

The Prosecution of Tod Mikuriya

The Medical Board of California Adopts Guidelines For Doctors Who Approve Cannabis Use — And Punishes the Doctor Who Called For Them

By Fred Gardner

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

It opens with an acknowledgment of reality: "The Medical Board of California (MBC) developed this statement because medical marijuana is an emerging treatment modality." And 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."

And yet the very same *Action Report* contains this listing under "Administrative Actions" taken against doctors who have run afoul of the board — typically, incompetents, perverts and quacks: "Mikuriya, Tod, H., M.D. (G9124) Berkeley, CA."

It then describes what Mikuriya allegedly did — "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" — and what will happen to his licence to practice medicine: "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 to defray the cost of his own investigation and prosecution (which is like being made to dig your own grave, financially). 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..."

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 California Medical Association and 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



The Medical Board's July 2004 Action Report featured a statement on "California Physicians and Medical Marijuana" and carried an announcement that the revocation of Tod Mikuriya's license had been stayed pending five years on probationary status.

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.

Through 1998, Mikuriya wrote 1/3 of the approvals issued in California.

During the first two years that marijuana was legal, i.e., through 1998, Mikuriya wrote some 4,000 letters approving cannabis use — an estimated one-third 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 2000, the California Cannabis Research Medical Group. [Now known as the Society of Cannabis Clinicians; the sponsor of this publication.]

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 Gordinier, 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 known to be doing cannabis consultations (Sausalito psychiatrist Eugene Schoenfeld).

In 1998 the Medical Board, responding to complaints from a Napa County sheriff's deputy, began investigating Mikuriya'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.

Not a single patient alleged that Mikuriya had provided inadequate care, nor did any complainant allege that a patient had been harmed.

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.

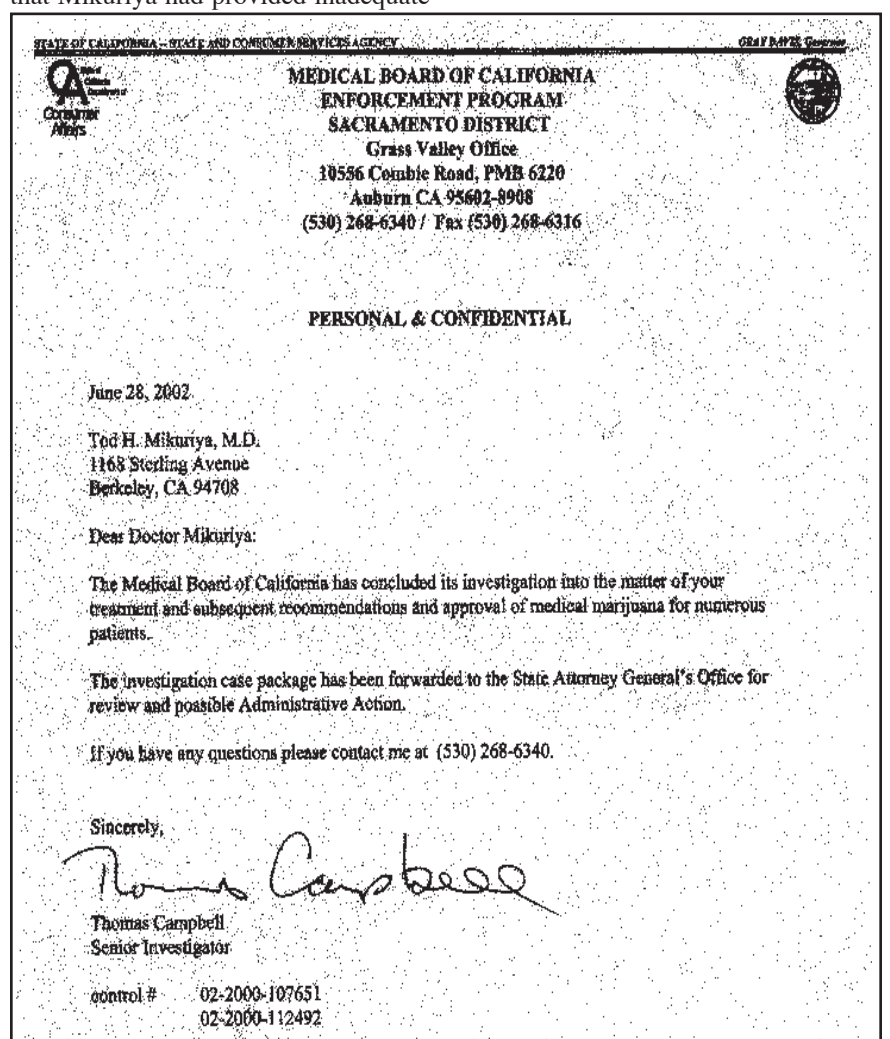
Mikuriya's files were sent to the Board's expert witness, Laura Duskin, MD, a psychiatrist employed by Kaiser. After reading 16 of the cases, Duskin concluded that the pattern of inadequate care was so consistent and blatant that there was no need to cite all 46. An "amended accusation" was filed in 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 his encounter with the *poseur*, "A man I now know to be Detective Steve Gossett of the Sonoma County Task Force infiltrated a clinic in Oakland [organized by an activist/entrepreneur]. 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" that added the charge involving Detective Gossett.

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LETTER TO MIKURIYA was sent the day the Medical Board filed a formal accusation against him with the Attorney General's office. Senior Investigator Thomas Campbell states explicitly that the investigation focused on medical

marijuana recommendations, not violations of practice standards. Campbell traveled through Northern California to confer with law enforcement officers who had filed complaints against Mikuriya.

Adapted from coverage in O'Shaughnessy's Autumn 2004

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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 (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 the patients 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 and the doctor instructed to change his form letter. 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. Duskin acknowledged that she never contacted any of the patients to question them about their treatment by Mikuriya or to find out whether there had been a discussion of follow-up plans.

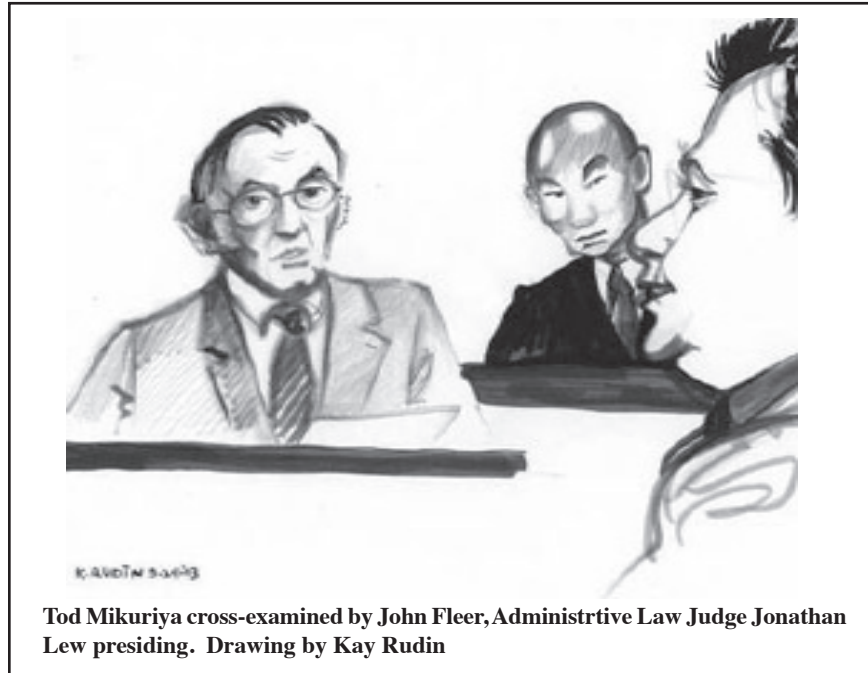
The Cult of Documentation

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 testified.

Duskin 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 as Mercer and Simon nodded soberly, 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



Tod Mikuriya cross-examined by John Flear, Administrative Law Judge Jonathan Lew presiding. Drawing by Kay Rudin

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 admit that she had been taught absolutely nothing about cannabis during her pharmacy classes at UCSF. Nor did she reveal that during her years at Laguna Honda patients were denied access to cannabis.

Duskin said that although she has never issued an approval for a patient to use marijuana, 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 smoking marijuana 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, Deputy Sheriff Steve Gossett, 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, supposedly).

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."

The thing about Mikuriya the Drug Warriors resent most of all: he even issues approvals to citizens who are facing charges.

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!

"It's hard to remember lies."
—Deputy Sheriff Steve Gos-

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!"

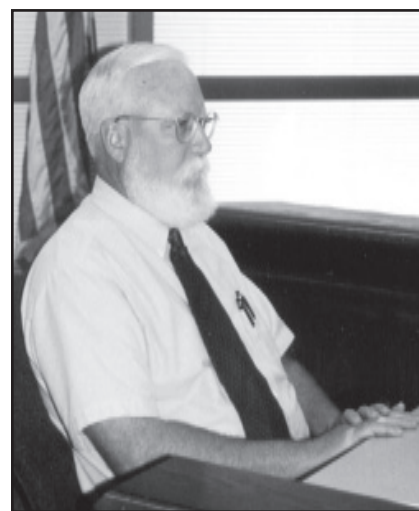
Which caused Gossett to stop talking and look pained. When asked by the judge to continue, Gossett said somberly, "Somebody just took the Lord's name in vain." After a few beats the detective gathered himself and resumed his recitation of the non-facts.

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 said he had 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



PHILIP A. DENNEY, MD, testifying as an expert witness on behalf of Mikuriya.

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 that he himself was

Denney said that the Medical Board's classification of cannabis as a "dangerous drug" was "scientifically invalid."

"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 therapeutics, 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 Flear, 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, Flear 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. Flear 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 had 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!"

D.K. testified that Mikuriya had written her a prescription for a neuropsychiatric evaluation, but it had been

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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



Mikuriya with attorney John Fleer

sliding scale. Other doctors had given her “medicines that didn’t help. They put me out and deprived me of feeling in control.”

Prior to the next patient’s swearing in, Judge Lew commented that he’d never had a case in which patients’ 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.”

The prosecution hoped to show that Mikuriya provided substandard care by not pushing the available corporate products.

• 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’ cannabis use are hearing reports of efficacy in the treatment of pruritis (itching)!

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 *People of California v. Tod Mikuriya* takes us through the looking glass. A psychiatrist who elicits from his patients the most honest medical history they’ve ever given stands to lose his license for conducting inadequate exams!

• 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 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 been free.

“What are you doing to this guy, anyway?” R.H. asked Mercer, whose face turned beet red. “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!”

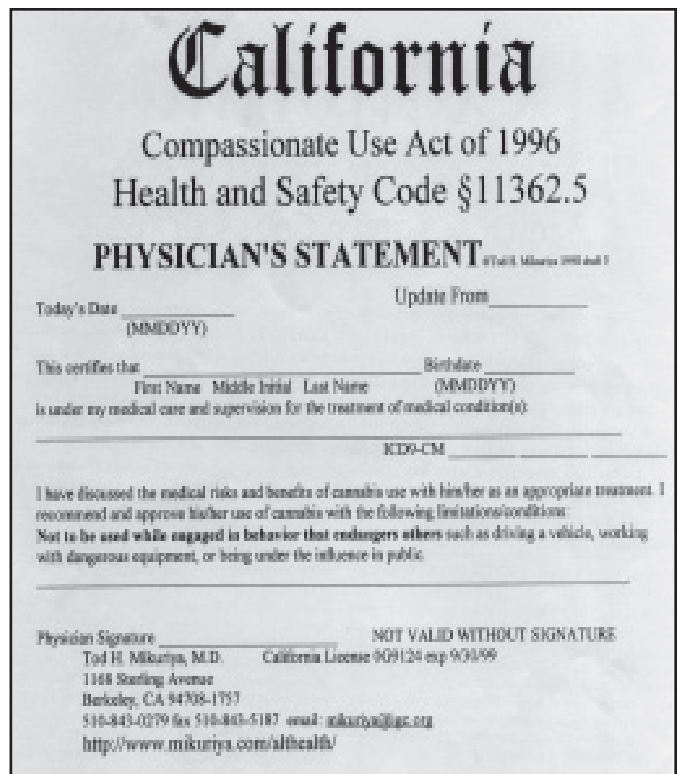
Mikuriya had noted on R.H.’s chart that he drank 8 to 10 cups of coffee a day. Did Mikuriya approve of that, Mercer probed? “He told me I should stop, but I didn’t,” said R.H., non-compliant to the end.

• 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.”



Letter of diagnosis from Mikuriya inappropriately stated that patient “is under my medical care for the treatment of...” When the flawed phrase was brought to his attention, he changed it.

Also accompanying J.C. were her 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 marijuana 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 had 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. had taken only once because he hated the effect. “I don’t really believe in taking narcotics,” he testified.

K.B. had read extensively on the topic

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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 short. Although they kept trying, it had not been easy for Mercer and Simon 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. Then 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.

My role is to establish whether he had a condition that would qualify him to use cannabis under Health & Safety Code 11362.5. —THM

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 cannabis approvals. 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.

"Repeated 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 2000 he and nine like-minded colleagues formed the California Cannabis Research Medical Group (CCRMG, now the Society of Cannabis Clinicians) 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.

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Patient F.K.



Frank Kortangian and wife Lisa Brand with their granddaughter.

Patient F.K. is a 66-year-old Navy veteran named Frank Kortangian. He and his wife Lisa are caretakers of a ranch in Gray Eagle, a small town in Plumas County. Before Frank's back went out in the '90s, he used to do landscaping and raise vegetables for the farmers' market.

Like many of the patients involved in the *Mikuriya* case, Frank Kortangian had previously crossed swords with local law enforcers. His letters to the editor of the local papers had earned him a rep as an environmentalist and a medical marijuana advocate. In the winter of '95-'96, Frank and Lisa gathered six pages' worth of signatures for Prop 215. They and others like them were the reason it passed.

In September '96 Frank and Lisa were arrested for growing seven plants —four on federal land in Sierra County, and three on the property of a local land baron. The bust involved "at least 15 officers" according to Lisa —Sierra County sheriffs, Forest Service, maybe DEA. "They're very bored up here," she commented. The plants were about four feet high, grown in the shade, and would have yielded less than half a pound of usable marijuana, according to knowledgeable witnesses. The Kortangians were charged with cultivation, cultivation for sale, and conspiracy.

Frank had informed his doctor that he used marijuana for chronic back pain and arthritis, but the doc, described by Lisa as "a yuppie type who doesn't want to rock the boat," refused to testify for him. Nor would the Veterans Administration doctors he had consulted. Mikuriya interviewed Kortangian, reviewed his medical records, and offered to appear on his behalf at a preliminary hearing. District Attorney Sue Jackson objected that Mikuriya had not been Kortangian's doctor at the time of the bust, and Judge William Skillman agreed that Mikuriya should not be allowed to testify.

Kortangian's lawyer, Dale Woods of Truckee, was struck by the level of support and direction the District Attorney received from the office of Attorney General Dan Lungren. "They would send her boilerplate motions to file," he according to Woods. DA Jackson

"People being prosecuted for crimes they are innocent of seldom show remorse." —Frank Kortangian

was quoted in a local paper, the *Mountain Messenger*, questioning Mikuriya's professional qualifications. "I believe there will be some question about the man's license," she said.

Woods urged the Kortangians to accept a plea bargain. Lisa copped to misdemeanor possession and got 15 days in jail plus three years' probation, although the quantity of mj found at the house was too small to weigh. "They wouldn't even consider diversion," she says. Frank got 75 days plus three years probation.

Frank Kortangian wrote an open letter back in March '98 to the judge who presided over his conviction. (See box)

Kortangian reports that the DA who prosecuted him, Sue Jackson, was voted out of office and that the current DA has dismissed a number of marijuana cases brought by the local police —in other

words, there's been some progress in them thar hills. Upon hearing that Mikuriya had recently undergone heart surgery —a triple bypass- Kortangian proudly expostulated, "I beat him —mine was quadruple."

A comment from attorney Gordon Brownell: "The Kortangian saga demonstrates, as if we need reminding, that the roots of the campaign against Tod were in the Lungren DOJ and the same soldiers in that effort have not given up the crusade... The genesis of this prosecution is found in the Lungren/McCaffrey cabal that has never let up in their vindictiveness against Tod. For them to maintain the charade that their accusations have nothing to do with recommending marijuana is ludicrous."

An Open Letter From Frank Kortangian To the Honorable Judge Skillman:

I know this letter is highly irregular but you brought up some issues in your courtroom which need to be addressed and as you must know it is almost impossible for a defendant to say much in your court.

You mentioned several times your frustration with me and my co-defendant not accepting responsibility for our actions. You are wrong about that. I have from the very beginning taken full responsibility for the seven cannabis plants in question. I think what you really wanted to say was, I showed no remorse. On that point you would be correct. I don't think I have done anything immoral and if some crime was committed, please show me a victim besides Lisa and me.

As for Lisa, she is not accepting responsibility because she is not guilty of anything. People being prosecuted for crimes they are innocent of seldom show remorse. You pontificated on your view of what the voters had in mind when they enacted Health and Safety Code 11362.5 (Prop 215) almost to the point of practicing medicine from your bench. Actually the new law is quite simple, perhaps too simple for great legal minds like yours to grasp. It was meant to protect people with serious illness and chronic pain from prosecution and not the medicine of last resort after all other drugs have failed, as is your expressed view.

Cannabis is the most benign drug in a physician's Pharmacopoeia. If you would have taken time to read my medical records perhaps you would not have been so adamant about not allowing me to use a prop 215 medical defense. I would have welcomed a chance for a jury trial in which the jurors could have heard the whole truth, but apparently you were afraid to let me have a fighting chance to keep a felony conviction off my good record.

By convicting Lisa and me you have accomplished one thing: all our many friends and acquaintances have been repulsed by the lack of justice in our legal system and when we explain how your court has refused to abide by the law of the land and would not allow a medical defense in spite of my doctor's written recommendation, they are flabbergasted. The Superior Court of Sierra County is a shining example of the ever-widening chasm between the people and their government.

If your Honor knew Lisa Brand and what a wonderful, kind loving person she is, as many of us do, you would be the one showing shame and remorse for forcing her to spend even one minute of her exemplary life in your jail.

A quick word about the D.A., a woman who looks at less than a pound of medical marijuana, convinces the judge not to allow it to be shown in court, and then testifies that it weighed seven pounds. Well all I can say about a person of that caliber is that the voters of Sierra County are indeed fortunate to have a chance to vote for a person with some sense of decency in the upcoming elections.

I fully expect some form of government retaliation in response to this letter, but I think the people of Sierra County and elsewhere need to know how our justice system is being manipulated.

Frank Kortangian

Prosecution of Mikuriya *from previous page*

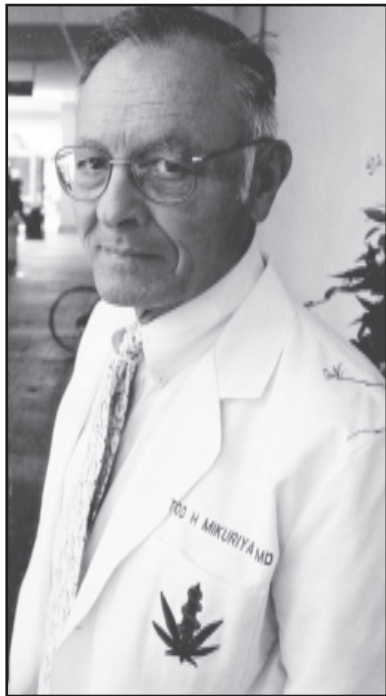
In March 2003 Mikuriya and Frank Lucido formally asked the California Medical Association to adopt the CCRMG minimum practice standards and to lobby the Medical Board to follow suit. (The Board’s 1997 “statement” had been drafted with CMA input; but since then the CMA had abandoned its opposition to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



Dr. Tod outside his new office in El Cerrito in 2004.

photo by Pete Brady

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 with a motion alleging that Judge Lew had concealed a bias.

Mikuriya has hired an appeals specialist, Charles Bond, to challenge the Board’s verdict in Superior Court. 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 showing the doctor’s obligation to protect the patient’s privacy outweighs the subpoena. Common sense suggests that the *Bearman* precedent 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. — 513 El Cerrito Plaza — conveniently located above Trader Joe’s.

Attorney John Flear 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 record and decide the matter anew. “It’s not just a question of saying

\$75,000 is “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 Flear.

“Was there substantial evidence to support what the [administrative law] judge did?” It’s a trial *de novo*, based on the hearing record,” Flear explains.

“It’s not unusual for there to be two different standards being proposed by two different experts,” says Flear, 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.”

Flear characterized as “absurdity” 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 Flear.

Who Complained About Mikuriya’s Standard of Care?

The state medical board received complaints about Mikuriya from the following sources, according to documents filed in the case reviewed by John Trapp:

- Sacramento County Deputy District Attorney Del Oros: Patient 1
- Nevada County Sheriff’s Sgt Steve Mason (Commander of the Narcotics Task Force): Patients 2, 9, 14
- Humboldt County Sheriff’s Sgt Steve Knight: Patients 3, 6
- El Dorado County Narcotics Det. Bob Ashworth: Patients 4, 7, 8
- Sacramento County Sheriff’s Det Jeff McCannon: Patient 5
- District Attorney’s Office Tehama: Patients 11, 12
- Tehama County Det. Sgt Dave Hencraft: Patients 13, 15
- Anonymous (newspaper clip sent to MBC Investigator Tom Campbell): 10
- Napa County District Attorney’s Office: 16
- Sonoma Narcotics Task Force: 17