

Clunky Drafting Mucks Up Michigan's Power of Attorney for Healthcare

By Joseph Kimble

This column concerns MCL 700.5507(4), which sets out 10 “statements” that someone must accept to be appointed a patient advocate—a person who can make healthcare decisions for an incapacitated patient. Naturally, these statements are incorporated in the power-of-attorney forms that name the patient advocate and describe their decision-making authority. And naturally, most forms tend to just copy the statutory language.

Let's assume that we want patient advocates, before signing the acceptance, to actually read what they're agreeing to and understand it. Wouldn't it be a good idea for the 10 statements—which, again, will likely be copied—to be drafted as plainly as possible in the statute itself? I wouldn't say that the drafting is terrible (*Mucks Up* in my title might be an overstatement), but it could be much better.

Following this introduction are redlined and clean versions of the 10 statements. I consider my revised statements to be the same “statements” that the statute requires. They provide the same substantive information. If I made an inadvertent change somewhere, it can easily be fixed. So the gotcha game is a loser—as always when criticizing a competent plain-language makeover. Nor does a fixable mistake (or two) nullify the

point that the statutory drafting should have been clearer.

The main deficiency is that the drafting does not use the first person. The term *patient advocate* is used throughout, instead of *I*. Thus, the statements seem to be talking about some other person than the *I* who is accepting the appointment and signing the acceptance. First person would have made the signing personal to the patient advocate.

Incidentally, of the small group of forms that I've looked at so far, the only one that converted to first person was written by Making Choices Michigan. Credit where credit's due—although there must be others out there that do likewise.

Note that, under the statute, the acceptance must include “substantially all of the following [10] statements.” I take that to mean substantially all the information, the content, in each statement, not substantially all the words. If it means the latter, the legislature has truly elevated form over substance—and compounded the effect of its drafting.

For the record, the word count in the statutory version is about 430. The revised version is shorter by about 80 words, or 19 percent.

Finally, as a side note, the Kimble Center for Legal Writing at WMU—Cooley Law School (you can Google the title for more) is working on a full durable power of attorney

for healthcare. We hope to publish a draft in this column—and solicit comments from far and wide. In the meantime, comments on just the part that follows are most welcome.

1. **This I can act and make decisions as** patient advocate **designation is not effective unless only if** the patient¹ **is unable to cannot** participate in decisions **regarding about** the patient's **their**² medical or mental health, as applicable. **My authority to act ends when the patient dies,**³ **with one exception: if this patient advocate designation includes the patient gave me** the authority to **make an anatomical gift donate their body or body part as described in section 5506,**⁴ **the authority remains exercisable after the patient's death I can do that after the patient dies.**⁵

1. It might be better to have a line for filling in the patient's first name, but you would have to do it multiple times.

2. Yes, this is singular *they*. See the June 2019 column.

3. This clause is the only substantive piece added to the statutory statements. Experts tell me that it will eliminate a common—or at least possible—misunderstanding.

4. This reference will mean nothing to virtually all lay readers. And it's unnecessary anyway.

5. This second sentence could be moved to its own paragraph. The argument for not moving it is that it relates to the time when the advocate can act.

“Plain Language,” edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 36 years. To contribute an article, contact Prof. Kimble at WMU—Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at kimblej@cooley.edu. For an index of past columns, Google “Plain Language column index.”

The main deficiency [in the required statements] is that the drafting does not use the first person. . . . First person would have made the signing personal to the patient advocate.

2. ~~A patient advocate shall not~~ **I cannot** exercise powers concerning **make any decision about** the patient's care, custody, and medical or mental-health treatment that the patient; ~~—if the patient were able to participate in the decision; —could not have exercised on his or her own behalf~~ **made on their own.**
- 3.4.6 ~~This patient advocate designation cannot be used to~~ **But I cannot** make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant ~~that if doing so would result in the pregnant patient's~~ **her** death.
- 4.3. A patient advocate **I** may make a decision **can decide** to withhold or withdraw treatment—~~that~~⁷ would allow⁸ **a** even if the patient ~~to~~ could or would die as a result—only if the patient has **clearly and convincingly**:
- ~~expressed in a clear and convincing manner that the patient advocate is authorized~~ **me** to make such a decision, and ~~that~~
 - ~~the patient acknowledges~~ that⁹ such **a** the decision could or would allow the patient's **result in their** death.
5. A patient advocate **I** shall not receive compensation **am not paid** for the performance of his or her authority, rights, and **carrying out my** responsibilities, but a patient advocate **I** may be reimbursed for **my** actual and necessary expenses ~~incurred in the performance~~
- of his or her authority, rights, and responsibilities.¹⁰
6. **When making decisions for the patient,** A patient advocate **I** shall **must**:
- act in accordance with the standards of care ~~applicable~~ **that apply** to fiduciaries (**trusted persons**) ~~when acting for the patient,~~ and
 - shall act consistent with the patient's best interests. ~~The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental health treatment decisions are presumed to be in the patient's best interests.,~~ and
 - **follow the patient's desires that I know about, as expressed or evidenced while the patient was able to participate in medical or mental-health decisions.**¹¹
7. ~~A~~ **The** patient may revoke ~~his or her patient advocate designation~~ **my appointment** at any time and in any ~~manner sufficient to~~ **way that** communicates an intent to revoke.
8. ~~A~~ **The** patient may ~~waive~~ **give up** his or her ~~their~~ right to revoke the patient advocate designation as to the ~~my~~ power to make mental-health-treatment decisions; and if such a waiver is made, his or her ability to revoke as to certain treatment will be delayed for 30 days after the patient communicates his or her intent to revoke. **Later, if the patient revokes my appointment, I will still have the power to make mental-health-treatment decisions for 30 days.**¹²
9. A patient advocate **I** may revoke his or her ~~my~~ acceptance of the ~~this~~ patient advocate designation **appointment** at any time and in any ~~manner sufficient to~~ **way that** communicates ~~an~~ **my** intent to revoke.
10. A patient admitted to a health facility or agency has the rights ~~enumerated set out in section 20201 of the public-health code, 1978 PA 368, MCL 333.20201 found in Michigan Compiled Laws 333.20201.~~¹³
1. I can act and make decisions as patient advocate only if the patient cannot participate in decisions about their medical or mental health, as applicable. My authority to act ends when the patient dies, with one exception: if the patient gave me the authority to donate their body or body part, I can do that after the patient dies.
 2. I cannot make any decision about the patient's care, custody, and medical or mental-health treatment that the patient—if able to participate—could not have made on their own.
 3. I can decide to withhold or withdraw treatment—even if the patient could or would die as a result—only if the patient has clearly and convincingly:
 - authorized me to make such a decision, and
 - acknowledged that the decision could or would result in their death.
 4. But I cannot make a medical decision to withhold or withdraw treatment from

6. This statement seems to conflict with the one that follows, or to create an exception. So they are switched, and new 4 starts with *But*. Another possibility would be to merge the two, putting the exception after the bullets in new 3.

7. There's a miscue here. You expect *that*, a relative pronoun, to modify the noun *treatment*, but it's not treatment that allows a patient to die. Technically, *that* modifies *decision*.

8. Again, I'm told by experts that the word *allow* causes trouble and pain, as if the patient advocate—rather than the consequences of withholding or withdrawing treatment—caused the patient's death.

9. Garbled syntax in the original. It reads "only if the patient has expressed in a clear and convincing manner that... and that the patient acknowledges that..."

10. This last bit, after *expenses*, seems altogether implicit. At most, I'd say *that I incur*.

11. Doesn't this third bullet effectively capture the standard in the sentence omitted from the second bullet? And won't it be clearer to the patient advocate?

12. The pertinent statutes here are (to say the least) a challenge to sort out, and the forms that I looked at vary considerably. Despite my best efforts, I'm not sure that (1) I have it right or (2) readers will get it. After waiving the right to revoke, is the patient later in effect canceling the waiver by revoking the appointment? Comments and suggestions are especially welcome on this piece.

Incidentally, notice how unhelpful it is to say, as MCL 700.5507(4) does, that "certain treatment will be delayed." Which treatment? I believe it's whatever treatment the patient might be receiving when they revoke the appointment, but who knows?

13. Another reference that won't mean anything to most readers. But the paragraph at least alerts patient advocates, who can get help looking it up if they're so inclined.

a patient who is pregnant if doing so would result in her death.

5. I am not paid for carrying out my responsibilities, but I may be reimbursed for my actual and necessary expenses.
6. When making decisions for the patient, I must:
 - act in accordance with the standards of care that apply to fiduciaries (trusted persons), and
 - act consistent with the patient's best interests, and
 - follow the patient's desires that I know about, as expressed or evidenced while the patient was able to participate in medical or mental-health decisions.
7. The patient may revoke my appointment at any time and in any way that communicates an intent to revoke.
8. The patient may give up their right to revoke my power to make mental-health-treatment decisions. Later, if the patient revokes my appointment, I will still have the power to make mental-health-treatment decisions for 30 days.
9. I may revoke my acceptance of this appointment at any time and in any way that communicates my intent to revoke.
10. A patient admitted to a health facility or agency has the rights set out in the public-health code, found in Michigan Compiled Laws 333.20201.

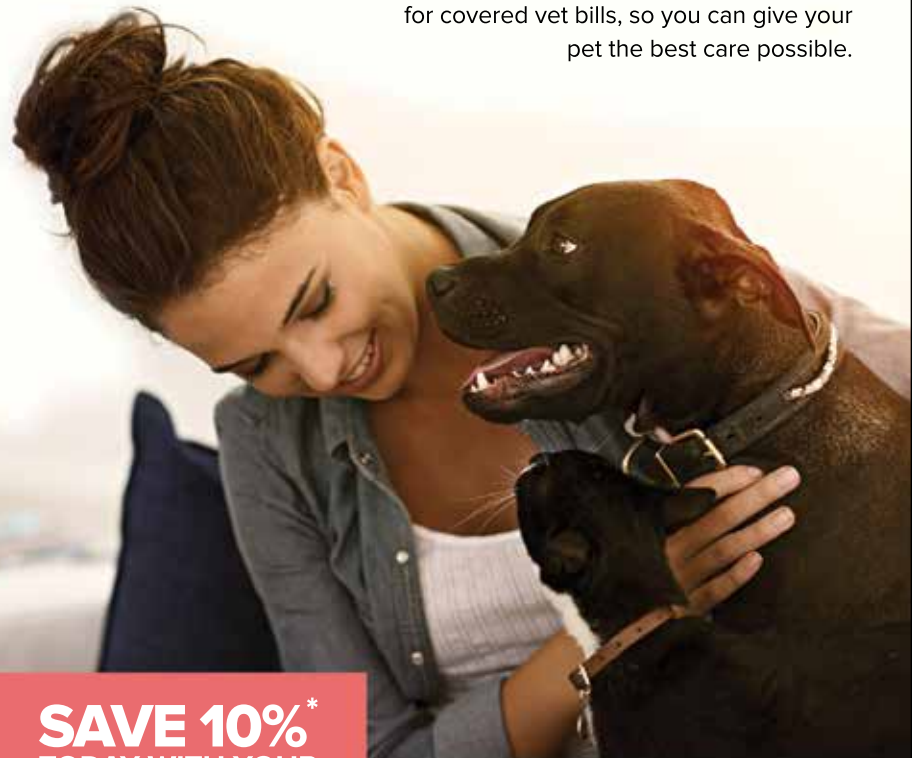


Joseph Kimble taught legal writing for 30 years at WMU–Cooley Law School. His third and latest book is Seeing Through Legalese: More Essays on Plain Language. He is senior editor of The Scribes Journal of

Legal Writing, editor of the "Redlines" column in Judicature, a past president of the international organization Clarity, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and Federal Rules of Evidence. Follow him on Twitter @ProfJoeKimble.

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