EFFECTIVE DATE

Q: Is Prop. 36 in effect yet?
A: Only that portion of the measure appropriating $60 million in start-up funds took effect immediately upon passage of the initiative.

The criminal law provisions of Prop. 36 take effect July 1, 2001. This includes the rules for processing new drug possession convictions, probation violations, and drug-related parole violations.

The first of five annual appropriations of $120 million for expanding drug treatment programs is also set for July 1, 2001, and for the same date in each subsequent year.

Q: What if an offender is caught before July 1?

A: Prop. 36 is not retroactive, and therefore, generally Prop. 36 will not apply to offenses before its effective date. However, the date of conviction or sentencing, not the date of arrest, determines a person's eligibility. Therefore, a person arrested on June 15, 2001, but convicted or sentenced after July 1, would be eligible for treatment.

Some persons whose offenses predate the initiative will still be affected by the new law. See the sections below on probation and parole violations.

WHO QUALIFIES

Q: What is the full range of offenses covered by Proposition 36? Who is excluded?

A: Beginning July 1, 2001, Prop. 36 generally applies to three classes of people: 1) those with new convictions for drug possession or being under the influence, 2) persons on probation for drug possession or under-the-influence offenses, and 3) persons on parole with no prior convictions for a serious or violent felony.

New convictions: People with new convictions for drug offenses qualify for treatment provided that they are not convicted of sale or manufacture or any non-drug crimes at the same time. Offenders are excluded if they have a prior conviction for a serious or violent felony (a "strike"), unless they have served their prison time and have been out of prison for five years with no felony convictions or misdemeanor convictions involving the threat of violence. Finally, individual offenders may "opt-out" of treatment by formally refusing it, in which case they face sentencing under pre-existing law.

Persons on probation: Once Prop. 36 takes effect, its probation-violation procedures will apply to people previously convicted of a Prop. 36-qualifying drug offense, if they violate a condition of probation deemed to be "drug-related." In essence, this means that some drug offenders who would have qualified for Prop. 36 treatment will get it, instead of facing jail time, if they test positive for drug use or violate other probation conditions. Within two to three years, this category of offenders will simply disappear, once current probation terms expire and all new drug convictions are being processed under Prop. 36.

Nonviolent parole violators: After July 1, 2001, a person on parole who commits a non-violent drug possession offense or who violates a drug-related condition of parole may be eligible for a treatment regimen in the community, instead of return to prison. To qualify, the parolee must have no prior convictions at any time for a serious or violent felony. Parole authorities, rather than the courts, will set monitoring conditions for these parole violators, and will punish violations of the treatment program, up to and including return to prison for serious or repeat violators.

Q: What if an offender has been previously convicted of another crime that would not fall under the auspices of Prop. 36? Can he still qualify for diversion?

A: It depends on the nature of the previous offense or offenses. As discussed above, any prior violent or serious felonies disqualify a person for consideration for Prop. 36 treatment. The exception to this rule is when the person has served the associated prison time and has been free for five years without committing a felony or violent misdemeanor.

Other kinds of prior offenses are not disqualifying when a person comes before the court for a Prop. 36-eligible offense.

Finally, one group of persons — nonviolent parolees — will qualify for Prop. 36 treatment if they violate parole by using or possessing drugs. The person need not be on parole for a Prop. 36 offense. However, the person's criminal history may not include a serious or violent felony conviction.

Q: Will the passage of Prop. 36 change drug possession or intent-to-sell laws? Who determines an offender's intent to sell and the amount that indicates trafficking?

A: Prop. 36 does not directly affect the laws against drug possession or related crimes. It only affects the punishment imposed on persons who meet the criteria for eligibility for treatment instead of jail time. Those who qualify are granted probation and required to complete a treatment program.

Prop. 36 has no effect on persons convicted of drug sales, manufacturing, or possession with intent to sell. They are excluded from treatment under the new law.

Neither Prop. 36 nor current law specifically defines the amounts of drugs that determine a person's intent to sell or distribute those substances. Obviously, very large amounts of drugs will trigger distribution or "intent-to-sell" charges. Prosecutors appear to prefer the flexibility that comes with a discretionary standard — smaller amounts of drugs can be charged as possession-with-intent if there are other circumstances that indicate a person was involved in or planning sales of the drugs in question. The decision is made case-by-case by the prosecutor examining the facts of each offense, and certain facts must be proved to secure a conviction for possession-with-intent. Prosecutorial discretion in such cases will not change under Prop. 36. However, prosecutors may be less likely to offer plea-bargains in cases where drug-dealing is alleged – in such cases, the more serious charge is more likely to be pursued instead of permitting a plea to the lesser offense of possession.

HOW PROP. 36 WORKS

Q: What does Prop. 36 "court supervised" treatment entail?

A: Prop. 36 takes effect when a person has been convicted of a drug possession or under-the-influence offense. Instead of ordering jail time, the judge must place that person on probation and require completion of a drug treatment program lasting up to one year. Many counties will use treatment professionals to interview and screen, or "assess," each drug offender to match individuals with treatment programs that are appropriate to their drug use history and treatment needs.

The judge may set any range of conditions of probation to monitor the offender's progress. These may include regular check-ins with a probation officer or court appearances, a requirement to pay a share of treatment costs, drug testing and other restrictions on the person's place of residence, associations, or lifestyle.

If the offender violates any of the court's conditions, he or she faces the risk of having probation violated or revoked. Otherwise, the treatment provider selected by the court will provide regular progress reports through the required course of treatment.

At the end of the required treatment regimen, the offender may petition the court to dismiss the drug charges. If the court finds that the person complied with the probation conditions and that treatment was "successful," charges may be dismissed, and the defendant will be obliged to disclose the fact that he or she was arrested only in certain specified circumstances.

Q: What happens if an offender violates probation granted under Prop. 36?

A: Prop. 36 defines two kinds of probation violations: drug-related violations such as relapse, and non-drug-related violations. A person whose violation is not directly related to drug use — such as failure to check in with a probation officer, or defiance of other conditions — can have probation terminated at once and can be incarcerated for one to three years.

For drug-related violations, Prop. 36 spells out a process in which the consequences vary based on the severity and number of violations. For the first violation, the most common consequence will be that the court will order the person into a more restrictive treatment program. If, however, the court finds that the person is "a danger to the safety of others," that person can have probation revoked immediately.

Upon a second violation, the court again has the option of transferring the offender to a more rigorous treatment program. But the court may also revoke probation using a simpler standard — that the defendant has proved to be "unamenable to treatment."

If the defendant stays in treatment after two drug-related violations have been considered by the court, and a third violation is proved, the protections of Prop. 36 disappear, and the person faces sentencing under pre-existing law, which allows incarceration for one to three years.

Q: What options and tools do judges really have?

A: Judges have a great deal of flexibility to handle each drug offender differently under Prop. 36. The range of treatment options may vary from county to county, along with caseloads in each program. The judge can set any range of probation conditions, from the relatively modest requirement that the defendant not be re-arrested during the probation period, through the other extreme — heavy monitoring by the court and probation department, along with regular drug testing.

If there is a probation violation, the judge can respond in several ways. The judge can impose sanctions, change the person's required treatment program, tighten probation conditions, or even revoke probation and drop the person out of Prop. 36 treatment entirely.

Defendants who hope to have their drug charges dismissed will need to impress the judge with their compliance with the court's orders, because, after completing treatment, the defendant must apply to the sentencing judge to receive that benefit. This dynamic enhances the judge's authority with the offender throughout the course of treatment.

DRUG TREATMENT

Q: Does California have the capacity now to offer treatment to all the people who will qualify under Prop. 36?

A: No. The new law anticipates the need to add many more treatment slots. State and county governments are, however, working aggressively to expand capacity with the funds provided by Proposition 36.

Prop. 36 recognizes that drug treatment services have been neglected in California, and that new investment is necessary. The measure contains $660 million in new, additional funding for drug treatment during a five and one-half year span. The first $60 million should be distributed to counties by the beginning of calendar year 2001, to be used to build capacity before the first person enters Prop. 36 treatment on July 1. Beginning on that day, an additional $120 million per year will be made available each year through fiscal year 2005-2006.

California now provides publicly funded drug treatment to nearly 100,000 people each year. An additional 25,000 receive treatment for alcohol-related problems. An estimated 36,000 new clients will enter drug treatment programs each year in addition to these individuals, as a result of Prop. 36. This means we need to add significantly to capacity, but also that it is an achievable goal.

Q: What are the minimum requirements for drug treatment facilities under Prop. 36?

A: Programs must be "licensed and/or certified" to receive Prop. 36 funds or defendants processed under the new law. They may not be offered within a prison or jail facility.

Licensing and certification are currently provided by the state and counties, as well as private organizations such as the California Association of Alcoholism and Drug Abuse Counselors. The state Department of Alcohol and Drug Programs may establish uniform state standards, or local governments could devise their own standards and require programs within their reach to meet those standards.

Q: What counts as "drug treatment" under Prop. 36?

A: Besides the licensing/certification requirement, a program may include one or more of the following: outpatient treatment, half-way house treatment, narcotic replacement therapy (such as methadone and similar substances), drug education or prevention courses, detox, or limited inpatient treatment. These categories can embrace a wide variety of treatment modalities. Prop. 36 sponsors encourage each county to maintain a diversity of treatment services to meet the different kinds of needs of each community.

Q: Do additional life-skills and counseling services qualify as drug treatment? Are such programs entitled to receive Prop. 36 funds?

A: Support services do not qualify as drug treatment by themselves, though judges may require defendants to complete literacy training, vocational training or family counseling programs in addition to drug treatment. When required for a Prop. 36 defendant, these programs may be paid for out of the funds provided by the initiative.

Q: Who licenses treatment facilities? What is the process? Who would a potential provider contact?

A: The state Department of Alcohol and Drug Programs currently licenses drug treatment facilities and provides certification of certain kinds of facilities.

In response to Prop. 36, the department is re-evaluating its licensing and certification processes, and it may develop new regulations in the near future. For this reason, any potential treatment provider should be directly in contact with the department: Department of Alcohol and Drug Programs, 1700 K Street, Sacramento, CA, 95814, (916) 322-2911, fax: (916) 323-0659, or at:

http://www.adp.cahwnet.gov/SACPA/prop36.shtml (see "Facility Licensure and Program Certification")

FUNDING

Q: Who will allocate Prop.36 funds?

A: The state Department of Alcohol and Drug Programs (ADP) is the lead agency for Prop. 36 implementation, and therefore it receives the initial appropriations each year from the state's General Fund. After the first $60 million was allocated to prepare for the first defendants coming into the system July 1, 2001, an additional $120 million is appropriated each year for the next five years.

Q: How will the funds be allocated?

A: Prop. 36 requires that ADP use a "fair and equitable distribution formula" that is meant to approximate the need for these funds in each county. ADP must consider such factors as per capita arrests for drug possession and drug treatment caseload. If ADP determines that a particular county is not adequately meeting the need for treatment, the state agency may initiate a direct contract with a provider to offer treatment in that county. Regulations and the funding allocations are provided by ADP online at: http://www.adp.cahwnet.gov/SACPA/prop36.shtm l (see "County Allocations" for funding levels)

Q: Where will Prop. 36 funds come from? Do these funds merely replace existing appropriations?

A: Prop. 36 mandates a direct annual appropriation from the state's General Fund each year without reference to the annual budget process. This means that none of its funds are subject to legislative or gubernatorial approval until the measure's five-and-one-half-year fixed appropriations expire, concluding with the 2005-2006 fiscal year.

Prop. 36 contains a "non-supplantation" clause that stipulates that its funds cannot be used, according to the new law, "to supplant funds from any existing fund source or mechanism currently used to provide substance abuse treatment." In other words, these new funds must be added to any pre-existing funds, not used to replace them. If there are cutbacks in certain areas of drug treatment services in a future year, there

is a possible avenue for litigation to restore previous levels of funding.

Q: Is $120 million per year going to be enough? Is more money available?

A: Most projections indicate that the funds contained in Prop. 36 will be sufficient to pay for the additional treatment slots the new law makes necessary. An October 2000 estimate by the RAND Corporation suggests that between $92 million and $114 million will be needed to pay for all of the treatment necessitated by the law.

The new law does permit additional claims on its funds. Courts and probation departments may seek reimbursement for some new costs they incur handling Prop. 36 defendants. However, it would be a violation of the intent of Prop. 36 if these costs took precedence over costs associated with treatment. Sponsors of Prop. 36 take the position that five-sixths (83%) of the measure's $120 million-per-year allocation must go to providing treatment services, with the same ratio applied at each county level.

Q: What factors might influence the actual expenses under Prop. 36?

A: The RAND cost models assume that a quarter or more of the individuals receiving treatment wouldreceive the most expensive form — long-term residential treatment. As this assumption indicates, choices made at the county level could greatly affect the actual costs of Prop. 36.

An unknown amount of the new costs will be covered by the individuals required to seek treatment, due to a provision allowing judges to insist that offenders who can reasonably afford to must pay some or all of their own treatment costs. In its own evaluation, the Office of the Legislative Analyst simply estimated this pay-your-own-way provision would offset state and county treatment costs by several million dollars per year.

Perhaps the greatest factor will be the actual number of offenders coming into the system each year. This could vary from the Legislative Analyst's projection of 36,000 people per year for a number of reasons. Prosecutors might reduce the number of offenders charged only with drug possession and therefore eligible for Prop. 36 treatment. A larger than expected number of first-time felony offenders or misdemeanor drug possession offenders might opt for treatment, rather than refusing treatment and taking the punishment provided under pre-existing law. The choices made by individual offenders will naturally affect the number entering treatment.

Finally, one bill pending in Sacramento could eliminate the possibility of *any* low-level marijuana offenders being considered for Prop. 36 treatment. **SB 79**1, by Sen. Bruce McPherson (R-Salinas), would reduce the offense of possession less than one ounce of marijuana from a misdemeanor with a maximum $100 fine to an infraction with a $100 fine for the first two offenses in any two-year period. Though many such marijuana offenders are already expected to refuse Prop. 36 treatment, SB 791 would virtually guarantee this outcome for all those who possess less than one ounce. (SB 791 passed on the Senate floor 23-13 on June 4.)

URINE TESTING

Q: Why wasn't funding for urine testing included in Prop. 36?

A: The sponsors of Prop. 36 believed that urine testing was too often being substituted for quality drug treatment within the criminal justice system. Given current practices, the sponsors feared that the new money provided by Prop. 36 would be overwhelmingly directed to monitoring offenders with urine testing, rather than being used to build the treatment infrastructure in California, as was intended. For this reason, the $120 million appropriated by Prop. 36 is directed to providing treatment services and not urine testing.

Q: Will urine testing be required of Prop. 36 offenders? If so, how will it be paid for?

A: Judges can order urine testing of Prop. 36 offenders. The testing can be required as a condition of probation. The actual tests could be conducted by the treatment provider, probation department, or court staff – or some mixture of these – depending on the judge's order.

On April 2, 2001, Gov. Gray Davis announced the availability of $11.9 million in new federal funds that would be distributed to counties to pay for the costs of drug testing of Prop. 36 offenders, as well as for some other purposes. Also, pending now in the legislature is SB 223, a bill that would add another $18 million per year for additional drug testing of Prop. 36 offenders. (SB 223 passed on the Senate floor 35-2 on June 6.)

EVALUATING SUCCESS OR FAILURE

Q: How will the public learn whether Prop. 36 is working? Who is responsible for collecting data and reporting on progress?

A: Prop. 36 requires both annual and long-term studies of its effectiveness. The annual study will be published by the lead agency implementing Prop. 36, the Department of Alcohol and Drug Programs (ADP). That department contracted with UCLA through its Integrated Substance Abuse Project for a long-term Evaluation of the new law. For more information see: www.medsch.ucla.edu/som/npi/DARC/sa/prop36/Prop36.htm.

Each year, counties will be required to report basic data to the state — the number of Prop. 36 offenders, the kinds of treatment programs they enter, and the completion or failure rates of these offenders. The department will compile these data into a public report that will also evaluate the implementation process, any reduced social costs attributable to the initiative, and other impacts or issues.

For more information on data collection and evaluation, see: http://www.adp.cahwnet.gov/SACPA/prop36.shtml (see “Evaluation”)