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SUMMARIES OF LEGAL ISSUES OF INTEREST TO PANPHA MEMBERS

PANPHA

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Culture, Confusage and Cryptography: *A Dialectic Discourse on Doublespeak, Dysgraphia and the Legalistic and Jurisprudential Requirements of Plain Language in Consumer Contracts*

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I. Introduction

As former Eagle Glenn Frye used to croon, "We make it harder than it has to be, and I can't tell you why. . . "[1] Frye's observation pretty much sums up the problem with many of the agreements that we offer to residents and their families. Consider the following language and syntax taken from a continuing care retirement community (CCRC) agreement selected at random from the year 2000 annual filings with the Pennsylvania Insurance Department (PID):

> *In order to maintain a stable level of operating income for [facility], the service charge may be increased or decreased periodically to reflect changes in the cost to [facility] of achieving its purposes. Changes to the services charge will be based on factors, including but not limited to, changes in the U.S. Government Cost of Living Index, facility occupancy levels, government regulations affecting [facility] and maintenance of necessary reserve funds. [Facility] agrees that it will endeavor to maintain the Monthly Service Charge at the lowest feasible figure which in the judgment of the Board of Trustees of [facility] is consistent with the sound financial operation and maintenance of quality service the [facility] has undertaken to provide. [Facility] will endeavor to make such adjustments on a once a year basis and will provide resident thirty (30) days prior written notice of any change in the service charge or in the scope of services covered by this charge.*

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[1] Glenn Frye and the Eagles, *I Can't Tell You Why.*

The author of this agreement took 159 words in his attempt to communicate that the monthly charge might change. Compare it with language and syntax used in the 34 word attempt below:

> *Facility has the right to adjust the service charge once each year to reflect changes in operating costs. Facility will provide resident with thirty (30) days advanced notice of any change in the service charge.*

As we shall see, the law imposes upon facilities, a duty to communicate clearly in their dealings with residents and their families. This is one area where the requirements of the law also make great business sense. Clean, crisp and easy-to-read documents are excellent public relations and marketing investments.

A. Unfair Trade Practices and Consumer Protection Law

In 1968, Pennsylvania adopted the Unfair Trade Practices and Consumer Protection Law (UTPCPL). 73 P.S. §201-1, et seq. The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices. Pirozzi v. Penske Olds-Cadillac-GMC, Inc., 605 A.2d 373 (1992), appeal denied. The UTPCPL attempts to put the buyer and seller on more equal terms. Creamer v. Monumental Properties, Inc., 329 A.2d 812 (1974), on remand 365 A.2d 442.

Depending on the type of violation and the type of plaintiff, the UTPCPL provides four types of relief:

- treble damages
- injunctive relief
- civil monetary penalties
- attorney fees and costs

B. Plain Language Consumer Contract Act

In 1993, the Legislature added the Plain Language Consumer Contract Act ("Plain Language Act" or simply the "Act") to the UTPCPL. 73 P.S. §2201-2212. The legislative intent of the Plain Language Act is to protect consumers from making contracts that they do not understand.

Under Section 4 of the Plain Language Act, courts are instructed to interpret it "liberally" so as to protect consumers. 73 P.S. §2204(c). In plain language, this means that when the case is close, the plaintiff-consumer wins. A plaintiff may obtain the same 4 types of relief offered by the UTPCPL. The statute of limitations is 4 years from the date the contract is signed.

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Except for a very limited class of retirement community documents that can properly be considered real estate conveyances, most documents offered to residents and their families by PANPHA members are subject to the Plain Language Act. For example, most cottage residency agreements and housing leases as well as all personal care agreements, nursing facility admissions agreements and responsible party agreements would be subject to the Plain Language Act.

II. Compliance Issues

Facilities should inventory all documents used to establish the rights and responsibilities of residents and their families (residents and families are "consumers" in the language of the Act). Once an inventory is made, each document should be reviewed to assure its compliance with the standards in the Act. Facilities will discover that many documents currently in use fail to meet the standards of the Act. These standards are set forth in Section III of this article.

What are the reasons for spending time and effort to comply in greater detail? There are at least 4 good reasons to revise documents to comply with the Plain Language Act.

1. It's the law;
2. Clear, easy to read documents are the best marketing and public relations tool you can buy;
3. When disputes with residents or families arise, clear and easy to read documents are most likely to pass muster with courts and facilitate quick resolution; and
4. Documents pre-approval under the Plain Language Act will protect the provider with a presumption of good faith.

Let's take a closer look at two of these issues.

1. Personal Injury Lawsuits

Clear, easy to read agreements can be very important in defending personal injury lawsuits in the long-term care environment. An emerging trend in long-term care personal injury lawsuits is to bring cases based on breach of an express or implied promise to provide care of a certain kind or quality.

Plaintiffs can then hold the defendant facility to the standard that it set for itself through its documents, advertising, etc., rather than the "reasonable facility" standard used in simple negligence cases or the "community standard" used in malpractice cases. The best way to foreclose this strategy is to lay out the terms upon which your facility will render care, in clear and concise terms. The significance of this concept cannot be overstated.

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Recently, the United States Federal District Court for the Eastern District of Pennsylvania found that Pennsylvania nursing homes could be liable for so-called "corporate negligence." Plaintiff claimed that the facility should have had a physician on-site to respond to acute medical emergencies suffered by residents. The facility asked the court to dismiss the plaintiff's claim because there is no regulation requiring a nursing facility to keep a physician on-site.

The court refused, holding whether or not the facility's failure to have a physician on-site amounts to "corporate negligence" is a question for the jury to consider. Good agreements can help preclude these claims by clearly limiting the scope of the care offered to the resident and his or her family.

2. Family Disputes

Probably the most common type of dispute that arises with residents and their families is delinquent resident accounts. Clear and easy to read documents are the foundation of any program to solve these problems. Overly complex, lengthy and difficult to understand agreements do not make good tools for enforcing payment obligations.

Health care providers seeking to collect accounts receivable have been subject to the provisions of the UTPCPL. Commonwealth v. Richard A. Cole, M.D., 709 A.2d 994 (1998), appeal denied (2001). Facilities seeking to collect accounts receivable must be prepared to have their business practices and documents put on trial by defense attorneys seeking to turn attention away from their client's mal- or misfeasance.

The Plain Language Act is increasingly being used by defendants seeking to establish counter-claims against facilities, particularly in cases where facilities have initiated a lawsuit for payment of delinquent resident accounts. If such counter claims are successful, the defendant can:

- Enjoin the facility from attempting to collect
- Force the facility to pay the defendant's costs and attorney fees
- Obtain civil monetary penalties for violations of the Act

III. Plain Language Act Requirements

Basically, the Plain Language Act requires consumer documents to be written in a clear and easy to read style. Section 5 of the Plain Language Act sets forth a test of readability. 73 P.S §2205. It provides that:

1. The contract should use short words, sentences and paragraphs;
2. The contract should use active verbs;

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3. The contract should not use technical terms;
4. The contract should not use Latin terms;
5. Definitions should be consistent with commonly understood meanings;
6. The contract should reference parties using personal pronouns or easy to understand names such as "buyer" and "seller";
7. The contract should not use sentences with more than one condition;
8. The contract should not use cross references;
9. The contract should not use sentences with double negatives or exceptions to exceptions;
10. The contract should caption sections in bold face; and
11. The contract must contain a consumer restriction statement indicating that the consumer may lose rights or property if he or she violates the contract terms.

This readability test is the key to compliance with the Act. Agreements must be built from the ground up to comply. Each word, clause, sentence, paragraph and heading carefully chosen to create a clear and concise whole. Let's explore a few of the cardinal rules of plain language construction in more detail.

A. The Blessings of Brevity

Crafting contracts that reflect the will of the parties and comply with the test of readability can be challenging. Brevity is the key. Not only are brief documents easier to read and understand, they reduce the number of clauses that must be crafted to comply with the Act.

1. Regulatory Regurgitation

When it comes to brevity (or, in many cases, the lack of it), contract drafters make two common mistakes. First, they graft into agreements verbatim regulatory language. For example, consider the following passage taken from a nursing agreement that provides, in excruciating regulatory detail, the contents of a notice of discharge:

> *Each notice shall include the reason for the transfer or discharge; the effective date of the transfer or discharge; the location which Client will be transferred or discharged; notice of Client's right to appeal the transfer or discharge under the applicable State process; the name, mailing address, and telephone number of the State long-term care ombudsman; if Client has developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy system for developmentally disabled individuals; and if Client is mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy system for mentally ill individuals.*

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This language is almost verbatim from the regulations specifying the required contents of a notice of discharge from a nursing facility. This is both unnecessary and inadvisable.

There are a small class of notices that must be incorporated into certain agreements verbatim. For example, CCRC agreements must contain a verbatim right to cancel clause. Mostly though, regulatory language is not required to be incorporated into agreements. When regulatory language must be included, it is always drafted very plainly and does not pose a plain language problem.

The incorporation of regulatory language opens the facility up to a new type of claim. For years, plaintiffs have tried to bring private lawsuits against Medicare and Medicaid providers for violations of state and federal regulations. Most of these suits have failed. Although, a recent case suggests that this trend might be changing.

In the past, these suits have failed because courts have generally viewed the duty of compliance as owed only to the sovereign, i.e., the Government. Therefore, private parties, like consumers or residents and their families, have no "standing" to bring claims against facilities for regulatory violations.

This changes when facilities "incorporate" regulatory language into their agreements. When this happens, plaintiffs can hold facilities responsible for regulatory violations via a simple breach of contract claim. Because government resources are spread so thinly, the government's will to bring enforcement pressure to bear in any single private dispute is limited.

This is not so with a private party. In relative terms, he or she is able to bring much greater resources to bear on the "incorporation" and use it as a powerful lever in disputes with the facility. Agreements should be carefully cleaned of any existing incorporation that is not required by law.

2. More Than We Care To Know

Do not include extraneous information in agreements. This not only makes the agreement lengthy and difficult to comprehend, it can lead to serious drafting errors. Again, using the CCRC example give earlier, consider under what conditions, if any, the facility may increase the monthly fee?

> *In order to maintain a stable level of operating income for [facility], the service charge may be increased or decreased periodically to reflect changes in the cost to [facility] of achieving its purposes. Changes to the services charge*

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> *will be based on factors, including but not limited to, changes in the U.S. Government Cost of Living Index, facility occupancy levels, government regulations affecting [facility] and maintenance of necessary reserve funds. [Facility] agrees that it will endeavor to maintain the Monthly Service Charge at the lowest feasible figure which in the judgment of the Board of Trustees of [facility] is consistent with the sound financial operation and maintenance of quality service the [facility] has undertaken to provide. [Facility] will endeavor to make such adjustments on a once a year basis and will provide resident thirty (30) days prior written notice of any change in the service charge or in the scope of services covered by this charge.*

The clause *"a stable level of operating income"* presents a semantic problem. Presumably, if operating income is to remain *stable*, fees must also remain stable. An increase in fees would necessarily mean an increase in operating income. Hence, the clause may actually preclude raising the monthly fee.

That problem notwithstanding, here is my personal list of conditions that must be satisfied to avoid breaching the terms of the agreement:

1. Must be a result of a need to "maintain a stable level of income" (not an increased level of income mind you, only a "stable level").
2. Must be based on a change in "cost to facility."
3. Changes in costs must be related to "achieving its purpose."
4. Changes must be based, at least in part on each of the following factors:
   a. Changes in the U.S. Government Cost of Living Index;
   b. Facility occupancy levels;
   c. Government regulations; and
   d. Maintenance of necessary reserve funds (not prudent or desirable but necessary).
5. Charges must be the lowest feasible in the Board's judgment.
6. Board (full board) must meet, consider, and document the need.
7. Charges must be consistent with sound financial operations.
8. Charges must be consistent with the provision of quality services.
9. Charges may only be changed once every twelve months.
10. Changes may only be made after written notice.
11. Changes may only be made after 30 days notice.

All totaled, there are at least 11 conditions that must be met in order to raise the monthly fee without violating the letter of the agreement. The extra words have severely limited the facility's operational flexibility. Are residents and their families impressed by this syntax? No. Will they be thankful that the CCRC has presented such a detailed picture of its decision making process? No. Will they be confused? Probably. Should they be? Yes.

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The construction set forth below is more competent and offers the operational flexibility the facility needs. But just as important, it conveys a straightforward approach to the resident relationship that is honest and clear:

> *Facility has the right to adjust the service charge once each year to reflect changes in operating costs. Facility will provide resident with thirty (30) days advanced notice of any change in the service charge.*

Clarity creates trust. Clarity is also the essence of the plain language requirements set forth in the Act. Clarity is easier to achieve when agreements are streamlined. The elimination of regulatory filling and unnecessary syntax are the first steps toward achieving clarity and compliance with the Act.

B. Avoid The Passive Voice

Avoid the passive voice. The passive voice is associated with wordiness and confusion and, especially in its "agentless" form, with evasiveness and deception as in; *The bombs were dropped on innocent civilians* (by whom?). This example was taken from the Oxford Companion to the English Language, but there are many examples just like it in our agreements. For instance, our CCRC example provides:

> *. . . the service charge may be increased or decreased periodically . . .*

By whom? This construction is to be avoided because it creates an atmosphere of mistrust. Crisp, clear contract writing is marked by a series of statements, each statement setting out, in *"subject + verb + direct object"* form, to state a right or obligation of one or the other party.

The *subject* is always one of the parties. For example:

- *"the Facility,"*
- *"the Resident,"*
- *"the Responsible Person," etc.*

The *verb* describes the quality of the obligation. For example:
- *"will,"*
- *"should,"*
- *"must,"*
- *"shall," etc.*

The *direct object* is the obligation itself. For example:
- *"provide basic nursing services,"*
- *"pay the invoice by the 15th of the month,"*
- *"refrain from smoking indoors," etc.*

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Active construction is a key to plaint language construction. As discussed below, agreements submitted to the Attorney General for plain language review will be carefully parsed for active construction.

C. Bafflegab and Verbalism

Root out bafflegab and verbalisms. Linguist use these terms to describe fluent language that sounds impressive, but which confuses, confounds or says nothing of consequence. Consider the following example:

> *Why wouldn't an enhanced deterrent, a more stable peace, a better prospect for denying the ones who enter conflict in the first place to have a reduction of offensive systems and an introduction to defensive capability.*

This language was used by Dan Quayle in 1988 to explain his support for the Strategic Defense Initiative.

This language sounds stilted, artificial and pompous. Our agreements are not immune. For instance, our CCRC example provides a good illustration of some retirement community bafflegab:

> *In order to maintain a stable level of operating income for [facility], the service charge may be increased or decreased periodically to reflect changes in the cost to [facility] of achieving its purposes. Changes to the services charge will be based on factors, including but not limited to, changes in the U.S. Government Cost of Living Index, facility occupancy levels, government regulations affecting [facility] and maintenance of necessary reserve funds. [Facility] agrees that it will endeavor to maintain the Monthly Service Charge at the lowest feasible figure which in the judgment of the Board of Trustees of [facility] is consistent with the sound financial operation and maintenance of quality service the [facility] has undertaken to provide. [Facility] will endeavor to make such adjustments on a once a year basis and will provide resident thirty (30) days prior written notice of any change in the service charge or in the scope of services covered by this charge.*

It is so much easier to just say:

> *Facility has the right to adjust the service charge once each year to reflect changes in operating costs. Facility will provide resident with thirty (30) days advanced notice of any change in the service charge.*

Taking steps to ensure that your agreements are clean and direct will pay dividends in the long run. Residents and their families will thank you for it.

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D. Confusion And Compound-Complex Sentences

Remove all compound and complex sentences. A compound sentence is one that can be split into two sentences. For the most part, compound sentences are poor choices for contract work. They should be split for readability. Using our example above, consider the following sentence:

> *[Facility] will endeavor to make such adjustments on a once a year basis and will provide resident thirty (30) days prior written notice of any change in the service charge or in the scope of services covered by this charge.*

We can easily split this sentence into two:

> [*Facility] will endeavor to make such adjustments on a once a year basis.*

> and

> *[Facility] will provide resident thirty (30) days prior written notice of any change in the service charge or in the scope of services covered by this charge.*

Once the compound sentence is broken down into two simple sentences, it becomes easy to see the main thought of each sentence. Once the main thought is clear, it becomes a simple matter to streamline each sentence to convey only that thought. For example:

> *[Facility] may make annual adjustments.*

> and

> *[Facility] will provide thirty (30) days prior written notice of any adjustment.*

Notice that one very important thing drops out from the last simple sentence: the idea that there could be a change in the scope of services offered by the CCRC. While the purpose of the full paragraph is to describe the monthly fee and how it will change, the author carelessly inserted an additional thought pertaining to changes in the scope of services. This type of mistake is easy to make when sentence structure is complex and paragraphs are long. Conversely, it is easy to expose and correct mistakes when only simple sentences and short paragraphs are used.

A complex sentence is one that has an independent clause that can be severed from the sentence without affecting the viability of the sentence. Using our example above again:

> *In order to maintain a stable level of operating income for [facility], the service charge may be increased or decreased periodically to reflect changes in the cost to [facility] of achieving its purposes.*

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We can safely excise the clause:

"In order to maintain a stable level of operating income"

After which, we would be left with a much crisper sentence:

~~In order to maintain a stable level of operating income,~~ *[T]he service charge may be increased or decreased periodically to reflect changes in the cost to [facility] of achieving its purpose.*

While the sentence is still wordy, it is much better without the independent clause. Moreover, the loss of the clause does not change the meaning of the sentence.

Streamlining the sentence can further enhance readability. For example, by removing the independent clause at the end, which contributes little to the meaning:

The service charge may be increased or decreased periodically to reflect changes in the cost to [facility].

Of course, there are numerous other changes that can be made, some of which are very subtle. Note, however, that the fundamental problem with the sentence is that the service charge is the subject of a sentence intended to set forth the rights and responsibilities of the resident and the facility.

The facility should be the subject. Remember the fundamental purpose for an agreement is to set forth the rights and responsibilities of the parties. With the correction of that structural flaw, the remainder of the issues can be easily resolved. For example:

The facility reserves the right to increase the service charge.

We do not need to worry about situations where the service charge may decrease. The facility will not need the protections of a contract if that happens because no one will complain if their service charge is decreased!

E. Parallel Construction

Good agreements are not just lean, they flow easily. Parallel construction helps make this possible. Parallel construction refers to saying the same thing in the same way throughout the document. Nouns, verbs,

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clauses, sentences and paragraphs must be built alike wherever possible. Parallel construction in a contract reads like this:

1. *We will . . . do thus and such.*
2. *You will . . . do thus and such.*
3. *We will . . . do thus and such.*
4. *You will . . . do thus and such.*
5. *We will . . . do thus and such.*
6. *Etc.*

We can easily tell the parties to the agreement, "I" and "You." We can easily tell that the nature of their obligation is reciprocal, both "will" do thus and such. We can also tell quite easily, any given obligation by looking to the tail end of the sentence. This construction is consistent with the requirement of the Plain Language Act.

F. Other considerations

There are many more elements that should be considered in constructing a clear document. Unfortunately, limitations of space do not allow for a full exposition of all of them. For those who like homework, two additional considerations that are important are to ensure the proper use of various verbal modalities (primarily Deontic, in contract work) as well as careful filtering for amphibolies, which abound in many agreements.

IV. Pre-Approval Safe Harbor

The Office of Attorney General will review and pre-approve contracts for compliance with Plain Language Requirements. There is no cost to get pre-approval. Once a contract has been pre-approved, the drafting party will be entitled to a statutory presumption of good faith attempt to comply with the Act. This can be a significant benefit when a complex disagreement breaks out and the facility depends on its agreement for protection.

The Office of Attorney General offers a free packet outlining compliance requirements and containing the forms necessary to obtain review. It can be obtained by sending a written request to:

Office of the Attorney General
Attention: Plain Language Review
Strawberry Square
Harrisburg, PA 17120

Be forewarned, review can take a long time. Before submitting your agreement, ensure that your agreement is as compliant as you can

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make it. This will cut down on review time. Even so, reviewing can take over a year. One alternative is to seek out a contract that has already been pre-approved.

Some PANPHA member facilities have already obtained pre-approval for cottage residency, independent living and nursing agreements. By building on one of these agreements, you can save time and effort and obtain approval more quickly.

Information contained in this publication is intended as general information to our membership and should not be considered as legal or professional advice. Members should consult with their own counsel or advisors for the expert advice concerning particular facts or circumstances. Also, opinions expressed are those of the authors and may not necessarily be those of PANPHA.