

Study L-4000

December 8, 1998

Third Supplement to Memorandum 98-74**Health Care Decisions: Draft Recommendation
Revisions (Comments of Harley Spitler)**

Attached to this memorandum is a letter from Harley J. Spitler providing his detailed analysis of various issues in the draft recommendation on *Health Care Decisions for Adults Without Decisionmaking Capacity*.

We will raise Mr. Spitler's concerns when we get to the relevant sections at the December meeting.

Respectfully submitted,

Stan Ulrich
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December 7, 1998

Stan Ulrich
Assistant Executive Secretary
CLRC
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739HARLEY J. SPITLER
415 693-2060
spitlerhj@cooley.com**Re: CLRC Staff Memo 98-63, Dated September 18, 1998**
CLRC Staff Memo 98-74, Dated November 23, 1998
First Supplement to Memorandum 98-63, Dated November 30, 1998

Dear Stan:

This letter contains my comments regarding the above three CLRC memos. It also contains my comments regarding the letter from David M. English dated November 18, 1998.

Before beginning this seemingly never ending journey, please indulge my drafting style and tips which you will see repeatedly in this paper:

I. Use plain English – and a very minimum of both technical terms or not commonly used words.

II. Don't tinker or fuss with the statutory form

III. In any proposed change always study the definitions *first*. There may be some definition that impacts the proposed change.

IV. While the UHCDA is an excellent product – we can improve some of its provisions and omissions.

V. Don't omit some comment or some provision because someone says it is "*politically sensitive*," whatever that means.

VI. Be very wary of the interplay and interaction between any proposed change and other provisions.

Of one thing you can be very certain, you said it on page 1 of your opening comments to CLRC Memo 98-63:

"The staff anticipates that the Commission will decide to make a number of important revisions, and some additional research and technical analysis of the draft need to be done before a final recommendation can be printed. At this

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meeting, the Commission should be able to complete its review of the comments we have received. The staff will wrap up drafting on the final recommendation, and the Commission will be able to approve its recommendation to the Legislature at the December 10-11 meeting. As part of this process, it may be beneficial to circulate redrafts of the most important provisions if the Commission decides to make significant changes in response to the comments. *Since there is no consensus about what should be done with the more controversial provisions, without seeking additional review and comment, we may find that revised provisions are just as objectionable as the ones they would replace.*" (Emphasis added).

How true that is! On the emphasis added sentence: It is impossible to draft any language that will reach a consensus on the more controversial provisions. So, my suggestion is: draft what you conclude is the better language and do not waste valuable time trying to reach a consensus.

ENGLISH V. SPITLER

As you will note from my many letters to you and the letter from David M. English dated November 18, 1998, he and I differ on many subjects, and provisions in the health-care decision making field. Please indulge my comments, and perspective, re those differences.

A. *David English:* As the principal reporter of the Uniform Health-Care Decisions Act (UHCDA), David is the very best person, anywhere, to advise you, and CLRC, re the intention of the drafting committee. David (i) drafted major portions of the UHCDA and (ii) was the *sole* scrivener of all comments of the UHCDA.

So, if you or CLRC wants to know any of the above, David is your best source. You and CLRC are most fortunate to have him as a consultant.

B. *Harley Spitzer:* I am an ancient practicing attorney. My practice began many years before David was born! In addition, I am the sole author of "Durable Powers of Attorney and Health Care Directives" (3d. Edition, Clark Boardman Callaghan). Until rather recently, there were three other co-authors: Francis J. Collin, Jr.; John J. Lombard, Jr.; Albert L. Moses. In a number of years we four co-authors worked long and hard to keep that treatise "at the top." In some 2,500 pages it covers both statutory and decisional law in the 50 states and the District of Columbia.

The mission of that book is: *first*, the drafting attorney and *second*, the health care providers. It is not designed for academics; however it is being used by an ever increasing number of law schools as a resource in estate planning, and related courses.

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So, how does *English v. Spitzer* get resolved! It doesn't! However, always remember: the California forms on which you and CLRC are working will be used by all categories of persons – from the five star drafting attorney at the top of his profession to the attorney in his first week of practice; from the most intelligent lay persons to the most ignorant!

N.B.: Some of my comments re David English are very *harsh!* Don't be concerned re our long and continuing friendship. After all, he is a good academician!

_____, _____, _____, _____, _____, _____, _____,

In many instances, in the interest of time, I will refer to my prior letters where my position is unchanged. As usual, if I do not comment on any provision, I have no comment.

§4609: The Term "significant" is troublesome in two respects:

(i) Does it modify only "benefits"; or dos it also modify "risks" and "alternatives." My reading of the section is that it modifies all three words. If that reading is correct, what is a "significant risk" or a "significant alternative" and what is an "insignificant" benefit, risk or alternative.

David English would not delete "significant." If you pressed him for a reason, he would most likely plead the same definition in the UHCDA! Please note that there is no comment re that definition in the UHCDA!

Also, look at Cal. H&S Code Section 1418.8(b) which you include in your comment to §4609: it simply says "*risks and benefits.*"

Also, look at Cal. Prob. Code Section 812(c) and 813(a)(3)(D).

My preference would be to have the "including" clause read: " _____ including the nature, risks and benefits of any alternative medical treatment _____"

§4613: Leave as is.

§4621: I prefer the UHCDA definition, i.e., delete "by the law of this state" and substitute "*by law.*"

The comment is wrong in stating that Section 4621 "is the same as Section 1(8) of the Uniform Health-Care Decisions Act (1993)." It ain't the same! It's very different!

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§4650: David English says that "the statement of legislative purpose which is drawn from the Natural Death Act, seems too narrow." Perhaps you should consider using the statement contained in Cal. H & S Code §7185.5:

§7185.5. Legislative findings and declaration.

(a) The Legislature finds that an adult person has the fundamental right to control the decisions relating to the rendering of his or her own medical care, including the decision to have life-sustaining treatment continued, withheld or withdrawn in instances of a terminal condition or permanent unconscious condition.

(b) The Legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits.

(c) The Legislature further finds that, in the interest of protecting individual autonomy, such prolongation of the process of dying for a person with a terminal condition or permanent unconscious condition for whom continued medical treatment does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.

(d) In recognition of the dignity and privacy that a person has a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written declaration instructing his or her physician to continue, withhold or withdraw life-sustaining treatment in the event of a terminal condition or permanent unconscious condition, in the event that the person is unable to make those decisions for himself or herself.

(e) The Legislature further declares that, in the absence of controversy, a court normally is not the proper forum in which to make demons regarding life-sustaining treatment.

(f) To avoid treatment that is not desired by a person in a terminal condition or permanent unconscious condition, the Legislature declares that this chapter is in the interest of the public health and welfare.

(Added by Stats. 1991, c. 895 (S.B.980), § 2.)

§4652: In prior letters and memos to you, I have commented at some length re my opposition to Section 4652(a), (b), (c) and (d). After *Cruzan v. Director* (1990) 497 U.S. 261, 110 S.Ct. 2841, I am assured that the acts mentioned in Sections 4652(a), (b), (c) and (d) are part of my "liberty interest" under the 14th Amendment to the U.S. Constitution.

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David English's comments are puzzling:

1. He says, quite correctly, that the entire section is "*politically sensitive*." Very true, but so what? Many, many other provisions are also "politically sensitive."

(a) Where does it say that we are supposed to avoid any provision that we believe is "politically sensitive" – whatever those words mean?

(b) *I have always believe that the "political sensitivity" of any legislative bill was to be determined by the state legislature – not by some academician or some attorney or some book author!* Conversely, I believe our job is to recommend what we believe the California statutory law should be based upon the present state of decisional law.

So, I believe that Section 4652 should be amended to read:

§4652 Unauthorized act: Abortion

4652. This division does not authorize consent to an abortion on behalf of the patient."

Abortion differs from Section 4652(a), (b), (c) and (d) because it deals with *two* lives: (i) the mother, (ii) the fetus.

A similar change should be made to Cal. Prob. Code Section 4722.

§4653: I concur with David English. I would remind him that we are "*writing on a clean slate*" for California's system. Hence, I would change Section 4653 to read:

§4653: Attempted Suicide; construction

In making health care decisions under this division, an attempted suicide by the patient shall not be construed to indicate a desire of the patient that health care be restricted or inhibited.

A similar change should be made in Cal. Prob. Code section 4723.

§4659: I concur in both the second paragraph of the staff note and with David English's comment – namely delete the entire section.

§4662: Here is one very important place that you and David English on the one hand and I on the other part company:

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Both I and the California State Bar advance Directive Committee very strongly recommend that Section 4662 be changed to read:

4662. Where this division does not provide a rule, the law of agency shall be applied.

David offers no reason for his cursory deletion of the section.

By this time, even academicians should know that every power of attorney is an agency! What other body of law would apply – the law of admiralty, landlord and tenant, torts, copyright? I strongly suggest you try to dream up a situation where a power of attorney is not an agency!

§ 4609: Same comment I have made with the terms “significant”. You will have trouble explaining this term. What is an “*insignificant*” risk – maybe a headache, toothache or a common cold?

§ 4617: Same comment as appears in my letter on page 13. This makes the statute consistent with the comment.

§ 4665(a): See my comment on pages 14 and 15. I reaffirm those views. As the “comment” is no part of the statute, you should include the second sentence, second paragraph, of the comment in the statute – and not, simply, bury it in the comment!

The Staff Note says “the staff cannot think of a case where this division *could* invalidate an advance directive executed under prior law”.

Here is the case, and there are many of them, which I have mentioned many times and which is very common in practice:

§ 4665(a) reads:

§ 4665. Application to existing advance directives and pending proceedings

4665. Except as otherwise provided by statute:

(a) On and after January 1, 2000, this division applies to all advance health care directives, including but not limited to durable powers of attorney for health care and declarations under the former Natural Death Act (former Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code), regardless of whether they were given or executed before, on, or after January 1, 2000.

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The precise problem is whenever the principal ("P") becomes incapacitated before January 1, 2000. Here is the very common factual setting:

P, fully competent, executes an advance directive sometime before January 1, 2000. The directive conforms with the law when he signs it. Then, sometime before January 1, 2000, P becomes incapacitated. So, what to do?

Obviously, in his incapacitated state, he personally cannot redo his directive so as to conform it to the many substantive changes made by CLRC Staff Memo 98-63.

Can a judicial proceeding such as a petition for instructions help P? Very doubtful if any court would rewrite P's directive.

§ 4665(a) should be prospective in operation and should read:

4665. Except as otherwise provided by statute:

(a) On and after January 1, 2000, this division applies to all advance health care directives, including but not limited to durable powers of attorney for health care and declarations under the former Natural Death Act (former Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code) given or executed on or after January 1, 2000.

My above change makes 4665(a) consistent with 4665(d) which very correctly reads:

"(d) Nothing in this division affects the validity of an advance health care directive executed before January 1, 2000, that was valid under prior law"

§ 4682: Delete "ordinarily" in line 6, page 56, of comment. That term is not in Section 2(c) of Uniform Act.

§ 4697: See my comment on page 15. I reaffirm those views.

§ 4697: This is simply another instance in which both you and David English, tucked away in your respective isolated offices, are not in touch with the "real world" in which we practicing attorneys function.

1. "(a): change to read:

"A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a prior designation of a spouse as agent unless otherwise specified in the decree

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or in a power of attorney for health care.” This is the same as Section 3(d) of the UHCDA.

2. “(b): As written, “(b) is contrary to the real world experience of any person, woman or man, who has been through a bitter divorce, followed by a reconciliation and remarriage to the same spouse.

I favor deleting “(b).” If P wants to appoint the remarried spouse as agent, that’s fine; let P create a new DPAHC!

§ 4701: Delete the entire paragraph preceding the box in part 2 on page 66. Those instructions should *always* be filled out by the principal!

§ 4701: Leave (2.2) in Part 2 “as is.” The word “it” very clearly refers to “treatment”; and adding Dr. Miller’s proposed words “to be effective in pain relief” adds nothing. Also, I strongly disfavor minor tinkering with the UHCDA form.

I concur with David English’s comment re Dr. Miller’s concerns about euthanasia. Section (2.2) has nothing to do about euthanasia!

§ 4701: I favor leaving Part 3 “as is” in the UHCDA for the following reasons:

A. It is quite common for an individual to change his/her wishes regarding the disposition of remains. This change could be, and in many cases would be, contrary to, or inconsistent with, those in a prior Advance Health Care Directive Form.

B. More common: what about the *oral* wishes given to the principal’s spouse as the principal is dying. On death of principal, the spouse finds the principal’s prior Advance Health Care Directive form which contains the principal’s wishes in (3.3) that are directly contrary to the principal’s later oral wishes.

C. Most principal’s execute an Advance Health Care Directive form only once and do not examine it periodically to determine if it still clearly expresses the principal’s wishes. So, the disposition of the principal’s remains can be frozen in an Advance Health Care Directive form that is 5, or 10, or 20, etc. years old: and may be contrary to the principal’s current wishes.

D. Disposition of ashes is a somewhat minor matter. However, the principal cannot have his/her ashes lawfully scattered wherever he/she wishes. *See* Health and Safety Code Section 7054.7. The implication of proposed (3.3)(b) is that the principal can *lawfully* direct the disposition of his/her ashes. That cannot be done!

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E. What "Other": Proposed (3.3)(c) is puzzling. What "*other*" disposition of the principal's body? Proposed (3.3)(a) and (b) cover burial, cremation and ashes. What is contemplated by "other"? Perhaps delivering the body to some religious sect for burning?

§ 4701: Please carefully note David English's admonition:

"With regard to other issues raised in the staff note, *please keep the statutory form as simple as possible.*"

I very strongly concur!

Stan, please again reconsider my prior comments regarding "Part 2." I strongly reaffirm those comments. Please carefully focus on the first sentence of the "Part 2" instructions. This is what it now says: *If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out this part of the form.* So, you give P's agent carte blanche authority to do any or all of the things set forth in 2.1, namely:

Not to prolong P's life if P has any of the conditions set forth in 2.1(a); *or*

To prolong P's life "as long as possible within the limits of generally accepted health care standards" under 2.1(b).

For many years all of us working in this area of the law – and especially you – have been endeavoring to build a statute that would protect the incapacitated principal from the uncontrolled action of his agent. Unfortunately, as now written, the first sentence of the "Part 2" instructions does just the opposite; and removes all protections that the incapacitated principal should have.

§ 4712(a): See my comments on pages 16 and 17. I reaffirm those views. In passing, I note that you very carefully have omitted any reference to my comments on the three most common situations in which 4712(a)(1) does not reflect the real world.

The major defect in 4712(a)(1) is the word "*legally*". That requires, in California, a judicial legal separation proceeding. *See* Cal. Family Code Secs. 2300 *et seq.*

Here again "(1)", as written, does not, at all, reflect the real world. Very few spouses get a judicial legal separation. Countless more spouses simply split, move out, and live separate and apart for many reasons some of which are:

1. *Religious*: Roman Catholics for example.

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Legal expense: many spouses simply do not want to pay the cost of a legal separation.

Miscellaneous: reasons that defy rational explanation cause many spouses to simply break up.

CONFORMING REVISIONS AND REPEALS

Stan, except in selected instances, I am not reviewing your conforming revisions and repeals.

§ 4712(a)(7): Change "(7)" to read:

- (7) An adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available to act as a surrogate.

Prob. Code § 2105(f): There is a very serious time problem in your definition of "Terminal Condition". *First*, consider the following provision in Part 2 of the UHCDA:

"I do not want my life to be prolonged if (i) *I have an incurable and irreversible condition that will result in my death within a relatively short time*".

Second, consider how that clause would read without any stated time limit:

"I do not want my lie to be prolonged if (i) *I have an incurable and irreversible condition that will result in my death*".

The addition of "without the administration of life-sustaining treatment" adds nothing helpful. All of us working in this area of the law know of numerous cases in which the Patient, hooked up to "life sustaining equipment" can be kept "alive" for months and years.

Prob. Code § 2356(b): My reading of "(e)" is that the patient's advance health care directive can both authorize and direct the "convulsive treatment" and sterilization referred to in "(c)" and "(d)". Because this has been a subject of considerable controversy, I suggest changing and clarifying (e) to read as follows:

"The patient's advance health care directive can authorize or direct the patient's agent to either authorize or direct the patient's "convulsive treatment" under "(c)" or the patient's sterilization under "(d)".

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PART 7. CAPACITY DETERMINATIONS AND HEALTH CARE DECISIONS FOR ADULT WITHOUT CONSERVATOR

A. Opening Comment: I strongly favor merging the Section 3200 procedure into the Health Care Decisions Law.

B. Prob. Code § 3200: I believe that the following statement in the Comment is not accurate:

“The definition of “health Care Decision” in subdivision (b) makes clear, as used in other provisions in this part, that court-authorized health care decisions include end-of-life decisions. See Section 3208(c)”

Neither subdivision (b) nor Section 3208(c) deal with “end-of-life decisions”. To clarify subdivision (b), I suggest adding the following as subdivision (b)(4):

“End-of-life decisions”

C. Prob. Code § 3204: Delete “a medical declaration” in line 12 on page 120 and substitute “a declaration of the patient’s physician”

D. Prob. Code § 3206

1. Add the following as (b)(3) and (b)(4):

(b)(3) The patient
(b)(4) The patient’s Agent

2. Change (c)(1) to read:

(1) The existing medical facts and circumstances set forth in the petition or in a declaration of the patient’s physician attached to the petition or presented to the court

F. Prob. Code § 3211: See my comment under § 3211(e) *supra*. So, I would change 3211(e) to read:

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(e) The patient's advance health care directive can authorize or direct the patient's Agent to either authorize or direct the patient's "convulsive treatment" under (c) or the patient's sterilization under (d)

C.L.R.C. MEMORANDUM 98-42 DATED MAY 27, 1998

Stan: Sections 3200-3211 may be duplicated or superseded elsewhere. I did not have time to check this.

A. EX2 §3200: I prefer the "Staff Note" approach, namely to define "medical treatment" to mean "health care" as defined in Section 4615 of the tentatively proposed health Care Decisions Law

B. EX4 §3203: Same change as in Section § 3203 *supra*.

C. EX4 §3204:

1. Delete "[medical] declaration" in first line and substitute "a declaration of the patient's physician"

2. Delete brackets around "medical" in (a)

3. Delete brackets around "medically" in (b)

4. Delete brackets around "medically available" in (e)

5. Delete brackets around "an informed" in (f)

D. EX5 § 3206

1. Same changes as in Section § 3206 *supra*.

E. EX6 § 3208

1. Delete brackets around "give an informed" in (a)(3) and (b)(2)

F. EX8 § 3208.5

1. Delete brackets around "give informed" in four places in (a), (b) and (c)

2. Delete brackets around "accepted " in (b)

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3. Change "a" to "the" in fourth line of (b)

G. EX9 §3211: Same changes as in I-H. *Supra*

§ 4720: Adding "After a diligent search" at the beginning of 4720(c) is an improvement. However, note David English's second sentence comment re "reasonable inquiry." If we add only the above opening words, the section would read:

(c) After a diligent search, no surrogate can be selected . . . or the surrogate is not reasonable available. That is clumsy and rather ambiguous!

Why not simply say:

(c) No surrogate to be selected under Chapter 3 is reasonably available.

See definition of "reasonably available" *which means readily able to be contacted without undue effort*. I believe that is the same as a "*diligent search*." I very much disfavor introducing new adjectives or synonyms!

§ 4722(b)(5) and (6):

I concur with David English that you must put some meaning into "critical health care decisions."

Possibly (5) and (6) could be combined to read:

(5) In cases determined by the patient's primary physician:

(i) a member of the community who is not employed by or regularly associated with the patient's primary physician, the health care institution, or employees of the health care institution.

(ii) a member of the health care institution's ethics committee or an outside ethics consultant.

§ 4723(a)(3): David English has focused upon a very tough problem to resolve – one which will result in many different viewpoints. David's conclusion is to give primary weight to the patient's wishes expressed while he had capacity; and to give some consideration to the patient's inconsistent current views. I differ.

Please not that 4723(a)(3) very carefully provides that in determining the desires of the patient "the surrogate committee shall interview the patient, *if the patient is capable of communicating*."

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So, back we go to the definition of "capacity" in Section 4609. Seems very clear to me that a patient having "ability . . . to communicate a health care decision" (4609) is the same person as the "patient . . . capable of communicating" under 4723(a)(3). And, accordingly, I would give those wishes top priority; and where there is a conflict with any prior inconsistent wishes, the latter should be superseded.

§4735: I concur with the staff note and David English. As "medically ineffective health care" is used only in Section 4735, I would not put it in the statutory definition's section. Do as the UHCDA does – namely, put in a comment stating:

"medically ineffective health care" as used in this section, means treatment that would not offer the patient any significant benefit:

"Futile care" v. "palliative care": For the medical community, "palliative care" would be better. For lay persons "futile care" would be better. Many lay persons will never have heard of the term "palliative"! In addition, the category of *"futile"* medical procedures, operations, etc. is very common in the statutes. For these reasons, I would use "futile care."

§ 4766: I concur with David English: Section 4766 should state that the section applies to "surrogate committees" as well as "the surrogate."

Best wishes,


Harley J. Spittle

HJS:lsb

cc: Granof
Rae
English
Deeringer
Blix

P.S.: Stan, your "First Supplement to Memorandum 98-74 arrived too recently for me to comment on it. I will try to get my comments to you before the CLRC Friday meeting.

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