

# RIVERSIDE LAWYER

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MAGAZINE

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The official publication of the Riverside County Bar Association



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# RIVERSIDE LAWYER

MAGAZINE

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# MISSION STATEMENT

## Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

## RCBA Mission Statement

The mission of the Riverside County Bar Association is:  
To serve our members, our communities, and our legal system.

## Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities.

Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

*The Riverside Lawyer is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6<sup>th</sup> day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are \$25.00 and single copies are \$3.50.*

*Submission of articles and photographs to Riverside Lawyer will be deemed to be authorization and license by the author to publish the material in the Riverside Lawyer.*

*The material printed in the Riverside Lawyer does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

# CALENDAR

## JANUARY

- 11 Criminal Law Section**  
Noon – 1:15 pm  
RCBA Gabbert Gallery  
Speaker: Manuel Barba  
Topic: Defending DUI's  
MCLE
- 13 MCLE MARATHON**  
9:50 am – 2:30 pm  
RCBA Gabbert Gallery  
RCBA Members - \$25 (includes lunch)  
Non-Members - \$95 (includes lunch)
- 17 Family Law Section Meeting**  
Noon – 1:15 pm  
RCBA Gabbert Gallery  
Speaker: Mitchell Rosen  
Topic: "Managing Substance Abuse in the Family Law Arena"  
MCLE
- 18 Estate Planning, Probate & Elder Law Section**  
Noon – 1:15 pm  
RCBA Gabbert Gallery  
Speaker: Wealth Counsel  
Topic: Wealth DocX: What You Need to Know"  
MCLE
- 20 General Membership Meeting**  
Noon – 1:15 pm  
RCBA Gabbert Gallery  
Speakers: Judge Sherrill Ellsworth (Ret.) & Kelly Bennett  
Topic: "Vicarious Trauma & Burnout"  
MCLE
- 24 Appellate Law Section**  
Noon – 1:00 pm  
RCBA Gabbert Gallery  
Planning Meeting
- 27 Bridging the Gap**  
8:00 am – 5:00 pm  
RCBA Gabbert Gallery  
For New Admittees Only





# President's Message

by *Jean-Simon Serrano*

This past November, Proposition 64 (The Adult Use of Marijuana Act) was approved by California voters (57% favored v. 43% disfavored). Essentially, this proposition was for the legalization of recreational marijuana for persons aged 21 years or older and established certain sales and cultivation taxes.

One of the stated purposes of this proposition is to "tax the growth and sale of marijuana in a way that drives out the illicit market for marijuana and discourages use by minors, and abuse by adults." I think this is a laudable goal. It is my sincere hope that legalization of marijuana will strike a blow to the drug trade similar to the blow dealt to bootleggers by the 21st Amendment to the Constitution (repeal of prohibition).

Though the text of Proposition 64 is approximately sixty-one pages, it is quite vague in certain parts and leaves a lot of unanswered questions for those in the legal field.

In my line of work (personal injury), questions remain as to how this proposition and legal marijuana use will impact our profession.

Proposition 64 deals with consumption of marijuana and driving as follows:

Section 3, part "p" – Maintain existing laws making it unlawful to operate a car or other vehicle used for transportation **while impaired by marijuana.**

The key term here is "impaired by marijuana." What does this mean? When dealing with alcohol, the law has very specific definitions for impairment. If one's blood alcohol is .08% or greater, they are deemed to be under the influence pursuant to Vehicle Code Section 23152, subdivision (b). This is an objective amount which can be scientifically measured. The Vehicle Code also has a "catch all" under 23152, subdivision (a), which more subjectively states that it is unlawful for a person who is "under the influence" of alcohol to operate a vehicle. This enables a finding that someone is driving under the influence (DUI) even if their blood alcohol is under the .08% threshold. This is typically measured subjectively.

With marijuana, we don't have an objective test to determine if one is "impaired by marijuana." Indeed, due to the nature of how marijuana is metabolized and how long it remains in one's system (unlike alcohol, it remains in one's system for days as compared to hours), it may be difficult to devise an objective test similar to what is used for alcohol.

Proposition 64 adds Section 11362.45 to the Health and Safety Code, which provides for the creation of laws regulating the use of marijuana and driving; however, a comprehensive set of laws and regulations have not yet been enacted.

Fortunately, the writers of Proposition 64 seem to have anticipated some of these problems and concerns as Proposition 64 creates Section 34019 of the Revenue and Taxation Code which reads, in part: The Controller shall next disburse the sum of three million dollars (\$3,000,000) annually to the Department of the California Highway Patrol beginning fiscal year 2018-2019 until fiscal year 2022-2023 to establish and adopt protocols to determine whether a driver is operating a vehicle while impaired, including impairment by the use of marijuana or marijuana products, and to establish and adopt protocols setting forth best practices to assist law enforcement agencies. (Rev. & Tax. Code, § 34019, subd. (c).)

This is encouraging, but it looks as though it may be some years before a comprehensive set of protocols is implemented. In the meantime, authorities will have to rely on subjective findings to determine if a driver is under the influence. As one who represents those injured by motorists (oftentimes involving those injured by drivers whom are under the influence), I prefer to have objective findings of intoxication when making a claim that the offending motorists was driving under the influence. Objective findings are more precisely measured and much harder to dispute by the defense. A lot of legislation will have to be created to deal with this recent legalization but, ultimately, the benefits may outweigh the drawbacks if legalization of recreational marijuana serves to curb the illegal drug trade and keep many who would otherwise go to jail for possession/use out of prison.

*Jean-Simon Serrano is an associate attorney with the law firm of Heiting & Irwin.*



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# BARRISTERS PRESIDENT'S MESSAGE

by Erica M. Alfaro

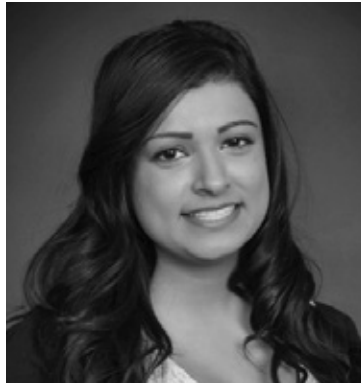


## Board Member Q&A: Priscilla George

Priscilla George is a new arrival to the Inland Empire but has quickly acclimated and connected to the area. As a military kid, Priscilla has grown up in several states including Missouri, Texas, Florida, and Mississippi, before finally settling in California. She attended California State University San Marcos and is a recent graduate of Chapman University's Fowler School

of Law.

As one of three attorneys at Disenhouse Law, located in downtown Riverside, Priscilla practices civil litigation while defending the County of Riverside and the City of Redlands. Although only a first-year attorney, Priscilla has been fortunate to gain valuable experience at her firm and recently second-chaired and won an 11-week jury trial. She enjoys the Inland Empire's tight knit and supportive legal community, which prompted her to run for secretary of Barristers. As the Secretary, she enjoys facilitating and publicizing events especially because the position allows her to utilize her creative side when creating flyers. She is excited to be a part of promoting Barristers' increased presence in the



Priscilla George

legal community. Priscilla is also excited to participate in the New Attorney Academy because of the amazing mentors, advice, and friendships she has gained through the experience so far.

Priscilla has decided to further explore her creative side by acting lead roles in various community musicals at Lifehouse Theater, such as *Rapunzel Untangled*, *Heroes*, and *The Emperor's New Clothes*. Although it is tough to manage full-time work at her firm, her role in Barristers, the late-night rehearsals, and multiple weekend performances, Priscilla enjoys the opportunity to make new friends and be a part of something larger than herself. She is also an aspiring writer and is working on her first young adult dystopian novel. In her limited spare time, Priscilla loves going to Disneyland with friends, singing karaoke, and painting ceramics.

## Upcoming Events

Bridging the Gap will be held on January 27, 2017. It's a free program for new admittees that provides an introduction to the practice of law. Barristers will be attending and greeting admittees.

On February 1, 2017, Barristers in conjunction with APALIE will be hosting a New Admittee Reception from 5:30 p.m. to 8:30 p.m. at Gabbert Gallery in the RCBA Building. In addition to networking, new admittees will be able to participate in a community resource fair, hear advice from a panel of seasoned attorneys, and take a FREE professional headshot. Appetizers and refreshments will be served. All attorneys age 37 and under or within the first seven years of practice are invited to attend. Free admission with RSVP by Friday, January 27, 2017 to [rcbabarristers@gmail.com](mailto:rcbabarristers@gmail.com). Don't miss this event!

Erica Alfaro currently works at State Fund.



## FINAL DRAWING of the Riverside Historic Courthouse by Judy Field

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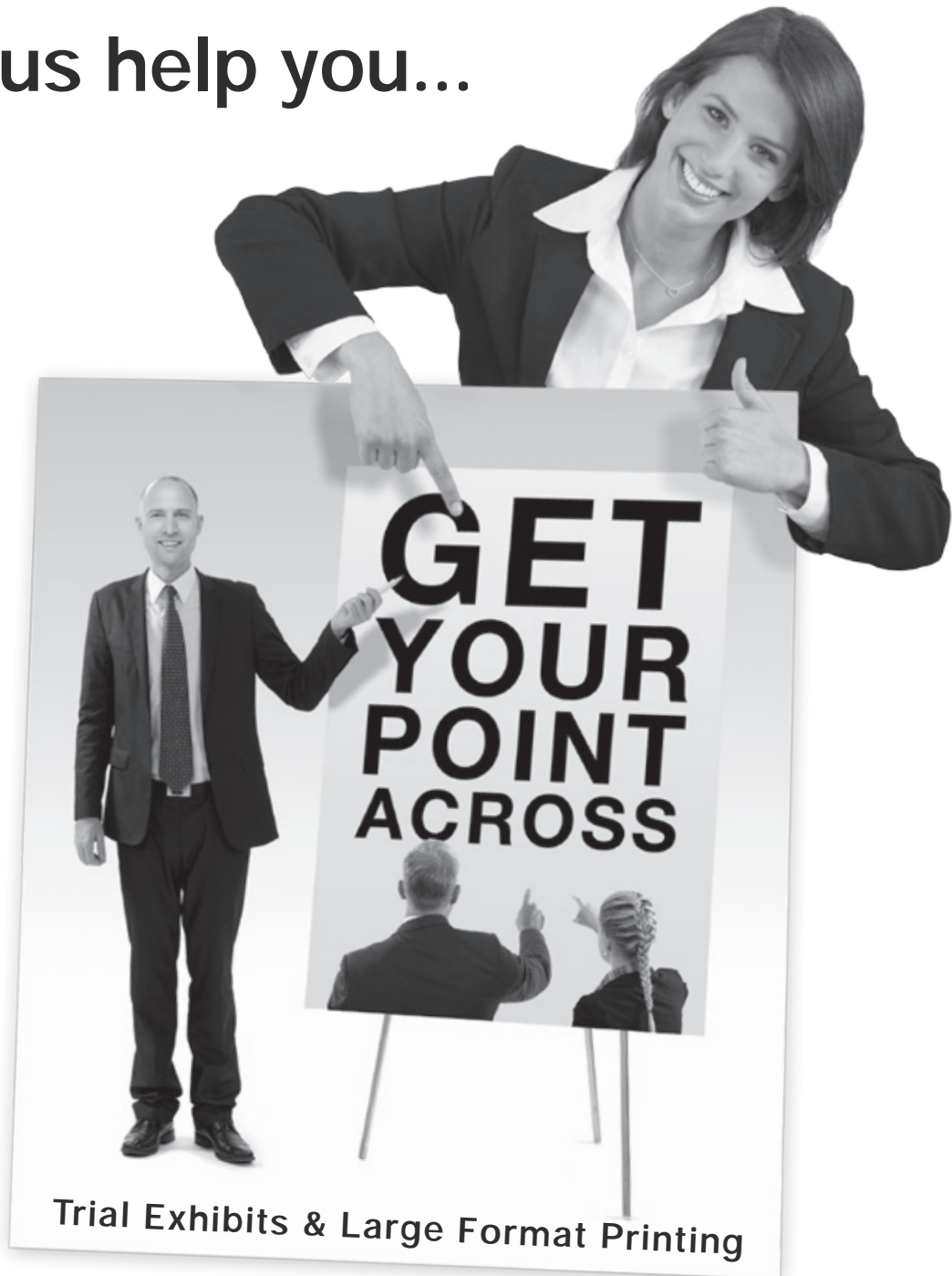
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# READY TO INHALE: CALIFORNIA VOTERS APPROVE PROPOSITION 64

by Mike Donaldson

## I. Introduction

On November 8, 2016, California voters approved the Control, Regulate, and Tax Adult Use of Marijuana Act, or Proposition 64 (Prop 64). Prop 64 significantly changed California's marijuana laws in two ways. First, it reduced and repealed the punishment for many marijuana offenses. Second, it established a robust regulatory scheme designed to control marijuana cultivation, manufacturing, distribution, laboratory testing, and the sale of nonmedical marijuana. This article will give an overview of these changes.

## II. Changes in Criminal Penalties, Resentencing, and Redesignation

Prop 64 reduced and repealed the punishment for many adult marijuana offenses, including violations of Health and Safety Code sections 11357, 11358, 11359, and 11360. It is now legal for adults 21 years of age and older to possess, process, transport, purchase, obtain, and give away to persons 21 and older up to 28.5 grams of marijuana or 8 grams of concentrated cannabis.<sup>1</sup> Further, adults 21 and older may possess, plant, cultivate, harvest, dry and process up to six marijuana plants and possess the cannabis they produce, even if the plants yield more than 28.5 grams.<sup>2</sup> However, persons cultivating marijuana must comply with the regulations in Health and Safety Code section 11362.2, as well as any permissible local regulations.<sup>3</sup> Prop 64 allows cities and counties to enact *reasonable regulations* regarding marijuana cultivation.<sup>4</sup> However, no city or county can completely prohibit indoor cultivation, including in an accessory structure.<sup>5</sup>

Prop 64 amended the adjudication process for juveniles that commit marijuana offenses by emphasizing education and community service. Prop 64 does not decriminalize any marijuana offenses with respect to juvenile offenders. However, depending on the type of offense and whether there are any prior convictions, a

court may impose drug education ranging from four to ten hours, and up to 60 hours of community service.

Lastly, Prop 64 added section 11361.8 to the Health and Safety Code, which provides post-conviction resentencing or redesignation relief to persons currently serving or persons who have completed a sentence for a marijuana offense, and who would not have been guilty of a crime or who would have been guilty of a lesser crime had Prop 64 been in effect at the time they committed the offense.<sup>6</sup> Such persons may file petitions for resentencing or redesignation under section 11361.8 in accordance with Prop 64's amended punishment scheme.<sup>7</sup>

## III. Prop 64's Commercial Marijuana Regulatory Scheme

Prop 64 establishes a comprehensive system to control and regulate all commercial marijuana activity and taxes the commercial growth and retail sale of marijuana.<sup>8</sup> Commercial marijuana activity includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, distribution, delivery or sale of marijuana and marijuana products for use by adults 21 and older.<sup>9</sup>

Entities wishing to engage in commercial marijuana activity must bring themselves within Prop 64's licensing scheme by obtaining a license from the applicable state licensing authority. Prop 64 authorizes the Department of Consumer Affairs to issue transportation licenses, the Department of Food and Agriculture to issue cultivation licenses, and the Department of Public Health to issue manufacturing and laboratory licenses.<sup>10</sup>

Prop 64 creates six different types of licenses.<sup>11</sup> License types 1, 1A, 1B, 2, 2A, 2B, 3, 3A, 3B, 4, 5, 5A, and 5B are cultivation licenses, which differ primarily with respect to the total amount of canopy size permitted to be grown under each license.<sup>12</sup> License types 6 and 7 are manufacturing licenses.<sup>13</sup> A type 8 license is a laboratory

<sup>6</sup> Health & Saf. Code, § 11361.8.

<sup>7</sup> *Ibid.*

<sup>8</sup> Bus. & Prof. Code, § 26010, *et seq.*

<sup>9</sup> Bus. & Prof. Code, § 26001, subd. (d).

<sup>10</sup> Bus. & Prof. Code, § 26010, *et seq.*

<sup>11</sup> Bus. & Prof. Code, § 26050

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>1</sup> Health & Saf. Code, § 11362.1, subd. (a).

<sup>2</sup> Health & Saf. Code, §§ 11362.1, 11362.2, subd. (a).

<sup>3</sup> Health & Saf. Code, § 11362.2, subds. (a), (b).

<sup>4</sup> Health & Saf. Code, § 11362.2, subd. (b).

<sup>5</sup> *Ibid.*

testing license.<sup>14</sup> All marijuana and marijuana products must be tested by a type 8 licensee before being sold, and a type 8 licensee cannot hold any other type of license.<sup>15</sup> Type 10 licenses are for retailers of marijuana.<sup>16</sup> Type 11 are distribution licenses.<sup>17</sup> Distributors are responsible for transporting marijuana from cultivators to laboratories, and then from laboratories to retailers.<sup>18</sup> A type 12 microbusiness license is unique in that it allows a licensee to cultivate less than 10,000 square feet of canopy, act as a distributor, manufacturer, and retailer all on a single license.<sup>19</sup>

Obtaining a state license to engage in commercial marijuana activity is contingent upon first obtaining a *local* permit or license.<sup>20</sup> State licenses will not be issued to entities operating out of compliance with local law.<sup>21</sup> Importantly, under Prop 64, cities and counties retain

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Bus. & Prof. Code, § 26020.

<sup>21</sup> *Ibid.*

control to adopt and enforce local ordinances to regulate marijuana businesses, and may completely prohibit the establishment or operation of marijuana businesses within their jurisdictions.<sup>22</sup> Accordingly, marijuana businesses operating in localities with prohibitions on commercial marijuana activity will not be able to obtain a state license once the state begins issuing them in 2018. In Riverside County, the only cities that currently permit some form of commercial marijuana activity are Desert Hot Springs, Coachella, Cathedral City, Perris and San Jacinto. Commercial marijuana activity is expressly prohibited in Riverside County and in most other cities within the county.

*Mike Donaldson is a criminal defense and marijuana compliance attorney in Temecula and an associate Professor of Political Science at Mount San Jacinto Community College. He serves as Vice President of the Southwest Riverside County Bar Association and as co-chair of the Solo & Small Firm Section of the Riverside County Bar Association.*



<sup>22</sup> *Ibid.*

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# THE OPIOID EPIDEMIC

by Suzanne A. Fidler

## Introduction

Tragic and untimely deaths from prescription drug overdoses, particularly opioids, have brought attention to what some have called an “opioid epidemic.” Opioids are pain medications such as hydrocodone (Vicodin), oxycodone (OxyContin and Percocet), morphine (Kadian, Avinza), and codeine. Not only have high-profile stars who have died from overdoses demonstrated the dangerous risks of these prescriptions, but lawsuits against prescribers and publicity about family members and friends who have been affected have contributed to recent guidelines and legislation for containing this apparent epidemic.

## Statistics Regarding the Prescription Opioid Overprescribing, Overuse and Potential Abuse

According to statistics from the Centers for Disease Control (CDC), overdoses since 1999 have quadrupled and by 2014 there were almost 19,000 deaths involving prescription opioids equating to two deaths per day.<sup>1</sup> The most common drugs of abuse include Methadone, Oxycodone, and Hydrocodone.<sup>2</sup> Overdose rates were highest among people aged 25 to 54 years.<sup>3</sup> In 2014, almost two million Americans abused or were dependent on prescription opioids.<sup>4</sup> Over one thousand people daily are treated in emergency departments across the country attributed to misusing opioid prescriptions.<sup>5</sup>

- 1 CDC. Wide-ranging online data for epidemiologic research (WONDER). Atlanta, GA: CDC, National Center for Health Statistics; 2016. Available at <http://wonder.cdc.gov>.
- 2 Ossiander EM. Using textual cause-of-death data to study drug poisoning Ossiander EM *Am J Epidemiol*. 2014 Apr 1;179(7):884-94. doi: 10.1093/aje/kwt333. Epub 2014 Feb 1112.)
- 3 Centers for Disease Control and Prevention, National Center for Health Statistics. Multiple Cause of Death 1999-2014 on CDC WONDER Online Database, released 2015. Data are from the Multiple Cause of Death Files, 1999-2014, as compiled from data provided by the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program. Accessed at <http://wonder.cdc.gov/mcd-icd10.html>.
- 4 Substance Abuse and Mental Health Services Administration, National Survey on Drug Use and Health, 2014.
- 5 Substance Abuse and Mental Health Services Administration. Highlights of the 2011 Drug Abuse Warning Network (DAWN) findings on drug-related emergency department visits. The DAWN Report. Rockville, MD: US Department of Health and Human Services, Substance Abuse and Mental Health Services Administration; 2013. Available from URL: <http://www.samhsa.gov/data/2k13/DAWN127/sr127-DAWN-highlights.htm>.

## Guidelines and Regulations

In an effort to combat the opioid epidemic, the CDC has launched an educational effort targeting primary care providers, who prescribe nearly half of all opioid prescriptions. Citing treatment of chronic pain with opioids as a key source of the opioid crisis, the CDC has issued twelve recommendations for treating adults with chronic pain in outpatient settings. The guidelines do not apply to patients receiving cancer treatment, palliative care, or end-of-life care. The guidelines emphasize that nonopioid treatment is preferred for chronic pain. Prescribers should weigh the benefits of opioids for pain and function against abuse, addiction, and overdose risk. When opioids are used, the prescriber should set treatment goals with the patient and identify the option of discontinuing opioids if benefits do not outweigh risks. The lowest effective dosage of immediate-release opioids should be prescribed with periodic reassessment of benefits and risks.

Federal regulations include the Controlled Substances Act (CSA) which regulates providers who prescribe opioids. The CSA divides drugs and other substances into five schedules and is published annually in Title 21 Code of Federal Regulations (C.F.R.) §§1308.11 through 1308.15.<sup>6</sup> These substances are placed in their respective schedules based on whether they have a currently accepted medical use in treatment in the U.S., their relative abuse potential, and likelihood of causing dependence when abused.

For Schedule I, the substances in this category have no currently accepted medical use in the U.S., a lack of accepted safety for use under medical supervision, and a high potential for abuse. Examples of Schedule I substances include heroin, lysergic acid diethylamide (LSD), marijuana (cannabis) and peyote.

Substances classified in Schedule II/IIN have a high potential for abuse which may lead to severe psychological or physical dependence. Examples of Schedule II narcotics include hydromorphone (Dilaudid), methadone, meperidine (Demerol), oxycodone (OxyContin, Percocet), and fentanyl (Sublimaze, Duragesic). Examples of schedule IIN are stimulants including amphetamine (Dexedrine, Adderall, metamphetamine, and methylphenidate (Ritalin).

Having less potential for abuse than substances in Schedules I or II, the Schedule III/IIIN substances may lead to moderate or low physical dependence or high psychological dependence. Examples of Schedule III narcotics

<sup>6</sup> Title 21 Code of Federal Regulations (C.F.R.) §§1308.11-1308.15.

include products containing less than 90 mg of codeine per dosage (Tylenol with codeine) and buprenorphine (Suboxone). Examples of Schedule III non-narcotics include: ketamine and anabolic steroids such as Depotestosterone.

With even less potential for abuse relative to substances in Schedule III, Schedule IV substances include benzodiazepines, which are sedatives, such as alprazolam (Xanax), clonazepam (Klonopin), diazepam (Valium), Lorazepam (Ativan), temazepam (Restoril) and triazolam (Halcion). Carisoprodol ((Soma), a muscle relaxant) and midazolam (Versed), an anesthetic used during procedures and surgeries, are also classified as Schedule IV substances.

The least potential for abuse are substances classified as Schedule V. These substances consist primarily of preparations containing limited quantities of certain narcotics. Examples of Schedule V substances are cough preparations containing not more than 200 mg of codeine per 100 ml or per 10 grams (Robitussin AC, Phenergan with Codeine).

The California regulations involving opioid prescriptions are located in the Health and Safety Code sections 11000-11033. This division is known as the California Uniform Controlled Substances Act. The state regulations contained in the California Uniform Controlled Substances parallels the federal regulations include the Controlled Substances Act (CSA), including the classification of opioids in Schedules I through V.

### **CURES (Controlled Substance Utilization Review and Evaluation System)**

Physicians, pharmacists, and other healthcare providers who prescribe opioids should be familiar with CURES (Controlled Substance Utilization Review and Evaluation System). CURES consists of a database of Schedule II, III, and IV controlled substance prescriptions dispensed in California. The most current version is CURES 2.0. Prescription Drug Monitoring Program (PDMP) is that national tool that states use to address prescription drug abuse, addiction and diversion.

Pharmacies and direct dispensers are required to report substances categorized as schedules II through IV through the CURES system. The data is reported to the Department of Justice (DOJ). CURES receives about one million prescription reports per week.

All California licensed pharmacists and all California licensed prescribers (including optometrists) who are authorized to prescribe scheduled drugs were required to register with CURES by July 1, 2016. There has been current proposed legislation to require prescribers to check CURES 2.0 prior to prescribing opioids.

CURES 2.0 provides registered prescribers and dispensers with Patient Activity Report (PAR) up to one year of patient prescription history. This allows practitioners who prescribe these substances to identify patients at risk of addiction. By reviewing the data from CURES 2.0, prescribers and pharmacists may identify patients who have been receiving pain prescriptions from other providers and filling prescriptions from multiple pharmacies. This should alert prescribers and pharmacists to monitor these patients closely for potential opioid abuse and misuse.

### **Standard of Care for Physicians Prescribing Opioids**

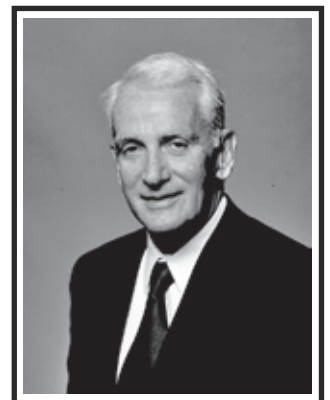
The standard of care for physicians prescribing opioids requires a face-to-face encounter with the patient. During this encounter, the documentation should include:

- (a) History and physical examination clearly defining the source of pain, and expected severity and duration;
- (b) Screen patients for risk factors (history of abuse);



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- (c) Document the discussion of informed consent which includes discussing alternatives and side effects of the controlled substances. Some side effects include respiratory depression (low oxygen saturation, decrease drive for breathing); constipation (opioids slow down the gastrointestinal system); sedation and drowsiness; dependence and likelihood of abuse, particularly with long term use; and the potential for withdrawal syndrome if suddenly stop taking them after long term use;
- (d) Document ongoing monitoring;
- (e) Obtain consultation in certain situations; and
- (f) Maintain legible records which include addressing pain relief, the impact of pain on activities of daily living, adverse effects, and aberrant drug-related behaviors.

## What is the Role of the Medical Board of California (MBC)?

The MBC serves to protect the public from improper care provided by physicians. In terms of prescribing controlled substances, the MBC ensures that doctors prescribe opioids for a legitimate medical purpose. The MBC issues MBC Pain Management Guidelines which require treatment plan and objectives. Prescribers must write for all controlled substances (Schedule II-V) on tamper-resistant security prescription forms (that have at least 10 required security features).

Some of the types of violations brought by the MBC against physicians include

charges of excessive treatment violations under Business and Professions Code section 725. It is unprofessional conduct for a physician to engage in repeated acts of clearly excessive prescribing or administering of treatment. The physician should prescribe only the quantity needed based on the expected length of pain.

Another violation falls under Business and Professions Code section 2242. It is unprofessional conduct to prescribe, dispense, or furnish dangerous drugs (prescription medications, including controlled substances) “without an appropriate prior examination and medical indication” or to engage in excessive prescribing of drugs or prescribing drugs without medication indication.

The MBC may charge a physician under Health and Safety Code Section 11170. Under this section, “No person shall prescribe, administer, or furnish a controlled substance for himself.”

## Red Flags

Physicians should recognize and identify red flags so that they avoid inappropriately prescribing opioids. The following are some of the red flags that should be addressed:

- (1) The patient appears sedated, confused, intoxicated, or exhibits withdrawal symptoms.
- (2) Patients travel in groups and/or have unusual common factors in their relationships with each other when requesting controlled substance prescriptions on the same day.
- (3) The patient repeatedly resists changes in therapy despite clear evidence of adverse effects.
- (4) CURES 2.0 suggests evidence of “doctor shopping.”
- (5) The patient pressures the physician to prescribe by implying or making direct threats to prescriber or staff.
- (6) The patient refuses to sign an opioid pain care agreement.
- (7) The patient fails the urine toxicology screen.
- (8) The prescriber discovers that the patient alters, forges or rewrites the prescription.
- (9) The patient requests specific drug combinations.
- (10) The patient repeatedly seeks pain medication from the emergency department.
- (11) The patient experiences an unintentional or intentional overdose.

## Conclusion

Over time, due to the increased publicity and attention, enhanced restrictions on prescribing, increased education and regulation of prescribers, and new guidelines regarding opioid prescribing, the opioid epidemic should improve. The federal and state regulations provide the necessary framework for prescribers to avoid potential misuse and abuse of prescription pain medication. The statistics will provide a factual basis to determine whether progress has occurred.

*Suzanne A. Fidler, MD, Esq., FACP is a healthcare attorney and physician practicing healthcare law. She also works as a freelance attorney with Montage Legal Group. Suzanne may be contacted at 949-631-0055 or [suzannefidler@gmail.com](mailto:suzannefidler@gmail.com).*



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**FRIDAY, FEBRUARY 10, 2017**  
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## SCHEDULE:

- Check-in and Continental Breakfast (9:00 - 9:45 am)
- Panel #1: The Global and Multi-Jurisdictional Practice of Law (10:00 - 11:30 am)
- Luncheon with Keynote Address by Honorable Samuel A. Alito, Jr. (12:00 - 1:30 pm)
- Panel #2: The Future of the Profession (1:30 - 3:00 pm)
- Panel #3: Emerging Areas of Education and Practice (3:15 - 4:45 pm)
- En Banc Reception - Appetizers and Drinks (5:00 - 7:00 pm)

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# DRUG PROSECUTIONS IN LIGHT OF RECENT CHANGES IN DRUG LAWS

*by Jay Kiel and Scott Mason*

In the last two years, with the passage of Propositions 47 and 64, California has experienced drastic changes in the law when it comes to the prosecution of drug cases.

Passed by California voters on November 4, 2014, Proposition 47 reduced many drug and drug-related theft crimes from felonies to misdemeanors. Proponents of Proposition 47 sold it as a way to ease prison overcrowding, reduce public safety expenditures, and to diminish the punishment for individuals who are addicted to controlled substances. Proposition 47 also allowed for prior felony convictions for drug and drug-related theft crimes to be retroactively reduced to misdemeanors – resulting in the filing of hundreds of thousands of so-called “Prop 47 petitions” in the superior courts.

This mass reclassification of narcotics offenses has not only had effects on individuals, but society as well. First, repeat offenders can now break the law with little or no consequence. While a felony conviction has a typical exposure of 3 years with the potential to impose additional enhancements for prior convictions or prison commitments, punishment for a misdemeanor conviction is limited to a maximum of one year in jail regardless of one’s criminal history. So, an individual can commit as many Prop 47-eligible crimes as he wants, and he gets the same punishment – a maximum of one year in county jail.

With no real consequence for their actions, users and addicts now have little to no incentive to seek treatment for their addiction. Codified programs like Penal Code section 1000 (Drug Diversion) and Proposition 36 (PC 1210.1), were designed to allow individuals charged with simple possession of narcotics to avoid a felony conviction, as well as possible time in jail or prison time, as long as they agreed to complete drug treatment and rehabilitation programs. Many counties also set up other Drug Court programs to help serious addicts who were facing state prison for simple possession or drug related theft charges. Because Proposition 47 changes these felonies to misdemeanors (and thus takes any real punishment off the table), there is little incentive for individuals to face their addiction and participate

in the rehabilitation and drug treatment programs offered by Penal Code section 1000, Proposition 36, and Drug Courts. Also, because there is less stigma associated with a misdemeanor conviction, and because the requirements of misdemeanor probation are far more lenient than completing most of these rehabilitation programs, individuals who would have jumped at the chance for a rehabilitation program, now scoff at the work and commitment that such a program requires. Both the individual, who never receives treatment and often ends up homeless, and society, who endures the consequences of the revolving-door crimes the individual commits, suffer.

On November 8, 2016, California voters passed Proposition 64, also known as the Adult Use of Marijuana Act (AUMA). The passage of AUMA makes it legal for anyone 21 years or older: to possess an ounce or less of marijuana; to give away an ounce or less of marijuana to individuals over the age of 21; and to cultivate six plants or less in their yard or inside their home. AUMA also sets up a scheme for the licensing and regulation of marijuana cultivation, distribution, manufacture, and sales.

Under AUMA, first and second time cultivation and distribution of marijuana for sales outside of the licensing and regulation laws is now a misdemeanor rather than a felony. Additionally, individuals who have previously suffered prior felony convictions for most marijuana offenses are now eligible to have their cases retroactively dismissed or reduced to a misdemeanor depending on the nature of their prior conviction. Additionally, under AUMA, in order for an individual to be charged with a felony for possession of marijuana for sale or cultivation of marijuana for sale, that individual must have been convicted twice previously of possession of marijuana for sale or cultivation of marijuana for sale under the new laws implemented under AUMA.

Proponents of AUMA argued that legalizing marijuana and regulating marijuana sales and cultivation would lead to a decrease in the involvement of organized crime in California’s marijuana industry. However, because AUMA places extra taxes and regu-

latory compliance costs on cultivators and sellers of marijuana, while at the same time reduces the criminal penalties, organized crime will continue to be incentivized to maintain or increase their presence in the marijuana black market.

Most of the effects from AUMA's passage have not yet been felt in California. However, studies of similar measures passed in Colorado and Washington have shown measurable effects on society. For example, in Colorado, according to the Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA), there has been a significant increase in individuals driving under the influence of marijuana. In the state of Washington, according to Northwest High Intensity Drug Trafficking Area (NWHIDTA), drivers with an active THC (tetrahydrocannabinol) level that were involved in a fatal traffic collision has increased 122% from 2010 to 2014. Additionally, the legalization of marijuana in Colorado and Washington has resulted in increased crime rates in those states. According to RMHIDTA, Colorado experienced a 6.2% increase in crime from 2014 through 2015.

While Propositions 47 and 64 may lead to reductions in the prosecution of certain drug crimes, they do so at a price – a price of increased crime rates committed by those using drugs or involved in the drug trade, and a decrease in society's ability to provide the necessary incentives for rehabilitation.

*Jay Kiel has been a deputy district attorney with the Riverside County District Attorney's Office since 2007. He graduated from Western State University College of Law in 2006. Currently, he is assigned to major narcotics in the Riverside office. Some of his duties include, the prosecution of major drug trafficking organizations operating in Riverside County.*

*Scott Mason has been a deputy district attorney at the Riverside District Attorney's Office after graduating from University of San Diego School of Law in 2008. DDA Mason has served in various assignments, including the Felony Trial Team, Drug Unit, Grand Theft Auto Division, and Domestic Violence Unit. Most recently, DDA Mason acted as the Trial Team Leader of New Career Prosecutor Unit; mentoring, teaching, and overseeing new deputy district attorneys. DDA Mason is currently assigned to the Riverside District Attorney's Office in Indio.*



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# SYNTHETIC DRUGS – THE NEW FRONTIER OF WAR ON DRUGS

by Nesa Targhibi

## What Are Synthetic Drugs

Synthetic drugs are drugs produced chemically in a laboratory. The chemical structures of these drugs are twiggged with to cause them to mimic or enhance the effects of natural drugs. These molecular modifications also cause these drugs to slightly differ from their related illegal or controlled drugs and thus be able to circumvent the existing drug laws.<sup>1</sup> Further, majority of companies selling such drugs as legal products, such as incense or bath salts, label the products as not intended for human consumption to avoid liability. Although these labels do not impact the applicability of federal and state laws, they do hinder the efforts of law enforcement and public health officials in identifying and controlling these drugs.<sup>2</sup>

## Impacts of Synthetic Drugs on Public Health

According to Congressional Research Service reports, from 2009 to 2011, synthetic drug abuse was reported to have dramatically increased. During this time period, calls to poison control centers for incidents relating to harmful effects of synthetic cannabinoids (such as “K2” and “Spice”) and stimulants (such as “bath salts”) increased at an alarming rate. The number of hospital emergency department visits involving synthetic cannabinoids more than doubled from 2010 to 2011. In 2012 and 2013, however, the number of calls to poison control centers for incidents relating to harmful effects of synthetic cannabinoids and synthetic stimulants decreased. Calls regarding bath salts have declined each year since 2011, while calls regarding synthetic cannabinoids have increased since the drops in 2012 and 2013.<sup>3</sup> The *Monitoring the Future* (MTF) survey results from 2015 indicate that annual prevalence rates for use of synthetic cannabinoids are down over the last two years, while bath salt use remained low. Government and media reports indicate that fentanyl, a synthetic opioid 50-100 times stronger than morphine, is rising in popularity as well as various synthetic cannabinoids.<sup>4</sup> Based on published studies and reported cases, the effects of synthetic drugs range from nausea to drug-induced psychosis and possibly death.

1 Finklea, Kristin and Sacco, Lisa N., *Synthetic Drugs: Overview and Issues for Congress*, Congressional Research Service (May 3, 2016).

2 Van Pelt, Jennifer, “*Synthetic Drugs – Fake Substance, Real Danger*,” *Social Work Today*, Vol. 12 No. 4 P.12.

3 Finklea, Kristin and Sacco, Lisa N. *Synthetic Drugs: Overview and Issues for Congress*, Congressional Research Service (May 3, 2016).

4 “*Regulation of Synthetic Drugs*,” Partnership for Public Health. Retrieved December 1, 2016.

Some cases have been reported where multiple organ failure and death resulted due to misdiagnoses caused by lack of information available on these drugs.<sup>5</sup> However, due to relatively new presence of these drugs and limited research, the true effects of many of these drugs are still unknown.<sup>6</sup>

## Federal, State and Local Reactions to Synthetic Drugs

In 2011, the Attorney General, through the U.S. Drug Enforcement Administration (DEA), placed five synthetic cannabinoids and three synthetic stimulants on Schedule I of the Controlled Substances Act (CSA). A drug may be placed on Schedule I if it meets the following criteria:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.<sup>7</sup>

In April 2013, due to further concerns over the reported increase in use of certain synthetic drugs and their extreme and unknown effects, then-U.S. Attorney General Eric Holder, through the DEA and in consultation with the Department of Health and Human Services (HHS), took administrative action to permanently place methylone on Schedule I of the CSA. A number of administrative scheduling actions have since taken place.<sup>8</sup>

The legislative branch has also taken actions against synthetic drugs and to help control their consumption. In 2012, Congress passed the Synthetic Drug Abuse Prevention Act, Subtitle D of Title XI of the Food and Drug Administration Safety and Innovation Act (P.L. 112-144), directly adding several synthetic substances to Schedule I.<sup>9</sup> As a result of these laws, those who produce, sell, use or possess these synthetic drugs may be subject to federal criminal prosecution.

5 Van Pelt, Jennifer, “*Synthetic Drugs – Fake Substance, Real Danger*,” *Social Work Today*, Vol. 12 No. 4 P.12.

6 Finklea, Kristin and Sacco, Lisa N., *Synthetic Drugs: Overview and Issues for Congress*, Congressional Research Service (May 3, 2016).

7 21 U.S.C. §812(b)(1).

8 U.S. Department of Justice, Drug Enforcement Administration, Office of Diversion Control, *Lists of: Scheduling Actions, Controlled Substances, Regulated Chemicals*, January 2016, <http://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf>.

9 “*Regulation of Synthetic Drugs*.” Partnership for Public Health. Retrieved December 1, 2016.

States have also been involved in an effort to control synthetic drugs. Forty-three states have passed laws prohibiting certain synthetic cannabinoids and 44 states have passed laws prohibiting certain synthetic cathinones.<sup>10</sup> Some state laws identify particular chemical compounds that are unlawful. For example, California has outlawed possession of synthetic drug “spice.”<sup>11</sup> Arizona law contains an extensive list of prohibited chemical compounds.<sup>12</sup> Other state laws use generic language so as to include any number of synthetic drugs. For example, Colorado law lists specific prohibited compounds, but also prohibits cathinones generally, defined as “any synthetic or natural material containing any quantity of a cathinone chemical structure, including any analogs, salts, isomers, or salts of isomers of any synthetic or natural material containing a cathinone chemical structure.”<sup>13</sup> There is a trend toward these more generic definitions. The main advantage of these generic definitions is that it allows the law to keep pace with the constantly changing molecular structure of the synthetic drugs. Otherwise, only a modest change of the structure will enable the manufacturer to avoid regulations and possible criminal prosecutions. Similar to federal laws, the state laws add the existing prohibitions on production, sale, use or possession to the listed synthetic drugs and require criminal prosecution for violations of the law.<sup>14</sup> Local legislators have also been taking action against the synthetic drugs. The local legislatures have mainly been using nuisance abatement power to take actions either broadly or against specific retailers.<sup>15</sup>

## Issues Facing Fight Against Synthetic Drugs

Currently, law enforcement officials face significant hurdles in pursuing criminal charges against those who manufacture and sell synthetic drugs. Even with the generic or catch-all language, expert testimony about the chemical composition of the product and its effect on the human body are likely required. This is mainly due to lack of available research and wide variety of synthetics drugs available in the market.<sup>16</sup> Additionally, labeling these drugs as legal products, such as incense or bath salts, increases enforcement officials’ struggle to identify and punish retailers.<sup>17</sup> Because synthetic drugs are relatively new products, informing the public about the risks of use is imperative. This includes incorporating information about synthetic drugs into youth drug education programs as well as broader public education so that retailers, parents and other adults are aware of

these products. Also informing and educating the medical community and health departments about the availability of these drugs and how to treat a user. Supporting research into the effects of the drugs will also contribute to the ability of the public and law enforcement to respond to this emerging and dangerous problem.<sup>18</sup>

*Nesa Targhibi, treasurer of the Riverside County Barristers, is a sole practitioner based in Riverside County. She practices mainly as a special appearance attorney covering Riverside, San Bernardino and Orange County.*



<sup>18</sup> *Ibid.*

## NOTICE FROM THE RIVERSIDE SUPERIOR COURT

### Subject: Change in Criminal/Traffic Boundaries

The court has evaluated traffic and criminal jurisdictional boundaries for the Mid-County (Southwest Justice Center) and the Western (Banning Justice Center and Hall of Justice) regions in order to equalize the workload between courts. Based on the court’s review, the court has decided to shift jurisdictional boundaries between Banning Justice Center, Riverside Hall of Justice Center and the Southwest Justice Center. The following changes will take effect on February 1, 2017.

- **Infraction citations** emanating from the cities of Temecula, Lake Elsinore and Menifee and the communities of Homeland and Winchester, issued on or after February 1, 2017, will be cited to appear at the Southwest Justice Center.
- **Misdemeanor and felony** cases emanating from the communities of East Hemet (Unincorporated area), with a violation date of February 1, 2017 or after, will be filed at the Southwest Justice Center.

The jurisdictional boundaries for criminal and traffic cases will now be designated by cities and communities, in lieu of zip code. Please notate the city or community on the citation or other document that is submitted to indicate where the violation occurred.

For your reference the Criminal Administrative Order which outlines where to file felony, misdemeanor and infraction cases is located on the Court’s website at:

[www.riverside.courts.ca.gov/wheretofile.shtml](http://www.riverside.courts.ca.gov/wheretofile.shtml)

If you have any questions regarding this change, please contact the Court’s Executive Office at 951.777.3163.

### Subject: New and Revised Judicial Council Forms (Family Law)

Please take note of the new and revised Judicial Council forms for family law effective January 1, 2017. All forms will be available on Judicial Council’s website at:

[www.courts.ca.gov/forms.htm](http://www.courts.ca.gov/forms.htm).

The Riverside Superior Court appreciates you using the new and/or revised Judicial Council forms as of January 1, 2017.

<sup>10</sup> *Ibid.*

<sup>11</sup> Ulloa, Jazmine, “California outlaws possession of synthetic drug ‘spice’ amid overdoses in L.A.’s Skid Row,” *Los Angeles Times*, (September 25, 2016).

<sup>12</sup> Arizona Revised Statutes, §13-1401.

<sup>13</sup> Colorado Revised Statutes, §18-18-102.

<sup>14</sup> “Regulation of Synthetic Drugs,” Partnership for Public Health. Retrieved December 1, 2016.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

# A NEW KIND OF HOLISTIC TREATMENT: MFI RECOVERY'S NEW HEALTH AND WELLNESS CENTER OPENS

by Juanita E. Mantz

On November 17, 2016, Riverside saw the opening of a new kind of cutting edge clinic, MFI Recovery's Health and Wellness Center ("Health and Wellness Center"), a clinic focused on a new kind of holistic wellness. The clinic is affiliated with MFI Recovery Center ("MFI") and was dreamed into being more than eight years ago when the MFI Board of Directors first began trying to think outside the box during a strategic planning session.

MFI's Health and Wellness Center seeks to provide holistic whole person health care to its clientele. The goal is one of integration, in the truest definition of that word, and is made possible through a partnership with the Inland Empire Health Plan (IEHP).

The goal of the Health and Wellness Center is to treat medical, mental health, and substance abuse, all in the same clinic. This is important because untreated and undiagnosed behavioral health conditions of mental health and substance abuse often co-occur with chronic medical diseases. Thus, with the opening of this innovative Health and Wellness Center, MFI Recovery is no longer limited to recovery. Instead, they will seek to treat all of the medical and mental health needs of its clientele, including substance abuse, depression, anxiety and medical diseases.

MFI expanded from its original one location to providing services via ten facilities in Riverside, Murrieta, Hemet/San Jacinto, and Banning. Prior to the opening of the Health and Wellness Center, services focused on substance abuse, mental health, In-School Services, and In-Home Services. You can now add primary health care to the list, creating a new approach to health and wellness that has sorely been lacking in Riverside County.

This new approach to wellness is in line with MFI Recovery's Mission Statement which states that their goal is: "To transform struggling people into loving and productive individuals who enrich their families and communities." Ultimately, the goal is not only the best counseling, but also the best medical care, all in one place.

According to Executive Director Craig Lambdin; "In many ways the MFI Primary Care Clinic marks a new transi-

tion in the continuous evolution of MFI. I have always wanted the medical people to come to us rather than MFI to have to send our clients on three buses and a van ride to get medical help. In the past, these medical appointments were spread all over the community creating logistical headaches and reflecting how fractured the services are when a program such as ours does not have a medical component."

Lambdin went on to emphasize how very important this clinic is stating, "When behavioral health problems are not effectively treated, they can impair adherence to prescribed medical and mental health treatments leading to poor health outcomes and increased mortality. Untreated behavioral health problems can lead to decreased work productivity and substantial increases in overall health care costs. For example, Medicaid patients with major depression in addition to a chronic medical conditions such as diabetes, have more than twice the overall health care costs than those without depression."

I personally became a Board of Directors member of MFI this year and was honored to attend the Grand Opening of the Health and Wellness Center. The clinic is beautiful with a positive energy reflected in the soothing color palette. I walked through the entire clinic and was amazed at the kind of treatment they offered. From counseling for parents dealing with troubled young children to game playing activities with tweens to treating medical conditions and substance abuse — I thought to myself, this is really a new way of dealing with the world. My favorite part of course, as a writer and deputy public defender, were the testimonials of clientele who have recovered their lives, wellness, and dignity with the help of MFI.

MFI's Health and Wellness Center is located at 5870 Arlington Avenue, Riverside, and is a registered non-profit entity that welcomes donations.

*Juanita E. Mantz is a Riverside County Deputy Public Defender and a member of the Board of Directors of MFI Recovery.*



*Members of the MFI Board of Directors: (l-r) Yundra Thomas, Mary Fowlie, Bonnie Russell, Sandra Schnach*



*The Ribbon Cutting for the MFI Recovery Center Medical Clinic Grand Opening.*





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# RECREATIONAL MARIJUANA LEGALIZATION ALLOWS LOCAL GOVERNMENTS TO CULTIVATE NEW REGULATIONS

*by Jordan Ferguson*

On Election Day 2016, Californians approved Proposition 64, the Control, Regulate, and Tax Adult Use of Marijuana Act (or “AUMA”), which legalized recreational use of marijuana for adults. The marijuana industry in California is likely on the precipice of explosive growth, with recreational retailers, dispensaries, cultivation operations, manufacturers, testing laboratories, and delivery services primed to open for business and take advantage of the new market. AUMA is poised to change the regulatory landscape at the state level in massive ways, but the new law leaves ample room for local governments hoping to regulate the emerging industry to ensure marijuana legalization serves the best interests of local communities.

As of November 9, AUMA will not only permit recreational use of marijuana by adults, but it will also allow indoor cultivation of up to six marijuana plants in any private residence or accessory structure. These changes will render many previously existing local regulations unenforceable, and it is advisable that all local governments examine their existing smoking and marijuana regulations to determine whether amendment is needed.

AUMA allows local governments to ban all commercial marijuana activities, including dispensaries, retailers, manufacturers, testing laboratories, and commercial cultivation. It also allows for a full ban of delivery services, although local governments cannot prevent a delivery service from driving through their jurisdiction, only from originating or terminating its delivery within a city. While AUMA allows local governments to “reasonably regulate” indoor cultivation – including by requiring a permit prior to cultivating – the law will no longer allow an outright ban on indoor cultivation in private residences or accessory structures. The law does, however, maintain local authority to regulate or ban all outdoor cultivation.

With this wide array of regulatory options, local governments have a variety of options when considering how to approach regulation of recreational marijuana. For some communities, the best regulation will be the strongest possible ban, precluding as many marijuana activities as possible within their jurisdiction. Others may decide to allow some or all commercial marijuana activities and adopt regulatory schemes to control the

emerging industry. Local governments allowing commercial marijuana activities are frequently turning to land use controls as tools to constrain commercial marijuana activity to appropriate areas of town. Beyond that, requiring a personal permit and business license application for all potential commercial marijuana activities will allow local governments to keep a close eye on the new industry. Cities can choose whether to make any permitting process ministerial in nature, or to allow for discretion by requiring a conditional use permit for any marijuana use.

AUMA also creates a statewide licensing and regulatory system for commercial marijuana activities, and requires that the Bureau of Marijuana Control begin issuing licenses before Jan. 1, 2018. This means that, while recreational use and indoor cultivation are already legal throughout California, in most situations recreational dispensaries, delivery services and other commercial marijuana businesses cannot open their doors until the State begins issuing licenses. AUMA also imposes a 15 percent sales tax and a cultivation tax of \$9.25 per ounce for flowers and \$2.75 per ounce for leaves, with exceptions for medical marijuana sales and cultivation.

Local governments should review their current regulations and consider enacting regulations surrounding recreational use of marijuana. Some marijuana uses may already be creating new issues in communities across the State, whether in the form of nuisances caused by recreational users, or in the more serious forms of fires, explosions or other structural damage caused by improperly designed or operated indoor cultivation areas. In addition to regulating the personal, medical and commercial uses of marijuana, local governments should reexamine their smoking ordinances, begin to consider the potential risks of unregulated cultivation in private homes and think about how they, as employers, will handle the legalization of recreational marijuana.

Beyond that, local governments should consider the opportunities created by recreational marijuana legalization, including the imposition of local taxes on any allowed marijuana use. As California ushers in a new era and a new industry, local governments should keep their eyes open for opportunities that best serve their interests. For some cities, that will mean banning as many

marijuana uses as they can. For others, it will mean opening their doors to some, or even all, marijuana businesses to benefit from potential tax revenue or to place themselves on the cutting edge of an emerging industry.

Proposition 64 has altered the landscape across California in some dramatic ways, creating both opportunities and challenges for local regulators. Every city will have its own concerns about the industry, and its own approach in determining how best to regulate recreational marijuana. Local governments should take action now to ensure they are regulating marijuana uses in a way that best serves the interests of the community and one that is fully compliant with state law.

*Jordan E. A. Ferguson provides legal services to cities, special districts and private clients across Southern California. He is well-versed in issues surrounding emerging technologies and the sharing economy, land use and planning laws, conflicts of interest, free speech regulations, privacy rights, sex offender regulations, the Brown Act, public safety regulations and elections law matters. As an associate in the Municipal Law and Special Districts practice groups of Best Best & Krieger LLP, his practice involves city attorney and general counsel services.*



## MEMBERSHIP

The following persons have applied for membership in the Riverside County Bar Association. If there are no objections, they will become members effective January 30, 2017.

**Eyad “Eddie” Abdeljawad** – Route 66 Law Group, Riverside

**Stephanie Gutierrez** – Reid & Hellyer, Temecula

**Mohamad A. Khatibloo (A)** – Diversified Monitoring and SCRAM, Santa Ana

**Kiki Manti** – Fabozzi & Miller, Temecula

**Bryan A. Mason** – Solo Practitioner, Riverside

**McKenzie D. McCammack** – Pedersen Law, Irvine

**Ronald A. Powell** – Law Offices of Michael A. Scaffidi, San Bernardino

**Karl D. Wallen** – Legal Aid Society of San Bernardino, San Bernardino

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# AMERICA'S WAR ON DRUGS: WHAT'S LOVE GOT TO DO WITH IT?

by Julie A. Vesej

Will America ever declare a victory to the war on drugs? I hope we do see victory, because it seems that time and again drug addiction acts as the primary factor in violent crimes. Over the last forty-five years, America's war on drugs has changed our Constitutional fabric by justifying legislation that strips the states of independently regulating the health, safety and welfare of its people. Asset forfeiture programs and mandatory minimums are two such acts of legislation used as weapons in this warfare. As our nation moves forward, it is my hope that we will see a shift in values within our correctional system from retribution to rehabilitation.

Asset forfeiture programs have been extremely successful in severely hampering the ability of drug traffickers and individuals involved in criminal activities to acquire assets with proceeds derived from illegal activities.<sup>1</sup> While asset forfeiture is a practice as old as government itself, this form of monetary punishment doesn't appear to be facing death any time soon. The United States Department of Justice Asset Forfeiture Program reported to Congress that the "Total Net Deposits to the Fund by State of Deposit Fiscal Year 2015" was \$1,629,261,564,<sup>2</sup> with California's contribution coming in at \$86,111,035.<sup>3</sup> While civil asset forfeiture was originally conceived in the 1980s as a way to target and drain resources away from powerful criminal organizations, it has primarily become a method for law enforcement to confiscate the savings and property of those not even charged with any criminal wrongdoing.<sup>4</sup> Over the last forty-five years civil and criminal asset forfeiture programs have seen governmental agencies regularly collaborate to execute the war on drugs. For instance the California Highway Patrol Department's involvement in the Federal Asset Forfeiture Program consists of a collaboration with federal agencies (i.e. Drug Enforcement Administration, Federal Bureau of Investigation, Department of Homeland Security, United States Secret Service, United States Postal Service, Internal Revenue Service, etc.) in joint criminal investigations by

providing canine assistance and assisting federal agents with federal seizure warrants.<sup>5</sup>

In addition to asset forfeiture, America's war on drugs was intensified when President Reagan signed the Anti-Drug Abuse Act of 1986, creating mandatory minimum penalties for drug offenses. On the battle lines, these mandatory minimum sentencing guidelines snatch discretion from judicial officers who, in some instances, would issue less harsh sentences or outpatient rehabilitation, or even job placement. Those charged with drug offenses face sentences that compound quickly when the defendant has any prior "serious" felony. Although Proposition 47 has done a lot to reduce the imprisonment of drug offenders by lowering certain drug possession felonies to misdemeanors, at the end of the day America still has the world's largest prison population<sup>6</sup> with the number of arrests in 2015 for drug possession coming in at 1,249,025.<sup>7</sup> Although these facts are damning, it really is not so bad by comparison to China, where drug dealing is punishable by death, and the mobile execution vans<sup>8</sup> circle neighborhoods ready to enforce death sentences daily.

By getting back to basics, we can apply the five traditional goals of punishment to see where we have gone off course. We have met the goals of retribution, deterrence, restoration, and incapacitation by creating the infrastructure commonly known today as America's Prison Industrial Complex. However, rehabilitation stands apart from the other factors because it is not a "one size fits all" type of process, instead it takes individualized attention. Many correctional facilities use the classroom setting to teach inmates how to read and educate themselves, and/or use psychiatrists and pharmaceuticals to stifle drug addiction manifestations, but we can do better.

Drug court, Penal Code section 1000, and Proposition 36 provide for a criminal prosecution diversion that often use an eighteen month rehabilitation program that, once completed, allow a judicial officer to dismiss the drug offense charge. Unfortunately these diversion options are not available to all persons charged with a drug offense. Even worse

1 <https://www.chp.ca.gov/programs-services/for-law-enforcement/federal-state-asset-forfeiture-program>.

2 <https://www.justice.gov/afp/fy2015-asset-forfeiture-fund-reports-congress>.

3 <https://www.justice.gov/afp/fy2015-equitable-sharing-payments-cash-and-sale-proceeds-recipient-agency-state..>

4 <http://www.drugpolicy.org/news/2016/08/bipartisan-asset-forfeiture-reform-bill-passes-california-assembly>.

5 <https://www.chp.ca.gov/Programs-Services/For-Law-Enforcement/Federal-State-Asset-Forfeiture-Program>.

6 [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All&=Apply](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All&=Apply).

7 <http://www.drugpolicy.org/drug-war-statistics>

8 <http://www.dailymail.co.uk/news/article-1165416/Chinas-hi-tech-death-van-criminals-executed-organs-sold-black-market.html>.

is when our veterans, to whom society owes everything, are put behind bars by the same country they laid their lives down for, simply because they are suffering from drug addiction. Veterans' courts play an invaluable role in preventing this kind of injustice, but for many veterans these courts are not available. "In December 2011, California courts reported that nine veterans' courts programs had been established throughout the state. Currently 12 programs are reported in operation."<sup>9</sup> Although this is a start, it means that there are still forty-six counties in California that do not have veterans' courts' programs. We can do better.

How can we do better? With today's abundance of violent crime and prison overcrowding, in-community rehabilitation programs seem to be a simple solution. Research shows that treatment for drug offenders, when delivered in the community, is one of the most cost-effective ways to prevent such crimes and costs approximately \$20,000 less than incarceration per person per year.<sup>10</sup> With the amount spent annually in the U.S. on the war on drugs at more than \$51,000,000,000<sup>11</sup> we could stand to trim some fat.

Although Drug court, Penal Code section 1000, Proposition 36, and veterans' courts are valuable alterna-

9 <http://www.courts.ca.gov/11181.htm>.

10 See more at: [http://www.drugwarfacts.org/cms/Prisons\\_and\\_Drugs#sthash.ii0yzGGu.dpuf](http://www.drugwarfacts.org/cms/Prisons_and_Drugs#sthash.ii0yzGGu.dpuf).

11 <http://www.drugpolicy.org/drug-war-statistics>

tives to avoid asset forfeiture and lengthy mandatory minimum sentences, these programs just scratch the surface of the in-community rehabilitation possibility. Let's tap into the other services that may be available to drug offenders through the Riverside County Department of Mental Health which range from: companion care, respite, transportation, community integration, crisis intervention and stabilization, supported employment, day support, prevocational services, residential support, therapeutic and supportive consultation, environmental modifications, intensive in-home therapy and day treatment, in addition to traditional mental health and behavioral treatment.<sup>12</sup>

This "life coach" type of rehabilitation will effectively lead many drug offenders to interact with their communities in a healthy way, get and keep employment, and altogether clean up their lives in a way that eliminates drug addiction, reduces violent crimes and nurtures the family as well as the community. What does love have to do with America's War on Drugs? Everything.

*Julie A. Vesey is a graduate of Atlanta's John Marshall Law School, Estate Planning Attorney with Beneficial Legal, PLC and practices criminal and family law.*



12 [https://npidb.org/organizations/agencies/community-behavioral-health\\_251s00000x/1679748289.aspx](https://npidb.org/organizations/agencies/community-behavioral-health_251s00000x/1679748289.aspx)

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# INTERVIEW WITH RIVERSIDE COUNTY DISTRICT ATTORNEY MICHAEL HESTRIN

*by DW Duke*

Michael Hestrin was born and raised in Coachella Valley. He received his Bachelor of Arts in history from the University of Arizona, a Master of Arts in Latin American Studies from Stanford University, and a Juris Doctor from Stanford University School of Law. After 18 years as a prosecutor in the Riverside County District Attorney's office, with over 100 trials under his belt, Mr. Hestrin decided to run for the office of Riverside County District Attorney. After a hotly contested race with District Attorney Paul Zellerbach, with many peculiar twists and turns, Mr. Hestrin ultimately prevailed and was elected as the District Attorney of Riverside County.

I met with Mr. Hestrin on November 18, 2016, in his office, to address his perception of the consequences of the legalization of marijuana for recreational purposes in the State of California.

DW Duke: On November 8, 2016, the citizens of the State of California passed Prop 64 which legalized recreational marijuana use in this State. As the District Attorney of Riverside County, do you believe that was a good decision for California?

Mike Hestrin: I was not in favor of the legalization of marijuana and I have concerns. But we are a democratic republic and the voters have spoken. We will, however, have to protect the public from the unintended consequences of legalization, such as people driving under the influence and people in the workplace while under the influence. Additionally, there is a concern that by legalizing marijuana for recreational use, we have communicated to the public that, as a government, we endorse marijuana use. We don't endorse marijuana. There are plenty of mind altering substances available, we really don't need to introduce more, in my opinion.

We are going to have to adjust our view of marijuana. The marijuana that was popular in the 60s and 70s is very different from the marijuana we have today. We know that it is now a much more potent drug than it was in the 60s and the 70s. Today the THC content levels are 25% to 30%, on average, which is five times higher than it was back in the 60's. Butane hash oil, which is becoming very popular, contains THC levels as high as 80% to 90%. That makes it a hallucinogen and is very dangerous. With alcohol, when the consumption level gets too high, there are some natural deterrents to excess consumption. For example, a person who drinks too much will become violently ill.

There is no such natural deterrent with marijuana. As a result, not only is consumption often excessive but excessive consumption is likely to be more frequent.

DW Duke: Do you believe that the legalization of marijuana will increase problems associated with substance abuse within the State?

Mike Hestrin: Yes, we are going to have to deal with many unintended consequences of marijuana legalization. First, there are the legal problems. For example, although marijuana is legal under California law, it remains a Schedule I controlled substance under federal law. This means that a person may still be prosecuted under federal law for possession of marijuana. During the Obama administration, marijuana users knew that they were fairly safe in that the federal government would generally leave them alone unless they were trafficking. We don't know how the Trump administration will address marijuana. Will this administration prosecute marijuana users as drug offenders or will it leave it to the states to address? We just don't know.

Another complication legalization creates is that marijuana purchase and distribution will be on a cash basis. Credit cards can't be used for purchase because banks would be in violation of federal law, if they allowed credit cards to be used in the purchase of marijuana. By the same token, businesses operating the sale of marijuana cannot get loans for the business because again, banks loaning money for a marijuana distributorship or retail sales would be in violation of federal law. This means that the industry will be a cash basis industry. We know from history that cash is the oil of organized crime. It leads to robbery, embezzlement, and theft. We should anticipate that businesses selling marijuana will be frequent victims of robbery and protectionism. In addition, cash based businesses are perfect money laundering and tax evading schemes. We can expect that the conflict between federal and state law will only exacerbate these problems.

DW Duke: Do you anticipate an increase in the case load of substance abuse cases prosecuted in the county?

Mike Hestrin: It may well be that there will be an increase in substance abuse cases as a result of the legalization of marijuana. I tend to believe that marijuana is a gateway drug but the evidence is in dispute at this time. Whether it will be a gateway drug in California only time will tell. I am hopeful that ten years from now

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we will look back at this time and say we were able to navigate the dangerous conditions while keeping our citizens safe. I am hoping for the best, but it remains to be seen. It may be that because it is legal now, and the more advanced drugs like opium and cocaine are not legal, that society will make a distinction between these kinds of drugs and it will not become a gateway drug. I am cautiously optimistic that will happen.

Another problem that we face from the legalization of marijuana is that it will fall into the hands of children and even pets will have access to it. Many people have liquor cabinets in their house, but most keep them locked so children can't get into them. And of course, if a child does get a hold of an alcoholic beverage, the taste is often a deterrent because to most children the taste is horrible. So it is not as common that little children get into their parent's alcoholic beverages. But what we have seen in other states that have already legalized marijuana is that it is being put in candy and brownies and other edibles. For example, it is commonly put in gummy bears. This is a natural attraction for children, so there are frequent instances where children are taken to emergency rooms. Even pets are getting into edible marijuana so veterinarians are reporting a large number of animals being brought in under the influence.

I believe we are going to need to quickly pass some laws prohibiting the production of candy and other products with marijuana ingredients. I am not saying the laws should prohibit all edible marijuana products, but our legislators will need to look at this problem and pass some common sense laws to prevent certain products that are especially attractive to children. In doing so, we need to be aware that parents do not always take the necessary steps to keep it out of their children's hands. So maybe we need law to prevent the production of the attractive nuisance for children. The legislature will need to regulate the production, sooner than later.

DW Duke: Will gangs continue to be involved in the distribution now that it is legal?

Mike Hestrin: I believe black market marijuana will likely increase through gang activity. One of the reasons is that the legal sale of marijuana will require pharmaceutical measuring of THC content. This will make it very expensive. As a result, people who cannot afford the higher priced marijuana will purchase higher priced black market marijuana, that does not have a measured THC content. It will be similar to what happened with alcohol when prohibition ended. During prohibition people began making alcoholic products using illegal stills, just like they have grown marijuana illegally until now. When the prohibition era ended, the demand for illegal alcohol continued because it was much cheaper. In the same way, the demand for illegal marijuana will continue because it will be cheaper than the legal regu-

lated product. Unfortunately, the illegal product was dangerous and many people became ill and some even died. In the same way, the black market product will not be regulated and will be more dangerous than the legal regulated product. Also, the black market product may contain other products to make it more attractive to the user, many of which could be very dangerous.

Additionally, because marijuana is going to be a cash basis industry, it will fit well within the illegal black market. For many consumers it will feel normal to buy black market marijuana because it will be purchased with cash just like the legal product. This, of course, leads to the problems we discussed about cash transactions earlier.

DW Duke: Do you anticipate an increase of traffic accidents as a result of the legalization of marijuana?

Mike Hestrin: Absolutely, in fact I anticipate that this is the biggest effect we will see immediately. I anticipate that the number of auto accidents and traffic fatalities will immediately increase due to people driving under the influence of marijuana.

DW Duke: Now is it true that drivers can be tested to see if they are under the influence of marijuana? I know that it stays in someone's blood for up to 30 days so urine testing gives a better picture of whether someone is under the influence. Is that true?

Mike Hestrin: This is one of the most difficult problems we will have in trying to prosecute drivers under the influence of marijuana. Neither urine tests nor blood tests are as accurate as blood tests or even breath tests with alcohol. As a result, those prosecuted for driving under the influence of marijuana are going to be both over-inclusive and under-inclusive. Because the THC remains in a person's blood for up to a month, there will be people who will be involved in accidents who may not be under the influence but given the nature of the accident, and the fact that it is in their blood, will give an impression that they are under the influence. Similarly, there will be people who actually are under the influence, but the officers will not know if they are under the influence or whether they are seeing the results of use several days or weeks earlier. The uncertainty in prosecuting DUI cases involving marijuana is one of the problems with legalization. Hopefully, we will develop the technology soon to deal with this problem.

DW Duke: Very good, Mr. Hestrin. It appears that your office will be very busy over the next few months. Thank you for taking the time to give this interview.

Mike Hestrin: It was my pleasure and thank you.

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*DW Duke is the managing partner in the Inland Empire office of Spile, Leff & Goor LLP and the principal of The Duke Law Group. He is the author of five books and a frequent contributor to the Riverside Lawyer.*



# GENERIC V. BRAND NAME DRUGS: CAN YOUR RECOVERY BE AFFECTED BY THE AMOUNT OF PREMIUM YOU PAY FOR YOUR MEDICINE?

by Nesa Targhibi

Generic or Brand? This is a question millions of Americans contemplate on daily basis when it comes to selecting their medications. For majority of people, the price difference is the major deciding factor. But could paying less for a drug affect how much you can recover in a liability case or maybe even bar you from having a claim for recovery?

## Pharmaceutical Product Liability and Existing Loop Holes

Product liability is a form of personal injury case which arises when a consumer is injured by a defective or a dangerous product. In the case of pharmaceuticals, product liability cases fall into two main categories: (1) the drug was defectively designed, or (2) the drug did not carry an adequate warning meaning the drug has side effects which the manufacturer did not warn about. In case of generic drugs, the rules are a bit different. Generic drugs are required to have exact same formula and identical labels and warnings as to their brand name counterparts. Under federal laws, generic drugs must have the exact same chemical composition and the exact same labeling as the name-brand drugs.<sup>1</sup> This limits what generic drug manufacturers can do regarding the labels and formulas of the drugs, even if they have knowledge of dangerous side effects that are not included on the label.

On the other hand, these laws also help limit liability for generic drug manufacturers. In 2011, in *Pliva v. Mensing*,<sup>2</sup> the Supreme Court ruled that generic drug companies cannot be sued for inadequate drug warnings because the generic drug companies cannot control the warning. This case dramatically limited product liability lawsuits for consumers who took generic drugs instead of brand name drugs. Another blow to consumers came in 2013, in *Mutual Pharm. Co., Inc. v. Bartlett*.<sup>3</sup> In that case, the Supreme Court ruled that generic drug companies could not be sued for defectively designed drugs because they are required by the U.S. Department of Food and Drug Administration (FDA) to use the exact same design that is used in the original drugs. Based on this, a drug company that only copies an innovation cannot be sued. The outcome of these two rulings in effect allowed the generic drug companies to enjoy all the profit from making the drugs without any liability.

## New Case and Regulations

In the years since *Mensing* and *Bartlett*, the consumer attorneys have continued to find new legal theories under

which to hold the generic drug manufacturers responsible. There have been some successes. One major area of success has been under the “failure to update” claims. These claims accuse the manufacturers of generic drugs of not updating and changing their labels quickly enough after the brand name drugs have changed their labels.

Another major success came in Alabama in 2014. In *Wyeth, Inc. v. Weeks*,<sup>4</sup> the Alabama Supreme Court held that a drug company can be held liable for alleged misrepresentations it made about its own name-brand drug, even when the plaintiff took another company’s generic equivalent because it was reasonably foreseeable that generic-taking patients and their doctors would rely on the name-brand manufacturer’s label. This “is not fundamentally unfair,” the court said, because the “alleged misrepresentations were drafted by the brand-name manufacturer and merely repeated by the generic manufacturer.”<sup>5</sup> The court emphasized that, under the circumstances of this case, liability is premised not on product defect, but on the alleged misrepresentations in the brand-name product’s labeling, which FDA regulations require generic manufacturers to use. The court limited its ruling to prescription drug manufacturers operating under specific FDA regulations related to labeling requirements and made clear that it is not creating a new tort of “innovator liability.”<sup>6</sup>

Although the outcome of the Alabama case was a great success for consumers, it remains in the minority. To this date only a handful of states have followed similar paths: California (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89), Vermont (*Kellogg v. Wyeth, Inc.* (2010) 762 F.Supp.2d 694) and Illinois (*Dolin v. SmithKline Beecham Corp.* (2014) 62 F.Supp.3d 705).

In federal landscape, the FDA has come up with a proposed rule which would allow generic drug companies to have more input on drug warnings.<sup>7</sup> If passed, this will open generic drug companies up to lawsuits for inadequate warnings on medications. The proposed rule was scheduled to be finalized in summer of 2016 but for now, the FDA has announced the rules will not be finalized until April 2017.

*Nesa Targhibi, treasurer of the Riverside County Barristers, is a sole practitioner based in Riverside County. She practices mainly as a special appearance attorney covering Riverside, San Bernardino and Orange County.*



1 21 U.S.C. § 355.

2 *Pliva v. Mensing* (2011) 564 U.S. 604, 131 S.Ct. 2567, 2571, 180 L.Ed.2d 580.

3 *Mutual Pharm. Co., Inc. v. Bartlett* (2013) 133 S. Ct. 2466, 186 L.Ed.2d 607.

4 *Wyeth, Inc. v. Weeks* (2014) 159 So.3d 649.

5 *Ibid.*

6 *Ibid.*

7 Thomas, Katie, “F.D.A. Rule Could Open Generic Drug Makers to Suits,” *New York Times* (July 3, 2013).

# OPPOSING COUNSEL: MICHAEL RAZO

by Sophia Choi

Michael Razo is a local Riverside attorney who has so much to offer, and most importantly, has a sincere desire to see what he can do to positively impact those around him.

Michael was born in Upland, California and raised in Ontario, California. He attended the University of California, Berkeley, receiving his Bachelor of Arts in Political Science in 2005. After graduating from college, he decided to travel all over Europe. While in France, he met his future wife, Carissa. He did not have to worry about long distance, international dating because Carissa happened to be from southern California. After his travels were over, he decided to attend law school. In 2010, he received his Juris Doctorate degree from the University of La Verne College of Law. Although Michael's initial thoughts during law school were to pursue a career as a deputy public defender, he changed his mind along the way. During and after law school, he joined Sabbah & MacKoul, a Professional Law Corporation, doing primarily civil litigation. He subsequently ventured out to start his own practice, at which time he handled all kinds of cases, ranging from criminal to civil, bankruptcy to family, and so on. Although it was a great experience for him, it was difficult to focus on one area of law.

Michael then joined the Law Offices of Catherine A. Schwartz where he practiced mainly family law and other civil cases. Having come to appreciate the complexities of family law, he joined a firm dedicated exclusively to family law, Bratton & Bratton, Inc., which is now known as Bratton Bratton & Razo. With an interest in understanding the intricacies associated with the practice of family law and a desire to help his clients, he enjoys working on solutions catered towards the needs of the particular family involved. He admits that at times, the hardest part of his practice is the emotional component inevitably involved in family law matters.

Every person has struggles, and each person deals with their struggles differently. However, each struggle is meaningful if you learn something from it, like Michael did. He started drinking alcohol in high school, which progressed in college and law school. Although he was able to complete law school, hold a job and remain functional, there came a point when the release provided by alcohol was outweighed by the consequences and resulting guilt. Over time, he quietly questioned whether he had a problem.



Michael Razo

He did not want to label himself an “alcoholic” due to the societal stigma associated with the term and his misunderstanding of alcoholism. He tried to cut back but he found that he continued to drink despite the adverse consequences that came with his drinking, including the most significant problems associated with the deterioration of his relationships with family and friends. Michael's meeting of Carissa in France was meant to be, as Carissa helped him find his path to sobriety. In efforts to help her then-boyfriend Michael, Carissa looked

into available resources and came across The Other Bar, a network of attorneys, judges and law students who are dedicated to assisting others within the profession who are struggling with substance abuse. The Other Bar helped Michael learn about alcoholism, and provided much needed support in a confidential setting.

The Other Bar is instrumental in his recovery, and, in an attempt to give back as much as he receives, Michael is fortunate to serve on the Board of Directors of The Other Bar as Secretary. He also serves as Director-at-Large of the Nelson House Foundation, a charitable organization committed to helping those in recovery from substance abuse.

He commented that his connection to family law is not without special meaning. He noted that there is a prevalence of substance abuse issues in many family law cases. He believes that there are not too many families without at least some experience, whether directly or indirectly, through friends or family, affected by substance abuse.

Michael currently lives in Riverside County with his wife Carissa and son Benjamin. He treasures time spent with family including trying to keep up with Benjamin, who constantly amazes him. He enjoys playing softball with friends and collecting sports memorabilia. He also enjoys practicing in Riverside and volunteering with Riverside Legal Aid. With the insight gained from his experiences, Michael recognizes that every struggle presents an opportunity with the right perspective. He hopes that his attitude contributes to all the people he is blessed to call family, friends, colleagues, and clients.

*Sophia Choi, a member of the Bar Publications Committee, is a deputy county counsel with the County of Riverside. She serves as secretary on the RCBA Board of Directors and is a past president of the Asian Pacific American Lawyers of the Inland Empire.*



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# PROPOSITION 64: ADULT USE OF MARIJUANA ACT

by Tiffany North

On November 8, 2016, Californians approved Proposition 64, the Adult Use of Marijuana Act (“AUMA”), which legalized nonmedical use of marijuana for adults ages 21 and over. California is now one of eight states and the District of Columbia with laws permitting marijuana for recreational, nonmedical use after the November election. The other states include Alaska, Colorado, Maine,<sup>1</sup> Massachusetts, Nevada, Oregon, and Washington.

At 62 pages in length, Proposition 64 contains a detailed licensing and taxation framework for nonmedical, marijuana that cannot be fully analyzed in this article.<sup>2</sup> Instead, let’s cover the high points (pun intended).

Effective November 9, adults 21 years of age or older may use, possess, process, transport or give away 28.5 grams of non-concentrated marijuana or 8 grams of concentrated marijuana in California.<sup>3</sup> However, such use is not unlimited. The AUMA regulates smoking or ingesting marijuana in public places and prohibits the use of marijuana in locations where smoking tobacco is prohibited, as well as within 1000 feet of a school, day care, or youth center. The use of marijuana is prohibited while operating, or being a passenger in, a moving vehicle, boat, aircraft or other vehicle used for transportation, including having an open container or package of marijuana while in such vehicle.<sup>4</sup>

## Local Control

The AUMA recognizes both commercial and personal marijuana activities at the state level. The extent of local government control differs in these two areas.

**Personal:** The AUMA allows adults to cultivate six marijuana plants inside a private residence or within a locked area on the grounds of the private residence.<sup>5</sup> A “private residence” is defined as a house, apartment unit, mobile home or similar dwelling. No more than six marijuana plants may be cultivated per private residence, no matter how many people live there.<sup>6</sup> While the AUMA allows local governments to “reasonably regulate” indoor cultivation, local governments cannot outright ban indoor cultivation.

What constitutes “reasonable regulations” will likely be the subject of future case law and legislation.

**Commercial:** Although adults can now possess and grow limited amounts of marijuana, they do not yet have a place to legally buy nonmedical marijuana until businesses are licensed by the state. No later than January 1, 2018, various state agencies will begin issuing 19 types of licenses for nonmedical marijuana-related activities, such as cultivation, manufacturing, testing, retail, distribution, and microbusinesses, including both nonprofit and for-profit businesses.<sup>7</sup> Licenses for large-scale cultivators will not be issued until January 1, 2023, to offset immediate monopoly interests.<sup>8</sup>

Similar to the Medical Cannabis Regulation and Safety Act (“MCRSA”)<sup>9</sup> adopted last year, the AUMA preserves local government control to regulate or ban all outdoor cultivation and all commercial marijuana activities, including dispensaries, manufacturers, testing laboratories and delivery services, as well as any other marijuana businesses that may develop as a result of the new law.<sup>10</sup> The AUMA provides that no state license can be issued for outdoor cultivation or other commercial nonmedical marijuana activities if the local government prohibits such activities.<sup>11</sup> Unlike a license issued under the MCRSA, a local license is not required for a state license under the AUMA. Therefore, if a local government does ban such activities in its jurisdiction, no action could potentially result in its allowance. Alternatively, local governments may take action to regulate outdoor cultivation or other commercial marijuana activities to a greater level than the state regulations, if desired. Also, local governments cannot ban transportation of marijuana through their jurisdictions when the transportation is being done in compliance with a state permit.<sup>12</sup>

## Taxation

Effective January 1, 2018, the AUMA implements a 15% excise tax on all marijuana products sold, except for medical marijuana.<sup>13</sup> There is also a cultivation tax on all marijuana entering the commercial market of \$9.25 per dry weight ounce of marijuana flowers, and of \$2.75 per dry

1 A statewide recount began on December 5 in Maine at the request of marijuana legalization opponents.

2 Complete text of Proposition 64 can be accessed at [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)\\_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf)

3 Health and Safety Code section 11362.1.

4 Health and Safety Code section 11362.3.

5 Health and Safety Code section 11362.2.

6 Health and Safety Code section 11362.2(a)(3).

7 The state licensing framework and regulations for the AUMA are set forth at Business and Professions Code section 26000 et seq

8 Business and Professions Code section 26061(d).

9 The MCRSA is at Business and Professions Code section 19300 et seq.

10 Business and Professions Code section 26200.

11 Business and Professions Code section 26055(e).

12 Business and Professions Code section 26080(b).

13 Revenue and Taxation Code section 34011.

weight ounce of marijuana leaves.<sup>14</sup> The AUMA details how state tax funds will be distributed, including reimbursement to state agencies for oversight of the AUMA, research funding, grant opportunities, and funding for mitigation.<sup>15</sup> Local governments may impose their own taxes on cultivation and commercial marijuana activities in addition to the state taxes.<sup>16</sup> Local taxes must be adopted by ordinance and approved by the voters.

## Violations

The AUMA changes existing state penalties related to marijuana. For individuals under 18, possession remains an infraction but the fine is replaced with a requirement for drug education or counseling.<sup>17</sup> For individuals over 18, selling marijuana without a valid license is punishable as an infraction, misdemeanor, or felony depending on certain factors. Further, engaging in commercial marijuana activity without a state license is subject to a civil penalty up to three times the amount of the license fee and the court may order destruction of marijuana associated with violation.<sup>18</sup> Civil penalty actions may be brought by the District Attorney, City Attorney, or County Counsel.

Individuals with prior marijuana convictions that would not have been guilty under the AUMA may petition to reduce, recall or dismiss the prior marijuana convictions from their records, regardless of whether they are still in jail, on probation or parole, or have already finished their sentences.<sup>19</sup>

## Employers

The AUMA does not interfere with an employer's rights and obligations to maintain a drug and alcohol free workplace.<sup>20</sup> It allows public and private employers to enact and enforce workplace policies pertaining to marijuana.

## Federal Law

With eight states and the District of Columbia now allowing nonmedical marijuana and numerous other states recognizing

medical marijuana, there has been a shift in attitude about the drug throughout the nation. However, it is important to remember that marijuana remains classified as an illegal Schedule I Drug under the Federal Controlled Substances Act, 21 U.S.C. §§ 801 et seq. While the Obama Administration has taken a "hands off" approach to enforcement in states that allow medical marijuana, the Trump Administration and future administrations may not take such an approach to marijuana. If that occurs, any regulatory actions that authorize marijuana, nonmedical and medical, at the state and local level could be found illegal under federal law.

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14 Revenue and Taxation Code section 34012.

15 Revenue and Taxation Code section 34019.

16 Revenue and Taxation Code section 34021.5.

17 Health and Safety Code section 11357.

18 Business and Professions Code section 26038.

19 Health and Safety Code section 11361.8.

20 Health and Safety Code section 11362.45(f).



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