

Medical Board Watch

Board Makes Mikuriya Ruling "Precedential"

By Frank Lucido

The Medical Board of California (MBC) voted at its July meeting to make the last ruling in the case against Tod Mikuriya "precedential" — even though MBC v. Mikuriya was not reviewed by an appellate court, the level at which the board has conferred precedential status on past rulings.

Precedential status means that administrative law judges reviewing the board's accusations against doctors in analogous cases must adopt the reasoning of ALJ Jonathan Lew, who ruled against Mikuriya in 2004 (See story on page 10). As explained by attorney Scott Candel in the box at right, Mikuriya won a small modification from a Superior Court judge, but it had no bearing on what the board is now setting in stone.

At the July 27 meeting of the board's Division of Medical Quality, I asked for clarification of what, exactly, was to become precedent. I was told alternately that it was "two key points" or "every word in the decision."

Doctors' Immunity Isn't Absolute

The two key points, as stated in a memorandum from Anita Scuri, a lawyer for the Department of Consumer Affairs:

"1. The standard of care for conducting a medical marijuana evaluation is identical to that followed by physicians in recommending any other treatment or medication and it applies regardless of whether the physician is acting as a treating or as a consulting physician.

"2. The Compassionate Use Act is conditional and does not immunize a physician from disciplinary action in those cases where the physician's care falls below the accepted standard."

This decision should not be onerous to most physicians who approve cannabis use by patients, since the majority have practiced "defensive medicine," expecting to be scrutinized carefully when dealing with controlled substances, especially those defined as "abusable" by the DEA.

Why was the medical board so keen to make these points "precedential"? Was the vote a prelude to more investigations aimed at pro-cannabis doctors? Will the quick-in, quick-out clinics be under heightened scrutiny?

My position has been to appeal to my colleagues to conduct examinations that are thorough and well documented, and to patients to avoid substandard practitioners. Doctors and dispensaries that cross-refer are particularly at risk in the current climate. The feds would like nothing better than an excuse to investigate doctors who approve cannabis use.

The second point that the board established as precedent defines the legal immunity conferred on doctors by Prop 215 as conditional rather than absolute. Conditional immunity means that the act of recommending marijuana to a patient does not excuse the doctor from, say, missing a diagnosis of bone cancer as the cause of the patient's pain. A malpractice suit by the patient or punishment by the medical board is not foreclosed.

Many medical cannabis activists and



FRANK LUCIDO, MD, asked the medical board to clarify what it was about the Mikuriya ruling they were making "precedential."

patient advocates argue that the wording of Prop 215 — now Section 11362.5 of California's Health & Safety Code — gives recommending physicians absolute immunity. It reads: "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."

Pro-cannabis doctors do not receive special protections.

It's true that the drafters of the Compassionate Use Act wanted to protect doctors who recommended cannabis from biased investigations and accusations. But unconditional immunity for doctors deprives their patients of protection. Doctors who are negligent should be held to account. Pro-cannabis doctors should act in accordance with the way physicians are expected to act in other areas of medicine. We should not require special protections.

Tod himself frankly wished he had paid more attention to documentation in the period when he was trying to "confer legitimacy" on as many patients as possible. Towards the end of his hearing in 2003, ALJ Lew asked Tod: "If there were a finding that your practice standards should be modified, would you be willing to do so?"

Tod replied, "Absolutely."

In the wake of the Mikuriya ruling becoming precedential, I expect that physicians who make safe and appropriate recommendations — the vast majority — will be left alone by the medical board, and may even sleep better at night.

If we continue treating cannabis as medicine, it's only a matter of time before responsible physicians who would never have thought of recommending cannabis will say: "I wonder if a trial on vaporized cannabinoids would help this patient?" In fact, this has begun to happen already.

Federal Implications: None

A "Discussion of Federal and California Appellate Decisions Pertaining to Medical Marijuana" was on the July agenda at the request of MBC executive director David Thornton. He wanted to know the bearing on the

board's medical marijuana policy of a federal court ruling against Angel Raich. (The 9th Circuit Court of Appeal had ruled in March that Raich, who happens to be my patient, is not immune from federal prosecution even if her life depends on access to marijuana.)

The AG's office sent Larry Mercer and Jane Zack Simon to explain to the board that Angel Raich's federal exposure had no bearing on their dealings with pro-cannabis doctors in California.

I used the public comment period to emphasize that the entire California Compassionate Use Act of 1996 is still the law in California, as affirmed by Attorney General Jerry Brown. I also reiterated that state agencies have a primary responsibility to uphold state law, according to the California constitution.

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Appealing the MBC v. Mikuriya Verdict

By Scot Candel

The door to my office opened and a messenger dropped five boxes of files at my feet. I was taking over the case of representing Dr. Tod Mikuriya in his appeal against the Medical Board of California, and I had just been given all of the information on his case.

I carried the boxes one by one up to my office and started reading the charges against Dr. Mikuriya. The Medical Board was attempting to suspend Dr. Mikuriya's license to practice medicine, claiming that he recommended marijuana to patients without doing a thorough medical examination to determine if the patients qualified for medical marijuana. It appeared that the government had subpoenaed all of his medical files and picked out 17 cases in which they argued Dr. Mikuriya recommended marijuana to an individual who was not qualified to use it.

I began reading the transcripts from the hearings. The first case involved a man who was bedridden with multiple sclerosis. It was undisputed that he was using marijuana to make his pain more bearable before he ever met Dr. Mikuriya. It was undisputed the marijuana was helping him. Dr. Mikuriya went to visit this man at his house to help him, and after examination and conversation with his caregiver, gave this man a recommendation to continue to use medical marijuana. There was no question this recommendation was justified. However, the medical board held that Dr. Mikuriya did not examine this man long enough to determine that medical marijuana would help him.

What? I had to read this twice. The patient was bedridden with multiple sclerosis, already using marijuana, which helped to ease his pain. There was no question that he had multiple sclerosis. There is no question that marijuana helped him. Yet they found that Dr. Mikuriya had not done enough to conclude that this person qualified to use medical marijuana. Wow!

I read on... A young woman was pregnant and having trouble gaining weight, which was jeopardizing the health of her unborn baby. Dr. Mikuriya examined her, reviewed her medical history, spoke with her and her mother, and then recommended that she use medical marijuana. The woman followed the recommendation, began gaining weight, carried the baby to term, and gave birth to a healthy

baby. It was incredible. There could not be a better example of a successful recommendation of marijuana to a patient that truly needed it. The medical board again found that Dr. Mikuriya had not examined the patient thoroughly enough before recommending medical marijuana.

Each of these cases turned out to be a wonderful success story.

As I read on, each of these cases turned out to be a wonderful success story. Each patient was helped by the medical marijuana, and no patient ever complained. No patient abused the marijuana, and no patient ever sold the marijuana or shared it with any other individual. Every patient benefited from its use and no patient was harmed. These patients all could have been used as shining example of the benefits of medical marijuana. In every case, the medical board found against Dr. Mikuriya.

You don't need to be a master chef to know when food is rotten, and you didn't need to be a lawyer to realize the government had another agenda here. Dr. Mikuriya was a leading advocate for the legalization of medical marijuana, had testified as an expert witness in many trials about the benefits of medical marijuana, and had ruffled the feathers of many prosecutors and conservative politicians throughout California and across the country. This was a good old-fashioned witch-hunt.

We fought this case in Superior Court and prevailed on one key point. The medical board had charged Dr. Mikuriya with illegally prescribing marijuana to his patients. We convinced the judge that marijuana is not prescribed, it is recommended, and thus cannot possibly be prescribed illegally. Unfortunately, he rubber-stamped the administrative law judge's other key findings.

Frustration and bewilderment don't begin to describe our feelings as we left the courtroom wondering how much longer these ridiculous political games would continue. Dr. Mikuriya did not rule out an appeal. But in his final years there would be other demands on his time, energy, and funds.

The fact that the government tried so hard to prosecute Dr. Mikuriya is a testament to his importance to the medical marijuana movement.

Thank you, Dr. Mikuriya

The Context of Prohibition

1 in 8 Adult New Yorkers Has Diabetes, Study Finds

By RICHARD PEREZ-PEÑA One in eight adults in New York City has diabetes, and nearly twice as many appear to be developing it, a population-wide government study of 100,000 people found. The study is the first to use a nationally representative sample to estimate the rate of the disease.

Surge in Arthritis Is Forecast

Retirement States Are Likely to Show Biggest Jumps by '30

Prevalence of Alzheimer's Rises 10% in 5 Years

By JANE GRONOS More than five million Americans have Alzheimer's disease, a 10 percent increase from the last time it was reported in the last five years, and a number expected to rise further by the year 2030, a study by researchers at the University of California, San Diego, says.

Drug Makers Post Strong Profits But Broader Problems Remain

By SARAH RUBENSTEIN In a report for an industry that has been riddled in problems, three big drug makers posted strong first-quarter earnings. But the results don't signal an end to the industry's broader struggles.

Antidepressants Linked to Risk Of Bone Breaks

Associated Press CHICAGO—The most popular pills for depression might substantially raise the risk for bone breaks in older people, a new study says.

Bipolar Soars As Diagnosis For the Young

By BENEDICT CAREY The number of American children and adolescents treated for bipolar disorder increased 40-fold from 1994 to 2003, researchers re-

