

STATE OF COLORADO

Colorado General Assembly

Kirk Mlinek, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Charles W. Pike, Director
Office of Legislative Legal Services

Office Of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: olls.ga@state.co.us

MEMORANDUM

May 2, 2006

TO: Sarah Landeryou and Hanna Weston

FROM: Legislative Council Staff and the Office of Legislative Legal Services

RE: Proposed initiated measure 2005-2006 #138, concerning end-of-life decision-making authority

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution, including suggested editorial changes to promote the use of plain language in such proposals. Pursuant to that provision, we are submitting our comments to you regarding the appended proposed initiative.

It is our understanding that the purpose of our comments is to help proponents arrive at language that will accomplish their intent in proposing changes to the constitution or laws of the state and to avail the public of knowledge about the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposal appear to be:

1. To prohibit the state from restricting the ability of an adult patient's family or legally authorized representative to determine the medical treatment for that patient if he or she is unable to provide informed consent to, or refusal of, medical treatment.
2. To define "adult" as any person eighteen years of age or older.
3. To define "legally authorized representative" as an agent appointed in a medical durable power of attorney, a legal guardian with medical decision-making authority, or any other person who has legal authority to act as a proxy decision-maker in connection with decisions about the patient's medical treatment.
4. To define "medical treatment" as the provision, withholding, or withdrawal of any health care, medical procedure, including artificially provided nourishment and hydration, surgery, cardiopulmonary resuscitation, or service to maintain, diagnose, treat, or provide for a patient's physical or mental health or personal care.

Comments and Questions

The form and substance of the proposed amendment raise the following comments and questions:

Technical Questions:

1. "SECTION 15." appears in small capitals. Standard drafting practice calls for the section number to be in regular type bolded. Would the proponents consider changing "SECTION 15." from small capitals to regular type bolded?
2. The headnote that follows proposed section 15 is shown in regular type. Standard drafting practice is to show the headnote in regular type bolded. Would the proponents consider changing the headnote from regular type to regular type bolded?
3. After the headnote for proposed section 15, subsection (1) begins after a hard return. Standard drafting practice calls for a subsection to begin after the headnote without a hard return. Would the proponents consider removing the hard return between the headnote and subsection (1) of proposed section 15?
4. The text in subsection (1) of proposed section 15 appears to begin after a tab. Standard drafting practice calls for the text to begin two spaces after a subsection number. Would the proponents consider starting the text two spaces after the subsection number?
5. In subsection (2) of proposed section 15, there appears to be a tab between the subsection number (2) and the paragraph letter (a). Standard drafting practice calls for a single space between a subsection number and a paragraph letter. Would the proponents consider placing a single space

between the subsection number and the paragraph letter?

6. The text in paragraphs (a), (b), and (c) of subsection (2) of proposed section 15 appears to begin after a tab. Standard drafting practice calls for the text to begin two spaces after a paragraph letter. Would the proponents consider starting the text two spaces after the paragraph letter?

Substantive Questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of this initiative?

2. When do the proponents intend the measure to become effective? Would the proponents consider including a specified effective date?

3. The proposed measure states, "The state shall not restrict the ability of an adult patient's family or legally authorized representative to determine the medical treatment for that patient if he or she is unable to provide informed consent to, or refusal of, medical treatment."

a. Who and what entities would be considered "The state" for purposes of this proposed section 15? Would the proponents consider defining "The state"?

b. What do the proponents mean by "restrict the ability"? What are some examples of ways that the state could restrict the ability of an adult patient's family or legally authorized representative to determine the medical treatment for that patient if he or she is unable to provide informed consent to, or refusal of, medical treatment? Would the proponents consider defining "restrict the ability"?

c. What about situations in which both a family member and a legally authorized representative want to make medical decisions on behalf of the patient? What if the wishes of the family member and the legally authorized representative conflict?

4. How do the proponents intend the proposal to affect existing Colorado statutes governing medical decision making on behalf of incapacitated persons? Do the proponents intend for the provisions of the proposed measure to supersede existing laws? Such laws include:

- Part 3 of article 14 of title 15, C.R.S., concerning guardianship proceedings for incapacitated persons;
- Section 15-14-506, C.R.S., concerning medical durable powers of attorney;
- Article 18 of title 15, C.R.S., concerning advance medical directives;
- Article 18.5 of title 15, C.R.S., governing the appointment of proxy-decision makers to make medical decisions on behalf of persons who are incapable of making their own medical treatment decisions; and
- Article 18.6 of title 15, C.R.S., concerning directives relating to cardiopulmonary resuscitation.

5. Do the proponents intend for the ability of an adult patient's family or legally authorized representative to determine the medical treatment for a patient to supersede any directive the patient might have indicated in a durable medical power of attorney or other document? What if the family member or legally authorized representative's wishes for the patient conflict with the patient's wishes, as expressed in a durable medical power of attorney or other document?

6. It appears that the defined terms in subsection (2) of the proposed section 15 are intended to apply only to section 15. Is that correct? If the defined terms are intended to apply only to the proposed section 15, would the proponents consider adding a qualifier to subsection (2) limiting the application of the definition to the proposed section 15? A standard qualifier in this situation would look like this: "(2) As used in this section 15, unless the context otherwise requires:".