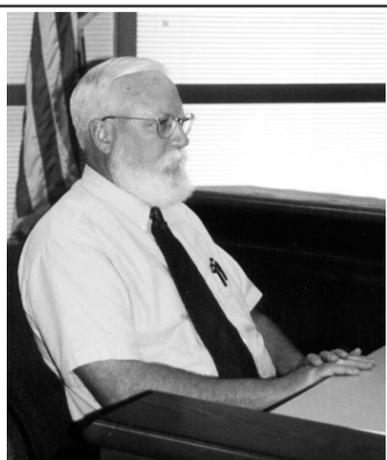
Denney said he'd reviewed all the relevant files and determined that Mikuriya had, in each case, elicited enough information to justify approval of continued cannabis use. (All the patients, including Gossett, told Mikuriya that they had been self-medicating prior to seeking his approval.)

Denney defined Mikuriya's as a "medical cannabis consultation practice" in which "patients are seeking the answer to one specific question: 'Do I have a medical condition for which cannabis might be a useful treatment?'"

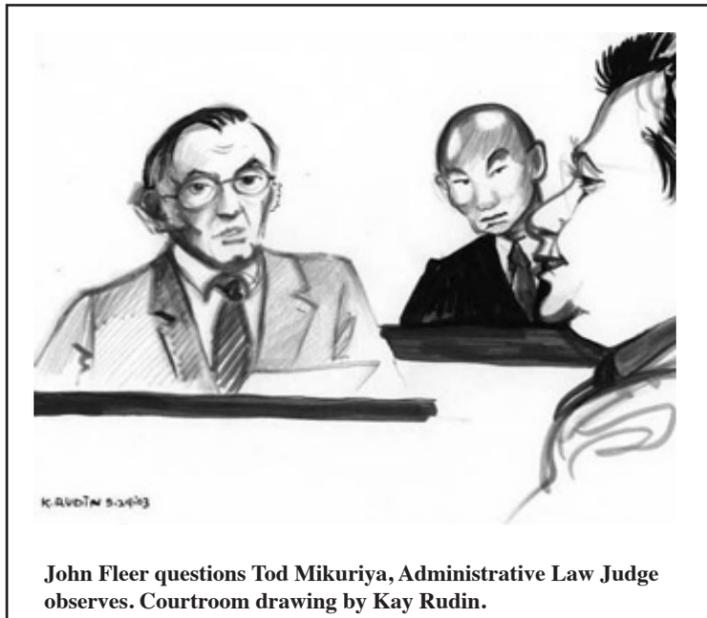
He faulted the Board for not issuing guidelines relevant to such practices.

Denney testified that the records of at least one other Northern California medical-cannabis consultant [Dr. Marian Fry] had been seized by government agents, and that the threat of confiscation was "a good reason for noting the minimum amount necessary" on patients' charts. Denney said he was "scared to death" by the prospect of reprisals from law enforcement as a result of his support for Mikuriya.

But he exuded confidence intellectually. He said he kept up with developments in the field of cannabis therapeu-



PHILIP A. DENNEY, MD, testified that in a "medical cannabis consultation practice" such as Mikuriya's, "patients are seeking the answer to one specific question: 'Do I have a medical condition for which cannabis might be a useful treatment?'"



John Fler questions Tod Mikuriya, Administrative Law Judge observes. Courtroom drawing by Kay Rudin.

tics, and had monitored its use by some 7,500 patients. Denney explained that the cannabis plant contains active ingredients other than THC, and that Duskin's definitions of Marinol as "synthetic marijuana" and "a pharmaceutical form of marijuana" were inaccurate. He said that the Medical Board's classification of cannabis as a "dangerous drug" was "scientifically invalid."

Legal Aid

Mikuriya got indispensable help from John Fler, the lawyer provided by his malpractice carrier, Norcal. (Doctors are covered for up to \$25,000 worth of dealings with the Medical Board as part of the standard policy). Over the years, Fler had seen numerous cases in which California doctors did not provide adequate care, came on to patients, defrauded them, and otherwise committed violations the Medical Board has every reason to prosecute. Fler continued defending Mikuriya after his reimbursement from Norcal ran out because his review of the files and discussions with his client had convinced him that Mikuriya been unfairly targeted.

Bill Simpich handled the cross-examination of Officer Gossett for the defense. Susan Lea questioned the nine patients who appeared for the defense to refute the allegation that Mikuriya had provided substandard care.

Patients' Testimony

Each patient who testified described Mikuriya as a thorough, empathetic, and helpful consultant who never passed himself off as a primary care provider. Each confirmed that s/he had been self-medicating with cannabis before seeking Mikuriya's approval to do so.

- First to testify was D.K., a middle-aged woman from Humboldt County who walked and spoke slowly and with obvious effort. At 21 she'd suffered a stroke brought on by the combination of smoking cigarettes and taking birth-control pills. ("The pill" was originally approved by the FDA in a dosage many orders of magnitude greater than required for efficacy. A safer formulation was introduced quickly in the U.S., less quickly in South America.)

D.K.'s enunciation may not have been crisp, but what she had to say was eloquent. "None of you have ever had a cerebral hemorrhage. I'm always the wrong one, the one who doesn't get the joke... I get feeling like I'm up against a wall. A couple of puffs and I can come back to myself, I can grip reality again." D.K. said she first consulted Mikuriya in June, 1998. "He had been recommended to me as a compassionate doctor... I was totally honest with him. I had discovered

for myself that marijuana helped more than anything. And I don't need more and more -the same amount works!"

Mikuriya suggested that she substitute cannabis leaf for tobacco.

D.K. testified that Mikuriya had written her a prescription for a neuropsychiatric evaluation, but it had been confiscated along with other papers in her husband's possession when he was busted for cultivation. Mikuriya had also urged her to quit or reduce her cigarette smoking, and had suggested that she substitute cannabis leaf for tobacco. "And it worked," D.K. reported. She mimed hand-rolling a joint and drawing on it as she explained "You get to do the same thing with your hands, and with your mouth..."

Assistant AG Simon asked, on cross-examination, if D.K. had obtained from Mikuriya a second prescription for a neuropsychiatric evaluation. D.K. replied as if Simon was the slow one and had missed the key point: "It got taken by the cops when they took our marijuana!"

D.K. also testified that she'd had four follow-up visits with Mikuriya over the years, and that he'd billed her on a sliding scale.

Prior to the next patient's swearing in, Judge Lew commented that he'd never had a case in which patients's names had been kept from him. Simon said, "We often have cases where patients names aren't used -but of course they never testify." Which shows how far removed from reality the Medical Board's procedures have become. Why shouldn't patients be testifying about mistreatment by physicians? The Mikuriya case is very unusual in that no patients contend they were victimized. Quite the contrary -the alleged victims are coming forward to say "Thank you, doctor."

Other doctors had given her "medicines that didn't help. They put me out and deprived me of feeling in control."

- D.H., another middle-aged woman who didn't look as if her life had been a bed of roses, testified that she'd found on her own that cannabis provided relief for severe itching and stress headaches "so bad I can't even function." Tests couldn't determine the causes of her problems. Other doctors had given her "medicines that didn't help. They put me out and deprived me of feeling in control." She'd brought Mikuriya records

from her previous doctors and told him that when she smoked cannabis, "the itching is less and I don't go to sleep with headaches." Mikuriya gave her an approval for cannabis and taught her a method of rolling the shoulders to reduce headache-inducing tension. She said she couldn't see him again "money-wise."

On cross, Simon asked D.H., "Did you ask Dr. Mikuriya if there was anything you should do about the itching?" -ignoring the woman's testimony that cannabis had been an effective treatment.

The prosecution hoped to show that Mikuriya provided substandard care by not pushing the available corporate products. It so happens that California doctors who are monitoring their patients's cannabis use are hearing reports of efficacy in the treatment of pruritis (itching)!

Because the cannabis specialists are collecting data to which the medical establishment has been unreceptive, it is the establishment doctors who are, in many instances, providing outdated, sub-standard care.

Because the cannabis specialists are collecting data to which the medical establishment has been unreceptive, it is the establishment doctors who are, in many instances, providing outdated, substandard care. The Mikuriya case takes us through the looking glass.

- R.B. a 30-something man with black hair and Buddy Holly specs, had been incapacitated by nausea, vomiting and dizziness. His Kaiser doctor conducted tests and diagnosed severe acid reflux, but couldn't come up with a cause or a cure. R.B. testified, "I lost my job because I was sick all the time, and then I lost my health insurance because I was unemployed... I spent a lot of time just rolled in a ball... I was ready to off myself."

"When you call Kaiser, a nurse takes your info and they call you back and you pick up some medicines," said R.B.

He first sensed the medical potential of marijuana after using it socially. He learned more via the Internet, he said, but was concerned about its addictive potential. Mikuriya spent more time with him than any doctor he'd seen. "When you call Kaiser, a nurse takes your info and they call you back and you pick up some medicines," said R.B., accurately describing the REAL standard of care provided by the medical establishment.

- E.K., a middle-aged Christian Scientist, listed his problems as insomnia, hypertension, and back pain when he saw Mikuriya in February, 1997. Except for the Army doctors who'd declared him 4F, he hadn't visited a doctor since childhood. He had self-medicated with cannabis for years. He'd sought a letter of approval from Mikuriya so that he could ingest THC without violating the terms of probation. E.K. (who also has cognitive problems) said Mikuriya had spent an entire morning with him and wound up prescribing Marinol.

Assistant A.G. Larry Mercer tried to imply that because E.K. had no other

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Mikuriya Case *from previous page*

doctor, Mikuriya was his primary-care physician. E.K. explained that it was his choice not to see doctors, and he only consulted Mikuriya to legalize his use of THC.

Mercer asked if E.K. ever tested his blood sugar “by pricking your finger.” E.K. looked confused. “Did you ever prick your finger to measure your blood sugar?” Mercer repeated. E.K. looked at the red-faced prosecutor carefully and asked, “Are you a doctor?”

- Next came R.H., your basic American alcoholic working man in his 60s, broken down physically and beyond fear. In 1997 R.H. was on probation — for cultivating three plants! — and couldn’t sleep. “I must have slept 100 hours in those eight months,” is how he put it. “Nothin’ worked. Cannabis worked. It ain’t no miracle but it sure helps. It just makes things a little better and I can sleep at night.”

On cross-examination Mercer inquired about Mikuriya’s billing practices. R.H. testified that he paid \$120 on his initial visit but follow-ups had

“He helped me! And you’re trying to screw him!!!”

been free.

“What are you doing to this guy, anyway?” R.H. asked Mercer, whose face reddened. “He helped me! And you’re trying to screw him!!! Even my regular doctor at Kaiser told me to smoke as much weed as I wanted, off the record. He wouldn’t give me a letter because he didn’t have enough guts!”

Mikuriya had noted on R.H.’s chart that he drank 8 to 10 cups of coffee a day. Did Mikuriya approve of that, Mercer probed? “He told me I should stop, but I didn’t,” said R.H., non-compliant to the end.

- J.C., a woman in her early 20s, had been severely anorexic since childhood — a response to sexual abuse by a relative, she testified. She was throwing up five, six, seven times a day. “One time I fell in the shower and couldn’t get up, I was too weak.” Her obstetrician advised that if she didn’t eat, the baby wouldn’t live and she might not either. She was prescribed antidepressants. She discovered on her own that marijuana made food palatable and enabled her to keep it down. She informed her primary-care physician who, J.C. said, “was so scared of the law, the cops, and the medical board” that he wouldn’t write her a letter of approval. Only Mikuriya, whom she consulted in December 1998, was “willing to make me legal.”

“The saddest part is that we have to be paraded out like this and have our private lives exposed.”

J.C.’s testimony evoked tears from a spectator who whispered, “The saddest part is that we have to be paraded out like this and have our private lives exposed.”

J.C. had brought with her an inch-thick stack of medical records, which she said Mikuriya reviewed when she consulted him. The defense also called J.C.’s mother, whose testimony about harassing visits from the local cops was cut short by prosecution objections on grounds of relevancy. Mercer had a mantra: “The question is what Dr. Mikuriya did, not what law enforcement did.”

Also accompanying J.C. were her



Deputy AGs Jane Zack Simon and Larry Mercer prosecuted medical-marijuana cases under former Attorney General Dan Lungren. Their assignment to prosecute Mikuriya suggested that AG Bill Lockyer was unwilling or unable to change the Prohibitionist orientation of his office.

husband and their healthy-looking four-year old boy. The Medical Board had been keen to name J.C. in the Accusation because she was pregnant and a minor when Mikuriya saw her.

There was a moment of levity when the little boy’s handheld computer game beeped. Judge Lew looked sternly at Mikuriya, whose cell phone had gone off twice during the course of the proceedings. “It was the Gameboy,” said Dr. Tod, swiveling to point at the guilty little towhead.

- S.F. was also a minor when she saw Mikuriya in 1999. From the age of 12 she had suffered from migraine headaches. She first smoked mj with some girlfriends when she was 13, and soon associated it with relief from migraines.

“Why should I spend time in juvenile hall if I’m not really a criminal?”

She’d had an abortion at 15, after which the migraines and her menstrual cramps seemed more severe. Marijuana provided relief. S.F.’s father, who had raised her after her mom split when she was five, was also a migraine sufferer and had used marijuana to reduce the pain. When she decided to seek an approval from Mikuriya — reasoning, “Why should I spend time in juvenile hall if I’m not really a criminal?” — her father accompanied her.

- K.B. looked like a rugby player — a big, well-muscled man in his 40s with long blond hair. He’d consulted Mikuriya in August ’98 after his back was injured in a car crash. He’d brought documentation of his degenerative disk disease (narrowing of space between L4 and L5) and reported that he couldn’t sleep when he didn’t have cannabis because his legs would “jump.” K.B. said he could feel the muscles seizing up and going into spasm.

Another doctor had prescribed Valium which K.B. took only once; he hated the effect. “I don’t really believe in taking narcotics,” he testified.

K.B. had read extensively on the topic of cannabis as medicine, including the voluminous Institute of Medicine Report. Why had he consulted Mikuriya? “He was the world’s expert, so why not go to the best?” On cross it emerged that Mikuriya had provided four follow-up consultations, and they were all face-to-face.

- F.K. a disabled 66-year-old Navy vet, testified that he discovered the medicinal effects of cannabis in the early 1970s. “It relieved my back pain

and allowed me to continue my dry wall work.” He later used it to control a tendency to binge on alcohol. After Prop 215 passed, F.K. asked for a letter of recommendation from a Veterans Administration hospital doctor, who told him to consult Dr. Tod Mikuriya... F.K. was the last patient called by the defense, and his cross examination — after it was established that F.K. paid on a sliding scale — was Mercerfully short. It had not been an easy task trying to trip up and discredit and find holes in the stories of these people who described their encounters with Mikuriya in such consistent yet individual terms.

Mikuriya’s Testimony

Mikuriya took the stand on Sept. 9, the last of five days that had been set aside for the hearing. Proceedings were broken off and resumed Sept. 24.

Guided by questions from Fleer, Mikuriya addressed every point raised by Laura Duskin’s critique of his files. She had found an “extreme departure from the standard of care” every time Mikuriya issued an approval letter stating that a patient was under his “supervision and care” for the given condition(s). Mikuriya said he’d lifted the phrase verbatim from a California Medical Association advisory letter sent to doctors after Prop 215 changed the law.

The exchanges took on a pattern.

Mikuriya was cross-examined by Mercer. The exchanges took on a pattern. Had Mikuriya taken Patient A’s blood pressure? No. Had he checked Patient B’s right-shoulder range of motion? No... Occasionally Mikuriya would throw in “That’s beyond the scope of the consultation.” Or, “My role is to establish whether he had a condition that would qualify him to use cannabis under Health & Safety Code 11362.5.”

Before Mikuriya stepped down Administrative Law Judge Jonathan Lew asked: “If there were a finding that your practice standards should be modified, would you be willing to do so?”

Mikuriya said “Absolutely.” He has

been urging since 1997 that the Medical Board issue guidelines for practices such as his. His lawyers contend that the Medical Board made an illegal leap in applying statutes that pertain specifically to “prescribing... dangerous drugs” to a physician approving a patient’s use of cannabis.

“Repeted Gross Negligence”

In late January 2004 Judge Lew issued his decision — promptly ratified by the Medical Board — that Mikuriya had committed “gross negligence” by repeatedly “violating the accepted standard of care.” Lew relied, as had Laura Duskin, on the authority of a policy statement issued by the Medical Board in its January 1997 Action Report. It stated:

“While the status of marijuana as a Schedule I drug means that no objective standard exists for evaluating the medical rationale for its use, there are certain standards that always apply to a physician’s practice that may be applied. In this area, the Board would expect that any physician who recommends the use of marijuana by a patient should have arrived at that decision in accordance with accepted standards of medical responsibility i.e., history and physical examination of the patient; development of a treatment plan with objectives; provision of informed consent, including discussion of side effects; periodic review of the treatment’s efficacy and, of critical importance especially during this time of uncertainty, proper record keeping that supports the decision to recommend the use of marijuana.”

Mikuriya had objected to this guideline from the time the Board issued it. In 1998 he and nine like-minded colleagues formed the California Cannabis Research Medical Group (CCRMG) and drafted their own “minimum practice standards” based on the unique real-world situation they were facing — tremendous pent-up demand by Californians who had been self-medicating safely and effectively with cannabis but who were unwilling to seek or unable to get approval from their regular doctors.

In March 2003 Mikuriya and Frank Lucido formally asked the California Medical Association to adopt the CCRMG minimum practice standards and to lobby the Medical Board to follow suit. (The Board’s 1997 “statement” had been drafted with CMA input; but since then the CMA had abandoned its opposition to California’s medical marijuana law.)

At its 2003 annual meeting the CMA adopted a modified version of the CCRMG minimum practice standards, and delegated its lawyers to work with the Medical Board on revising its 1997 statement. After several meetings of a joint CMA-Medical Board task force, an agreement was reached; but at the 11th hour, Deputy AGs Mercer and Simon joined the task force and the agreement fell apart.

At the Board’s Spring 2004 meeting, when the wording of the statement on medical marijuana that would appear in

continued on next page

“Minimum practice standards” adopted by the California Cannabis Research Medical Group for physicians recommending marijuana under Health & Safety Code section 11362.5

1. The initial examination is “face to face,” in person, confidential, and live. Follow up may be video, photographic, telephonic, or email.
2. The examination is memorialized with elements of: Name, sex, birthdate, social security number, address, phone number, date of examination, ICD-9-CM, DSM-IV TR Diagnoses.
3. Documentation supporting the diagnoses.
4. Compliance with the Health Insurance Portability and Accountability Act where required.

Mikuriya Case *from previous page*

the July Action Report was approved, the CMA representatives refused to sign on.

Mikuriya Will Appeal

Mikuriya supporter John Entwistle, using the web, uncovered Judge Jonathan Lew's association with PowerHouse Ministries, a Christian outreach group that works with prisoners and their families. The Powerhouse line on marijuana — that it's strongly addictive — is contradictory to Mikuriya's. According to the PH website, "Nobody likes slavery. And no one wants to be a slave. Yet, everyday in our community people 'awake' to find that they have become enslaved to some substance. For some it's marijuana, for others crank or alcohol or all three!... For people who want to get their lives straight again, Powerhouse offers a series of classes about substance addiction called Turning Point. These classes teach you about yourself and your addictions. They offer the only real hope for mankind — a changed life because of meeting Jesus Christ."

Susan Lea tried but failed to get a rehearing based on Judge Lew's concealed bias.

Mikuriya has hired an appeals specialist, Charles Bond, to challenge the Board's verdict in Superior Court. Bond says there are ample grounds. All the Board's evidence against Mikuriya was produced by subpoenaing patients' files. The appellate court's ruling in the *Bearman* case has been published and can be cited as precedent. Common sense suggests that it should apply to Mikuriya, who initially refused to turn over his patients' records to the Board, and did so only after they were subpoenaed. If the evidence produced by those subpoenas was inadmissible, there would have been no case against Mikuriya.

Meanwhile Mikuriya has resumed practice in a leased "suite" on the second floor of a mall on San Pablo Ave., conveniently located above Trader Joe's.

Meanwhile Mikuriya has resumed practice in a leased "suite" on the second floor of a mall on San Pablo Ave. — 513 El Cerrito Plaza — conveniently located above Trader Joe's. Although his leg is in a cast, he's seeing patients two or three days a week and trying to stay on the sunny side. "The new office is a short walk from the BART station and the bus stop on San Pablo, and right off the freeway," he says. The phone number is 510-525-1278.

Being monitored by a colleague was one aspect of his punishment that Mikuriya considered tolerable because Frank Lucido had agreed to be the monitor. (Monitoring a physician entails reviewing his/her charts every month and discussing procedures as needed.)

The Medical Board enforcement officer assigned to supervise Mikuriya's probation, Craig Leader, initially raised no objection to Lucido. But in mid-July Leader phoned Mikuriya to say that the arrangement was unsatisfactory. Mikuriya says he asked why and was told that Lucido "would be biased." [Frank Lucido is a physician in good standing with the Medical Board, has offices in Berkeley, and experience with cannabis-using patients. Anybody who knows him knows that he's conscientious and would take his responsibilities as a monitor seriously.]

Mikuriya says, "I thought it odd that after telling me Frank Lucido would

be biased, Leader said 'Oh, and Tom Campbell says hello.'" Campbell is the Medical Board investigator who built the case against Mikuriya.

Mikuriya told Leader he didn't have \$75,000 to cover the fine. Leader asked for three years' worth of financial information, which Mikuriya is reluctant to provide. "The Medical Board has shown that they have lower standards of confidentiality," says the doctor.

"It is very unusual for the Board to demand payment before the end of the probationary period," according to Charles Bond.

"It is very unusual for the Board to demand payment before the end of the probationary period," according to Charles Bond. "I double-checked with other attorneys and the California Medical Association. The Board doesn't expect payment at the outset," he says. "Tod is getting special treatment."

Attorney John Fleer thinks the Board's decision to fine Mikuriya and put him on probation "shows everyone's unease with imposing the standard they're imposing. In most cases involving the medical board, or any state board, where you have even one extreme departure, let alone this many, it would follow that they'd revoke a license. That the order doesn't do that shows some recognition that this is a developing issue. Dr. Mikuriya wasn't found to be operating in bad faith — just wrong about the standard he had to follow."

Mikuriya's appeal can be filed in Superior Court either in Alameda County, where the hearing was held, or in Sacramento County, where the Medical Board is headquartered. A Superior Court judge will read the entire record and decide the matter anew. "It's not just a question of saying 'Was there substantial evidence to support what the [administrative law] judge did?' It's a trial de novo, based on the hearing record," Fleer explains.

In other words, the judge will read what Laura Duskin said was the proper standard of care, and what Mikuriya and Denney proposed, and evaluate their reasoning, and give weight to who was in a position to know best. "It's not unusual for there to be two different standards being proposed by two different experts," says Fleer, who remains hopeful. "What the Board has done is accept the testimony of a physician who doesn't do cannabis recommendations over that of two who do. There might be judges who think that's an absurdity."

Fleer also used "absurdity" to characterize the \$75,000 bill for cost recovery the board has ordered Mikuriya to pay. "It's a stunning amount for investigative and prosecution costs. It shows how much effort was put in by the state to dredge up a case where there was no complainant," says Fleer.

Bond, who will be handling the appeal, thinks he has two other strong arguments. The 1997 Action Report "Statement" on which Duskin and Lew relied in deciding that Mikuriya violated the standard of care cannot be used as the basis for punishment, Bond says, because "it was not adopted in compliance with California's Administrative Practices Act. That would have required public hearings, which were never held. The Board's 1997 'Statement' is an underground regulation, and does not have any legal impact."

Bond was appalled by the issuance



WISH WE WEREN'T HERE: Elvy Musikka with the children of Mollie Fry and Dale Schafer: Geoffrey, 17, Cody, 12, and Caroline, 14, heard Fry challenge the Medical Board's obtaining her patients' files from the Drug Enforcement Administration

Medical Board Got Records From DEA Illegally, Says Fry

California Assemblywoman Hannah-Beth Jackson and State Sen. John Vasconcellos moved Aug. 11 that the Joint Legislative Audit Committee determine whether the state medical board has been investigating doctors for no other reason than that they specialize in cannabis consultations. At least nine of the 15 cannabis consultant MDs have been investigated, and it's a costly, time-consuming, stressful ordeal no matter what the outcome.

The request for an audit fell one vote short because Sen. Kevin Murray, a Southern California Democrat, didn't show. A reliable source says he's lazy and irresponsible. This was a costly screw-up, a missed opportunity to expose the criteria by which the Board's Enforcement Division has been choosing which doctors to pursue.

That same week Marian Fry, MD, appeared before Administrative Law Judge Ruth Astle in Oakland to recommend dismissal of the Medical Board's case against her on the grounds that her files had been obtained improperly via the DEA. Fry, who does cannabis consultations from an office in Cool, California, was represented by attorney Lawrence Lichter.

The Attorney General's office, representing the Medical Board, accuses Fry of providing substandard care to five patients. "Every patient I've been asked about by the medical board has passed through the criminal justice system in either El Dorado or Sacramento County," Fry says. "The complaints all came from district attorneys, not the patients themselves."

The three patients named in the ac-

Judge Astle expressed her concern about medical records being obtained without patients' consent, or a warrant, or a subpoena, or the involvement of a judge.

cusation with whom Fry is still in contact refused to release their files to the Board, and she assumes the others would have, too. Conveniently for the Board, the federal Drug Enforcement Agency had raided the home and offices of Fry and her husband, attorney Dale Schafer, in September, 2001, confiscating 24 file cabinets containing 6,000 patients' records. The Board acknowledges that it obtained Fry's records from the DEA.

Lichter was able to site a section of the California penal code listing the steps that have to be taken before law enforcement agencies can share medical information. Fry's prosecutors downplayed the significance of code section, arguing that "law enforcement agencies share information all the time," and that it had been done "pursuant to statute." But the statute they cited was a federal law authorizing the DEA to release information, not authorizing a state agency to receive it.

Judge Astle expressed concern about the Medical Board obtaining records without patients' consent, or a warrant, or a subpoena, or the involvement of a judge. She requested more briefing and continued the hearing on the motion to dismiss till October 1.

See story on page 19 for the background of Fry's ordeal.

of the revised "Statement" in July 2004. "Evidently they don't get it," he says. "But a Superior Court judge will."

Bond also plans to cite the injunction issued by U.S. District Court judge Frank Alsup in a civil case originally filed in January, 1997, as *Conant v. McCaffrey*, that bars the federal government from retaliating against doctors who discuss cannabis as a treatment option with their patients. [AIDS specialist Marcus Conant and co-plaintiffs had sued in response to threats made by McCaffrey at the infamous 12/30/96 press conference.]

The *Conant* injunction has been upheld by the 9th Circuit Court of Appeals and the U.S. Supreme Court refused a request by the Bush Administration to review it. In its July Action Report statement the Board seems to minimize the protection afforded by *Conant*, stating "Although it could trigger federal action, making a recommendation in writing to the patient will not trigger action by the Medical Board of California."

A more accurate formulation would have been "Although it could trigger illegal federal action, it will no longer trigger illegal action by us."

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