

The Prosecution of Tod Mikuriya, MD

The prosecution relied on a 1997 guideline that's being revised. Could "Dr. Tod" be exonerated retroactively?

By Fred Gardner

The Medical Board of California has ratified a "proposed decision" from Administrative Law Judge Jonathan Lew that will put Tod Mikuriya, MD, on probation for five years, during which time his practice must be "monitored" by a fellow physician.

The Berkeley-based psychiatrist—an internationally respected clinician and scholar—was also ordered to pay \$75,000 towards the cost of his own prosecution, and to stop seeing patients at his home office in the Berkeley Hills.

The sanctions do not include suspension or revocation of his license, nor is Mikuriya ordered to attend remedial classes. Such indignities would have driven the 70-year-old psychiatrist to contemplate early retirement. (He has a 10-year-old daughter whose education he intends to pay for.)

His supporters remain hopeful that a soon-to-be-issued revision of the Board's 1997 policy on marijuana recommendations will exonerate Mikuriya retroactively, and spare all concerned the cost in time and money of an appeal to the Superior Court.

Mikuriya says he can accept the prospect of a monitor—Lew specified that it could be a fellow cannabis specialist—but not the fine or the constraint on where he can practice.

Nor does he accept the Medical Board's verdict that he made "extreme departures from the standard of care" in his treatment of 17 patients (one a narcotics agent posing as a patient) whose cases were reviewed at a six-day hearing in September 2003.

All the patients had told Mikuriya they had been self-medicating successfully with cannabis, and all received his written approval to continue doing so. No harm was alleged to have been done to any of the patients; in fact, the patients named in the case invariably thanked and praised Mikuriya.

Through the looking glass

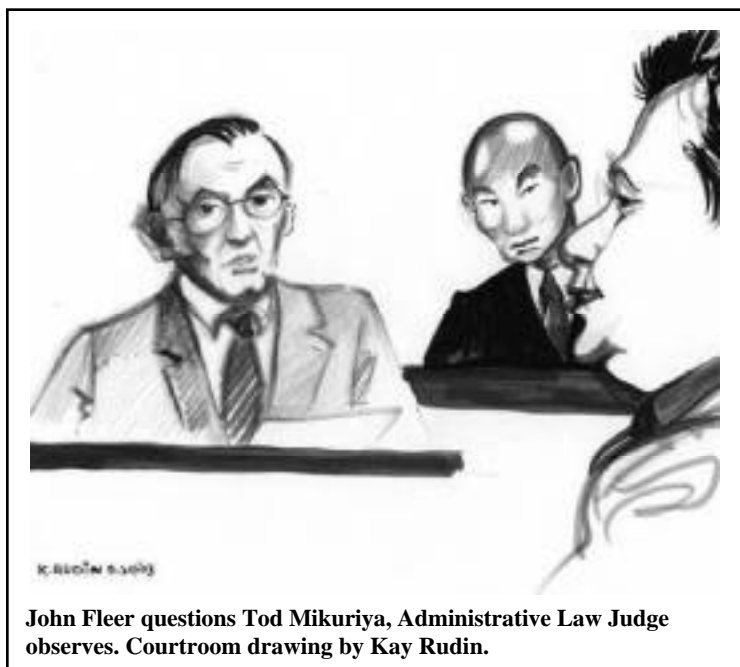
California voters, when they passed Prop 215, specifically prohibited the prosecution of physicians for recommending cannabis to their patients. Therefore the prosecution of Tod Mikuriya—technically—had nothing to do with his recommending cannabis and was based only on his failure to take certain steps in dealing with his patients.

Assistant Attorneys General Larry Mercer and Jane Zack Simon, represented the Medical Board. Their case was made by an expert witness, a Kaiser psychiatrist named Laura Duskin, who had read Mikuriya's files but did not interview any of his patients.

Duskin testified that Mikuriya had committed "extreme departures" from standard practice by not conducting physical exams and by issuing letters of approval implying that patients were un-

der his ongoing care

Judge Lew's decision rested heavily on a policy statement issued by the Medical Board in January 1997: "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.,



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

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 a dozen like-minded colleagues formed the California Cannabis Research Medical Group (CCRMG) and drafted "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 H. Lucido, MD, formally asked the California Medical Association to adopt the CCRMG minimum practice standards and lobby the Medical Board follow suit. (The Board's 1997 guideline had been drafted with CMA input; but since then the CMA had abandoned its opposition to California's medical marijuana law.)

At its 2003 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. As of January 2004 a joint CMA-Medical Board task force had finished drafting a revision of these all-important guidelines. But at the Jan. 30 meeting of the Board, several members expressed disappointment that they had not yet received the draft. (See related story on page 28.)

So... the possibility remains that the Medical Board will adopt guidelines in the months to come that will make Mikuriya's practice standards acceptable in retrospect.

"Dr. Tod"

Tod Mikuriya—"Dr. Tod" to many—has spent his entire career studying the medical effects of cannabis. He grew

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 reformers, and did what he could to educate the millions of Americans who smoked marijuana about its history as a medicine.

Mikuriya 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.

At the start of the '90s, when Dennis Peron opened his cannabis buyers club in San Francisco, 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 [a precursor to the CCRMG form described on page 2]. 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."

After Proposition 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 goal was to transform anecdotal evidence into serious epidemiological data.

The Infamous Chart

For his efforts, Mikuriya was ridiculed on worldwide television (CNN). On December 30, 1996, 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 federal officials 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 has 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"

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.

"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*

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?"

Mikuriya called the McCaffrey chart "a crude dirty trick—the kind of disinformation the U.S. military put out during the Vietnam War."

Mikuriya 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—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."

Journalist Pat McCartney has obtained documents showing that federal and California law enforcement officials colluded in the weeks and months following the passage of Prop 215 to block its implementation. [See story on page 24.] The Mikuriya defense tried to introduce McCartney's material as evidence that the Medical Board's case against Mikuriya could be traced to "a plot by a coterie of federal and state law enforcement officials to undermine California's medical marijuana law." Lew would not let it in on grounds of relevance.

Cascade of Cases

Mikuriya had practiced psychiatry for decades without running afoul of the Medical Board. He says his only troublesome encounter with law enforcement prior to the passage of Prop 215 involved "a phone call from a probation officer from Nevada county who told me to stop prescribing Marinol to one of his 'clients,' a patient of mine, because it interfered with the drug testing (which at the time couldn't distinguish between the legal synthetic and the forbidden herb). I verbally rebuffed the request and told the P.O. that when he had a license to practice medicine, he could countermand and prescribe alternatives."

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 B attorney Bill Simpich, "the hardcore anti-215 crowd in the AG's office realized they were



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.

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.

Mikuriya contends that Campbell and the Enforcement Division brass are part of a network of California law enforcement agents who bitterly opposed the medical marijuana initiative in 1996 and have been trying to block its implementation ever since.

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. 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 substandard care had been provided 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. Mikuriya declined the deal and the Attorney General's office kept its word by filing a "second amended accusation" on July 25.

As Mikuriya tells it, "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."

The Hearing

The climactic hearing began Sept. 3 with Duskin's testimony. The scene was a fluorescent hearing room at the state office building in Oakland, presided over by Administrative Law Judge Lew, a trim, soft-spoken man with a business-like air.

Duskin said she had read 16 of Mikuriya's patients' records and determined that the doctor had failed all of them, 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.

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.

Laura Duskin is the personification of the San Francisco medical establishment in her attitude towards marijuana. Although she never challenged its prohibition, she now claims to believe in its relative safety and limited efficacy as medicine. "Marijuana can be very helpful for certain conditions for certain patients," Duskin asserted—and the prosecutors nodded agreement, as if this was a self-evident truth.

Mercer and Simon are the Assistant AGs whom former Attorney General Dan Lungren chose to prosecute Dennis Peron. "Why did Bill Lockyer assign those two to prosecute Dr. Mikuriya?" asks Bill Simpich. "It appears that he's trying to mollify a rightwing faction within his office."

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 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.

Duskin didn't acknowledge that she had been taught nothing about cannabis at UCSF

There wasn't the slightest self-critical edge to Duskin's testimony. She didn't acknowledge that she had been taught 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 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 coping a smoke on the grounds. If only I'd known, I could have turned them on to Laura Duskin!)

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).

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.)

"Cannabis Consultation" Model

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

continued on next page

Mikuriya Case *from previous page*

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 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



Philip A. Denney, MD

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 Fleer, 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, Fleer has 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. Fleer 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 he’d 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.

In response to questions from Lea, 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’ 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 highly 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 any-

thing 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)!

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, sub-standard 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 doctor, that made Mikuriya 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 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.” —A patient

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’s mantra: “The question is what Dr. Mikuriya did, not what law enforcement did.”

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 tow-

continued on next page

Mikuriya Case from previous page

head.

• 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 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-

• 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.

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 him a single, poignant question: “If there were a finding that your practice standards should be modified, would you be willing to do so?”

Mikuriya said “Absolutely.” The overriding irony of the case is that Mikuriya 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 Mikuriya’s approval of cannabis.

What happens next?

Mikuriya can ask the Board to reconsider the probation order or he can appeal directly to the Superior Court. As noted, the standard from which Mikuriya was found to have made extreme departures is being revised by a working group that includes representatives from the California Medical Association and the Board’s Enforcement Division. If the working group —to which Board members William Breall, MD, and Linda Lucks have recently been added— comes up with practice standards that don’t require a physical exam, Mikuriya would have a common-sense basis on which to request reconsideration. The revised guidelines are supposed to be discussed at the Board’s May meeting.

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

Herb Caen item

The Mikuriya hearing was held in a state building named in honor of an Oakland pol named Elihu Harris. One morning your correspondent overheard a 50ish white woman at a pay phone in the lobby say, “I’ll be waiting on Clay Street, in front of the EmmyLou Harris state office building.”



Mikuriya with Attorney John fleer

operating in bad faith —just wrong about the standard he had to follow.”

If Mikuriya’s lawyers choose to appeal directly to the Superior Court, they can do so either in Alameda County, where the hearing was held, or in Sacramento County, where the Medical Board is headquartered. A Superior Court judge would 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 [lower-level] judge

Mikuriya, at Eidelman Hearing, Defines “Cannabis Consultant”

William Eidelman, MD, had his license suspended by the Medical Board in May 2002, after he’d approved marijuana use by four undercover police officers. At the time Eidelman had issued more approvals than any doctor in Southern California.

In February 2004, in Los Angeles, Administrative Law Judge Stuart Waxman heard two days of testimony in the Eidelman case, including two hours from the expert witness for the defense, Tod Mikuriya.

It was brave —risky— of Mikuriya to take the stand, because Eidelman has been tarred. The Medical Board’s former chief investigator referred to him as an “egregious example... whose medical office contained a computer, a printer and a cash register. There were no other instruments in that office. There was very little the physician was doing medically in that office to determine whether there had been an indication for a prescription. You walked in, you paid your money, your name was put in the computer, and a letter was generated.”

Even some of Eidelman’s patients complain that their interactions with him were disappointingly cursory. But he also has his supporters. Sister Somayah, a respected Los Angeles activist, says that Eidelman was the only doctor who ever showed interest when she reported that cannabis helped ease the symptoms of Sickle Cell anemia.

Mikuriya says that his testimony in L.A. was not an endorsement of Eidelman’s practices, per se, but an explanation to Judge Waxman of the “minimum practice standards for the cannabis consultant practice model.” Get the distinction? Mikuriya assumes the Medical Board members —who hold his fate in their hands— will.

“Cannabis consultations are medical forensic interactions with much more narrow and specific goals as compared with general medical practice,” says Mikuriya. “Specifically, ‘In your medical opinion does this individual qualify to be protected from marijuana law for self-medicating?’ Period. Anything else lies beyond the scope of this circumscribed medical consultation. No police-or prosecution-fantasized comprehensive medical diagnostic workup.

did?’ It’s a trial de novo, based on the hearing record,” Fleer explains.

In other words, the judge would read what Laura Duskin said was the proper standard of care, and would read 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. (No complaints against Mikuriya came from patients; all came from law enforcement.)

“Cannabis consultancy is in the same area as a Medical Review Officer reviewing results of drug testing —a forensic practice, but different. The minimum practice standard of the California Cannabis Research Medical Group mandates an initial face-to-face interaction and collection of ID and code-able diagnostic information.”

The cannabis consultant, according to Mikuriya, understands that cannabis has been used to treat an extremely wide range of conditions and “is retained to both diagnose and make the judgment” of whether cannabis is an appropriate treatment in a given case. If such a subspecialty didn’t exist, says Mikuriya, cannabis would be available only to those afflicted with “a short list of politically correct medical conditions.”

“The specialty of cannabis consultancy did not exist before the passage of Proposition 215,” Mikuriya observes, and there would have been no need for it if the law had specified the conditions for which cannabis could be used. (It was Mikuriya who insisted that the phrase “...any other condition for which marijuana provides relief” be included in the ballot initiative.)

Mikuriya says that the testimony on his behalf of Philip A. Denney, MD, helped clarify the nature of a cannabis-consultant practice, and enabled Mikuriya to describe its positive aspect. Although the cannabis consultant may meet only minimum practice standards (as opposed to conducting a thorough physical exam, etc.), he or she has expertise that conventional practitioners lack, specifically, an understanding of the range of conditions/symptoms that cannabis has been used to treat.

Lost, somehow, in the course of Mikuriya’s time- and money-consuming dealings with the medical establishment is the basic fact that he’s been right all these years about the safety and efficacy of cannabis, and they, with a very few exceptions, have been wrong.

The real experience of patients, scientific insight, and historical accuracy seem to count for very little. Proper documentation and obedience to dicta, no matter how false or impractical, is all.

—F.G.

Add ironies:

In 2001 Laura Duskin made a poignant observation, quoted by Bruce Mirken in the Bay Guardian, about the costly, ineffective treatment of far-gone addicts and alcoholics in San Francisco: “‘The Community Health Network is not savvy at all about figuring out how to serve these complex patients,’ said Duskin. ‘They don’t ask their frontline providers.’”

The Mikuriya defense could be summarized in a paraphrase: “The Medical Board is not savvy at all about doctors who serve medical cannabis patients. They don’t ask the frontline providers.”