

The Architecture of Clarity

By Mark Cooney

Some may see the quest for plain language as little more than an exercise in word choice—picking a smaller word here or there in place of a bigger word, or picking a single word in place of a wordy phrase. But achieving clarity involves much more. It's a process that works a variety of analytical and editorial muscles.

Clarity comes from a firm grasp on substantive meaning, of course. At the micro level, it requires an acute ambiguity radar and a host of fine editorial techniques. And yes, word choice plays a role. But we mustn't forget about large-scale architectural work: the careful organization of text. If we miss that part of the process, our quest for clarity will fall short.

With all this in mind, let's walk through the process of clarifying a legal text, working systematically. And let's see how a large-scale redesign becomes the foundation of our effort.

The patient

For our original text, I've chosen a single subsection of Michigan's medical-marijuana statute. (I'll spell *marijuana* with a *j*, though the statute uses an *b*.) It's fairly recent,

enacted in 2008. And it's not the worst provision I've seen, not by a long shot. It's not laden with hardcore legalese. But it's still woefully typical:

(f) A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition, provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions.¹

As you surely noticed, this provision is a single 166-word sentence with a number of distinct ideas. It's the type of dense, disorganized text that we've grown accustomed to in the legal profession. It needs some help.

The cure

First, the usual disclaimers. An actual redraft of legislation would be a comprehensive effort. And the drafter would consult experts to avoid straying from intended meaning or true terms of art. This type of collaboration leads to some give-and-take, but it's the prudent—not to mention realistic—approach.

Yet a drafter shouldn't work scared. We don't want inhibitions to suffocate good drafting instincts. So, recognizing the probability of later tweaks, let's attack this medical-marijuana provision step by step, until it's a writing that's more accessible while still sophisticated in content.

Step 1: Read it. After you've read it, read it again—and again.

This step is obvious, and cynical readers might view it as fluff or a grab at silly humor. It's not. And my point goes beyond practicalities: too many readers blame themselves for struggling through unwieldy text. But those struggles more often reflect the

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We mustn't forget about large-scale architectural work: the careful organization of text. If we miss that part of the process, our quest for clarity will fall short.

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drafter’s lack of training or empathy, or both. So take your time and feel no shame, reader. Give it another look—or two. Then we’ll move on.

Step 2: List the big ideas.

Now that we’ve read over the text a few times, we can list its main ideas. As is too often the case with traditional legal drafting, our medical-marijuana provision plasters a number of big ideas into a solid wall of unbroken text—into a single sentence—with no signals to help readers figure out what’s in there.

Professor Joseph Kimble found similar provisions during his work on the Federal Rules of Civil Procedure, noting that many of the original rules used no headings, thus obscuring their “disorder.”²

By pulling out the big ideas and listing them, we have the start of a new reader-friendly organizational structure:

- Doctors are usually protected (for prescribing marijuana)
- There are conditions for this protection
- There’s an exception for malpractice

With just a little reworking, this primitive list of big ideas translates into a heading and subheadings for our first draft, allowing us to divide the text into more manageable parts:

- (f) Protection for Physicians
- (1) Scope
 - (2) Conditions
 - (3) Exception

These headings will be our reader’s best friend. After all, “[g]ood headings and sub-

headings are vital navigational aids for the reader.”³

Step 3: Put each part of the text beneath the big idea it belongs to.

Now that we have our provision’s new skeleton, we can put some meat on those bones. Some call this “classifying” text.⁴ We’ll go back to the original text and pull it apart, being careful to put each piece beneath the heading it logically belongs to—kind of like sorting laundry into piles. (Don’t put a red idea into the white section.)

I often use highlighters at this stage. For instance, if I use yellow to highlight language expressing a general rule, I’ll switch to orange for language stating the rule’s conditions and to green for language stating exceptions, and so on. If the original text is in disarray, the highlighters show it in living color. You’d be surprised (or maybe not) how often intruding ideas separate language that relates to the same concept.

For now, let’s just paste the fragments of original text into their proper places under our rough headings; let’s not worry about editing the text itself, no matter how ungainly the draft looks when we’re done. Undue worry about microedits now may distract us from our immediate goal: large-scale reorganization. There will be plenty of time later for fine-tuning language.

Our initial—rough—effort might look something like this:

- (f) Protection for Physicians
- (1) Scope

- A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the

Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications...

- or for otherwise stating that, in the physician’s professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient’s serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition

(2) Conditions

- the patient’s serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition
- in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient’s medical history,

(3) Exception

- provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient’s medical condition or otherwise violating the standard of care for evaluating medical conditions.

It’s fragmented and incoherent, yes. But we’re only halfway done.

Step 4: Now attack the text.

Now that we’re organized, we can polish the text. During this step, we should think about whether to divide or shorten sentences, create reader-friendly vertical lists, define terms, and the like. A definition might help us tame a complex series. For instance, in our tentative subsection (1), we need to state that doctors won’t face any sort of punishment for prescribing marijuana or concluding that a patient will benefit from it. We’ll streamline that with a definition of *punished* and, for this initial redraft, tuck that definition right into the text, knowing that we might move it later.

By the way, the statute refers to *written certifications* instead of *prescriptions*, so we're probably stuck with that term of art. And we may resort to the passive voice because so many potential actors might take action against a doctor (police, prosecutors, medical boards, patients).

Our first attack on the text might produce something like this:

(f) Protection for Physicians

(1) Scope

A physician may not be punished for giving a patient a written certification for marijuana or for concluding that the patient will benefit from marijuana. *Punished* includes being arrested, prosecuted, assessed a civil penalty, or professionally disciplined.

(2) Conditions

The protection described in subsection (1) applies only if:

- (a) the patient's medical condition was serious or debilitating, and the marijuana treated that condition or its symptoms;
- (b) the physician had a bona fide physician-patient relationship with the patient; and
- (c) the physician fully assessed the patient's medical history before giving the written certification or diagnosing the patient's condition.

(3) Exception

Subsection (1) does not prevent a professional licensing board from sanctioning a physician who fails to properly diagnose a patient's condition or who otherwise violates the standard of care.

Note again that the original was a single 166-word sentence covering all the subjects in our redraft. Yet there was enough in that one sentence to easily justify three subparts covering three related, yet distinct, concepts.

Step 5: Let the new draft sit, and revisit it later with fresh eyes.

After our reorganization and initial attack on the text, our next step is to put the draft

away and stop working on it. Then, with refreshed eyes, we can return and wrestle with the finer points—word choice, for example.

This step brings to bear our earlier research. Does the broader statute define *physician* and thus prevent us from using the word *doctor* instead? (Yes.) Is a *serious* condition different from a *debilitating* condition? Doesn't *serious* cover both categories? Could a condition be debilitating without being serious? Probably not, but the statute specifically defines *debilitating medical condition*, so we must leave it or tweak the defined term. (In my redraft, I've broken up and reshuffled the phrase *debilitating medical condition* to enhance readability.)

I'm still not happy that our main provision is so passive-voice-heavy. But again, in this context many potential actors might try to punish a doctor in one way or another. So the passive voice makes sense for capturing the statute's broad protections without risking the accidental omission of a possible actor.

Our redraft also uses the normally discretionary *may*. The *not* that follows it eliminates discretion and signals a prohibition.⁵ Still, we'll mull that *may not* choice to ensure that it doesn't leave a gap for bad-faith readers to sneak through. Some might prefer "A physician is not subject to punishment for . . ." Yet that version leaves a wordy nominalization. It could come down to a choice between the lesser of two evils. (Oh, the joys of drafting.)

We should also revisit our headings. There's no rule requiring one-word subheadings. Some drafters might prefer a more informative style. For instance, our redraft's first subheading is *Scope*. We might experiment with something like this instead:

(f) Protection for Physicians

(1) No punishment for decisions about marijuana

A physician may not be punished for providing a written certification for marijuana or for concluding that a patient will benefit from marijuana . . . [etc.]

Health restored

Again, clarity—"plain language"—means so much more than word choice or small-

scale edits. It's a process, and it's a process that begins with a look at the big picture.

Our original provision wasn't full of hardcore lawyerspeak. Yes, it contained a false imperative at the start ("A physician shall not be subject to" instead of "A physician is not subject to"). It also contained an old-school proviso, which is always a recipe for potential ambiguity.⁶ And it contained the usual overprecision.

Yet overall, the word choices were straightforward. Our clarification came mostly from our reorganization—our architectural work. We tried our best to divide the text with informative headings, and we put each part of the text where it best fit. This produced a draft that's much easier for readers—judges, lawyers, the public—to use and understand.

That's plain language in my book. ■

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ENDNOTES

1. MCL 333.26424(f).
2. Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 *Scribes J Legal Writing* 25, 28 (2008-2009).
3. *Id.* at 72.
4. See, e.g., Child, *Drafting Legal Documents: Principles and Practices* (2d ed), p 133.
5. See, e.g., Steadman, *Drafting Legal Documents in Plain English* (Milano: Giuffrè Editor, 2013), p 78 (noting that *may not* "indicates a prohibition").
6. Garner, *Garner's Dictionary of Legal Usage* (3d ed) (New York: Oxford University Press, 2011), p 727.