

**Second Supplement to Memorandum 98-74****Health Care Decisions: Draft Recommendation Revisions  
(Comments of State Bar Advance Directives Committee)**

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Attached to this memorandum is a letter from Leah V. Granof on behalf of the Advance Directives Committee of the State Bar Estate Planning, Trust and Probate Law Section Executive Committee, commenting on the health care decisions tentative recommendation. The Advance Directive Committee is generally supportive of the draft, particularly taking into account a number of revisions made at the September meeting.

We will raise the Committee's concerns when we get to the relevant sections as we complete the review of the draft recommendation at the December meeting.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION THE STATE BAR OF CALIFORNIA



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December 7, 1998

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Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, D-1
Palo Alto, California 94303-4739

REPLY TO:

Re: Comments to Memorandum 98-63
Health Care Decisions: Comments on Tentative Recommendation

Dear Stan:

I am enclosing the summary of the Advance Directives Committee of the State Bar Executive Committee teleconference held on October 28, 1998.

These comments were presented at the last full Executive Committee meeting of the State Bar on November 21, 1998, which took place in Los Angeles. Jim Deeringer made the presentation for me in my absence and explained the Committee's thinking on the major issues. He invited comments and discussion to our position. There was no substantial variance within the Executive Committee.

As discussed in my Memorandum, we still need clarification as to how the CLRC views the establishment of a Surrogacy Committee (mandatory or permissive) and if one is not used, its alternative.

Naturally, call me if you have any questions or would like me to elicit any additional comments from my Committee.

I am very pleased that we are moving along so quickly toward finalization of this project due to your substantial talents and efficiency.

Cordially,

Handwritten signature of Leah V. Granof

Leah V. Granof
LVG/dm/8/186

cc: All Members of Advance Directives Committee

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MEMORANDUM

REPLY TO:

DATE: November 5, 1998  
TO: ALL MEMBERS OF THE STATE BAR EXECUTIVE COMMITTEE  
SPECIAL PROJECTS - ADVANCE DIRECTIVES COMMITTEE  
ESTATE PLANNING, TRUST & PROBATE LAW SECTION  
FROM: Leah V. Granof, Chair  
RE: Comments to Memorandum 98-63  
Health Care Decisions: Comments on Tentative Recommendation  
December 1998

The Committee met by teleconference on Wednesday, October 28, 1998, at 4 p.m. The purpose of the meeting was to comment on the redrafts of important provisions prior to the December 10-11 meeting of the California Law Revision Commission (CLRC), at which time it is anticipated that it will approve the Recommendation to the legislature.

Participants were Chair Leah V. Granof, Sandy Matthew Rae, Harley Spitler, Robert Temmerman, Fay Blix, Jim Deeringer, Betty Barrington, and Hud Towne.

The sections discussed and the comments of the Committee are as follows:

- Probate Code 4662 - Relation to General Agency Law: The Committee, in disagreement with the Staff, does not prefer the approach of leaving the question of the application of agency law, in cases where this division does not provide a rule, to the lawyers and the courts to decide whether agency law should apply. It is the Committee's recommendation that "may" should be changed to "shall", as Harley Spitler has already commented.

2. Probate Code 4665 - Application to Existing Advance Directives and Pending Proceedings: Subsection (a) provides that this division shall apply to all advance health care directives on or after January 1, 2000. However, the last sentence of subsection (a) reads: "Regardless of whether they were given before, on, or after January 1, 2000", the Committee believes that this should be changed to "Regardless of whether they were given or executed on or after January 1, 2000". This law should be prospective and subsection (a) without this revision is unclear when read with subsection (d). Therefore, we recommend this change.

3. Probate Code 4701 - Optional Form of Advance Directive: (Page 66, item 2.2) We agree with Dr. Ronald B. Miller's suggestion that this section should read "Relief from pain: Except as I state in the following space, I direct the treatment for alleviation from pain or discomfort be provided at all times, even if to be effective in pain relief it hastens my death;"

(Page 67) We disagree with Dr. Ronald B. Miller's request to include a Do Not Resuscitate instruction on the health care advance directive.

The Committee disagrees with the Commission's decision not to provide further implementation of autopsy or disposition authority so as not to complicate the advance directive. Contrary to the claim of complication, we agree with the original staff notes which welcome the Committee's suggestion as drafted by Fay Blix that these are items covered by the statute and are issues that might not otherwise be considered by the principal.

(Page 68, part 4 - Primary Physician) The Committee had a difference of opinion as to whether to include the optional designation of a primary physician because it may be problematic within the managed care environment. Thus, four members would omit part 4 and three members would retain it.

On Page 72, part of the Background from Uniform Act Comments, line 5 talks about an "incurable and irreversible condition which will result in death within a relatively short time." The Committee agrees with Harley Spitler's suggestion to amplify and clarify and would add Mr. Spitler's suggested language or some version of it.

4. Probate Code 4712 - Selection of Statutory Surrogate: The Committee was delighted with the Commission's decision to place domestic partners following the spouse and ahead of children. The Committee has recommended this hierarchy from the beginning of its involvement. It is an enlightened view which will serve the diverse California population.

5. Probate Code 4722 - Composition of Surrogate Committee: The Committee had an intense discussion about 4722(a), "a surrogate committee may be established by the health care institution". Harley Spitler and the Chair had a completely different view of the establishment of a surrogate committee. The Chair believed that the surrogate committee was mandatory in the case of the "friendless

patient" and therefore the word "shall" should replace "may". Harley Spitler was of the contrary view and thought that the establishment of a surrogate committee is permissive, and therefore the word "may" found in the second and fifth line of page 79 should remain as is. There ensued a somewhat lengthy discussion with the members of the Committee. Other than the Chair and Fay Blix, whose understanding was that this should be mandatory, the balance of the Committee voiced the opinion that the structure of the committee is permissive.

We would like some clarification as to how the CLRC views the establishment of the committee and, if one is not used then what is the alternative. This is a fundamental clarification that needs to be made before we proceed.

With respect to the staff's conclusion that it may be necessary to have two types of surrogate committees, one for long term care facilities, another for acute care hospitals, the Committee was opposed to this two-tier committee differentiation and was not clear as to why the staff needed to make this change. The Committee was also rather appalled that the registered nurse individual would be replaced by a nurses aide who could have minimal or varying degrees of experience which would not insure competence. We also need definition of "critical health care".

The Committee did agree with the requirement that four persons make a decision to keep the balance between health care professionals and layman.

5. Probate Code 4736 - Duty of Declining Health Care Provider or Institution: The Committee was in agreement with the Commission's decision to reverse the order of subdivision (b) (Continuing Care) and subdivision (c) (Assistance in Making Transfer), and also the health care provider or institution that declines to comply with the health care decision to "provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. In all cases, appropriate palliative care shall be continued."

6. On Page 19 of Memorandum 98-63, Bruce Hudson Towne's discussion of anatomical gifts, the Committee was in agreement with the Commission to add reassurance and appropriate comments to sections dealing with the authority of surrogates insofar as anatomical gifts are concerned.

The Committee continues to enthusiastically participate in this most important project. Naturally, the Committee is available for any further comments, review or elaboration.