Getting One-Upped

A Plain-Language Redraft Made Plainer

By Joseph Kimble

This month's column is an exercise in humility.

In the January column, I criticized the drafting in MCL 700.5507(4), which sets out 10 "statements" that someone must accept to be appointed a patient advocate under a medical power of attorney. I described the statutory language as "clunky"; said that the main deficiency was the failure to use first person; offered a shorter revised version; and noted that the statutory language would, regrettably, tend to get copied in most forms and documents.

Just a few days after signing off on the *Bar Journal* galleys, I discovered online a form copyrighted by the Regents of California. You can find it by Googling "Prepare for Your Care" and going to the Michigan version. (There is a form for each state.) I was impressed by the form and, at the same time, a bit depressed when I looked at the 10 patient-advocate acceptance statements and compared them with mine. They were better in some ways. Hats off to the drafters.

All three versions are reproduced on the following page, side by side. After each item in the California version, I show in brackets the numbers of the corresponding items in the original Kimble version. And at the end, by itself, is a new Kimble version, Kimble version #2.

The California version is about half as long as Kimble #1. In my (slight?) defense, the California version does not include my items 8 and 10 because it does not address mental-health decisions (as the Michigan statute does). It also omits some smaller bits that may or may not be needed or useful.

As I mentioned in January, under the Michigan statute the acceptance must include "substantially all of the following [10] statements." I understand that to mean substantially all the information in each statement, not substantially all the words. Otherwise, we are locked into clunky drafting. But could it mean substantially all the statements? That is, can you omit one or two of the 10? And if you do, must you still copy the others verbatim? Again, let's hope that the legislature did not intend such a rigid prescription. Is there a medical facility out there that would reject a power of attorney for variations in wording that do not change the substance?

At any rate, in my version #2 I did not omit any of the statutory statements and generally erred on the side of caution in deciding on smaller omissions. But I did make some organizational changes from my version #1: moved most of old item 6 to new item 1; moved the second sentence of old item 1 to new 10; combined old items 3 and 4 into new 4; moved old item 7 to new 8; and moved old item 10 to new 7.

There are at least two lessons in all this. First, I should not have just edited the statutory language, but tried harder to start fresh and rewrite it. Second, revision can be endless: you can always make a piece of writing better. (Thank you, editors everywhere.) At some point, though, you have to let it go, as busy lawyers know all too well. But before the *legislature* lets go of something that will be endlessly copied—for the public—perhaps they could try a little harder to draft in plain language.

"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."

[R]evision can be endless: you can always make a piece of writing better. (Thank you, editors everywhere.) At some point, though, you have to let it go. . . .

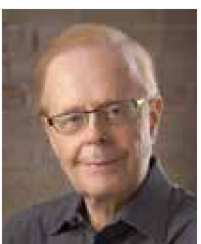
MCL 700.5507(4)	Kimble version #1	California version (with bullets replaced by numbers and with bracketed references to the corresponding items in Kimble version #1)
1. This patient advocate designation is not effective unless the patient is unable to participate in decisions regarding the patient's medical or mental health, as applicable. If this patient advocate designation includes the authority to make an anatomical gift as described in section 5506, the authority remains exercisable after the patient's death.	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.	**As the medical decision maker (patient advocate):** 1. You should always make decisions that the patient (the person who signed this form) would have wanted, not what others want. [#6, third bullet]
2. A patient advocate shall not exercise powers concerning 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.	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.	2. You can only start making decisions for the patient if 2 doctors decide they are unable to make their own decisions. [#1; the part about "2 doctors" is new]
3. This patient advocate designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.	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.	3. You can only make decisions the patient would have had the power to make on their own. [#2]
4. A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.	4. But I cannot make a medical decision to withhold or withdraw treatment from a patient who is pregnant if doing so would result in her death.	4. You can decide to stop or not start treatments and allow the patient to die naturally if they have made it clear that you can make that decision. [#3]
5. A patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.	5. I am not paid for carrying out my responsibilities, but I may be reimbursed for my actual and necessary expenses.	5. But, if the patient is pregnant, you will not be able to stop life support if it would cause the patient to die. [#4]
6. A patient advocate shall act in accordance with the standards of care applicable to fiduciaries 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.	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.	6. You can make decisions about organ donation after the patient dies. You must follow their wishes for organ donation on this form. [#1, second sentence]
7. A patient may revoke his or her patient advocate designation at any time and in any manner sufficient to communicate an intent to revoke.	7. The patient may revoke my appointment at any time and in any way that communicates an intent to revoke.	7. You cannot be paid for your time to be a medical decision maker. [#5]
8. A patient may waive his or her right to revoke the patient advocate designation as to the 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.	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.	8. You should help to protect the patient's rights. [new? or #6, second bullet?]
9. A patient advocate may revoke his or her acceptance of the patient advocate designation at any time and in any manner sufficient to communicate an intent to revoke.	9. I may revoke my acceptance of this appointment at any time and in any way that communicates my intent to revoke.	9. The patient can remove you as medical decision maker whenever they want. [#7]
10. A patient admitted to a health facility or agency has the rights enumerated in section 20201 of the public health code, 1978 PA 368, MCL 333.20201.	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.	10. You can remove yourself as medical decision maker whenever you want. [#9]

(Continued on the following page)

Kimble version #2

1. I must always follow the patient's wishes that I know about and act in the patient's best interests—even if others disagree.
2. I can make medical or mental-health decisions for the patient only if they cannot make decisions on their own.
3. I can only make decisions that the patient would have had the power to make on their own.
4. I can stop or refuse to start life-support treatment only if the patient clearly:
   - gave me that power, and
   - acknowledged that the decision could or would result in their death.

   But I cannot stop or refuse to start life-support treatment for a patient who is pregnant if doing so would result in their death.
5. I am not paid for carrying out my responsibilities, but I may be reimbursed for my actual and necessary expenses.
6. The patient may give up their right to immediately cancel my power to make mental-health-treatment decisions. Then, if the patient cancels my appointment while they are receiving mental-health care, I can still make those treatment decisions for 30 days.
7. 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.
8. The patient can cancel my appointment at any time and in any way that communicates an intent to cancel.
9. I can cancel my appointment—and stop serving—at any time and in any way that communicates my intent to cancel.
10. 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. ■



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.*

Connect with Us
@MIStateBar
facebook.com/mistatebar
twitter.com/mistatebar
linkedin.com/company/mistatebar
instagram.com/mistatebar