

ASRP Membership Meeting

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Robin Dale

Michelle Peterson

Lane Powell PC

Consumer Protection Act

Consumer Protection Act

- **RCW 19.86**
 - Provides for Protections and Penalties Against “Unfair and Deceptive Acts and Practices in the Conduct of Trade and Commerce.”
 - Provides for treble damages, attorneys’ fees, and civil penalties.
 - Enforcement by AAG or Privately.

Consumer Protection Act

- For our purposes, there are two aspects of the Consumer Protection Act with which we should be concerned.
 - Per Se Violations.
 - Consumer Protection Act (“CPA”) Violations.

Consumer Protection Act

- **Per Se Violation**
 - In some instances, the violation of a statute or regulation can be a “per se” violation of the CPA.
 - For example, Section 15 of the Elder Referral Legislation provides that *“operation of an agency in violation of this chapter”* is a violation of the CPA.

Consumer Protection Act

- **Per Se Violation**
 - Someone alleging a Per Se Violation still needs to prove their case.
 - They would need to show:
 - Existence of a pertinent statute;
 - Violation of the statute;
 - Violation of the statute resulted in damages being sustained to:
 - The class of people being protected by the act.
 - » Is another agency a “class of people protected by the act?”

Consumer Protection Act

- **CPA Violation**
 - **Unfair or Deceptive Act;**
 - **In trade or commerce;**
 - **Which effects the public interest;**
 - **That results in damages; and**
 - **The Unfair or Deceptive Act caused the injury.**

Consumer Protection Act

- Unfair or Deceptive Act is one that “has the capacity to deceive a substantial portion of the public.”
- Unfair or Deceptive Act is one that misleads or misrepresents something of importance.
- Remember, it needs to be in “trade or commerce” and effect the public interest.
- **Example: False Advertising.**

QUESTIONS

- **What is a deceptive business practice?**
- **What is the risk of not complying with RCW 18.330?**
- **What is the priority in the AGO to these complaints?**

QUESTION

Do geriatric care managers who are paid hourly and who manage and find housing and care options need to comply with RCW 18.330?

QUESTIONS

- Do dot.com/lead generators need to comply?
- Is there a line between advertising and referral?

Elder and Vulnerable Adult Placement Referrals

- **Section 12:**

An agency may not charge or accept a fee or other consideration from a client, care services provider, or supportive housing provider unless the agency **substantially complies** with the terms of this chapter.

DISCLOSURE STATEMENTS

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement:** An agency must provide a disclosure statement to each client prior to making a referral.
 - Not required for information only.
 - “Information” means the provision of general information about the types of housing and services available in the area that may meet the needs of the elderly, without giving the names of specific providers, or giving providers a person’s name. Information also means the provision by an agency of the names of specific providers to a social worker, DC planner, case manager, professional guardian, nurse or other professional who is assisting a VA to locate housing or care, where the agency does not request or receive a fee.

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement:**
 - Must be acknowledged by the client **prior** to the referral.
 - Agency shall retain a copy of the disclosure statement and acknowledgement.

QUESTION

- **Is verbal authorization/confirmation that client will sign good enough to start your process?**
 - **Depends upon what you mean by “start.”**
As long as you do not make a “referral” without acknowledgement of a Disclosure Statement, yes.

QUESTION

- **What is best practice, one disclosure form or two; one for release, one to obtain?**

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement:**
 - **Acknowledgement may be in the form of:**
 - A signature of the client or legal representative on the exact disclosure statement.
 - Electronic signature that includes the date, time, internet provider address, and displays the exact disclosure statement document.
 - A faxed confirmation that includes the date, time, and fax number and displays the exact disclosure document; or
 - In instances where the vulnerable adult chooses not to sign or otherwise provide acknowledgement, documenting the client's refusal to sign.

QUESTION

- **How do we obtain written acknowledgement of the client?**
 - Determine who the client is and get an acknowledgement via fax, e-mail/.pdf, or in person.
- **What are the risks of Section 6(1)(d)?**

QUESTION

- **How do we document that client will not or is not able to sign the disclosure?**
 - Be as specific as possible.
 - “X” and a signature line can be an acknowledgement.
 - Question why.

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - Name, address, and telephone number of the agency.
 - Name of the client.
 - Amount of fee received from the client, if any. Alternatively, if the fee is to be received from the provider, the method of computation of the fee and the time and method of payment. In addition, the agency shall disclose to the client the amount of fee to be received from the provider, if the client requests such information.

QUESTION

- In terms of disclosure of fees on the disclosure, is a range adequate?
 - Hourly fee must be disclosed.
 - Fees from providers must be explained.
 - Must disclose exact \$ from provider if resident asks.
 - Also see Section 10.

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - A clear description of the services provided by the agency, in general, and to be provided specifically for the client.
 - A provision stating that the agency may not require or request clients to sign waivers of liability or waivers of rights.

QUESTION

- **How do we phrase the “no waiver” requirement so as not to alarm families and still be in compliance?**
“Washington law requires us to inform you that an elder referral agency may not require or request that you sign a waiver of potential liability for losses of personal property or injury, or to sign waivers of any of your rights under state or federal law.”

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - A provision stating that the agency works with both the client and provider in the same transaction, and an explanation that the agency will need the client's authorization to obtain or disclose confidential health care information.

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - A statement indicating the frequency on which the agency regularly tours provider facilities, and that, at the time of referral, the agency will inform the client in writing or by electronic means if the agency has toured the referred provider, and if so, the most recent date that tour took place.
 - **QUESTION: Are tours required?**

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - A provision stating that the client may, without cause, stop using the agency or switch to another agency without penalty or cancellation fee to the client.
 - An explanation of the agency's refund of fees policy, which must be consistent with Section 10 of the Act.

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - A statement that the client may file a complaint with the Attorney General's Office for violations of this chapter, including the name, address, and telephone number of the consumer protection division of the AGO.

Elder and Vulnerable Adult Placement Referrals

- **Disclosure Statement must be dated and must contain the following information:**
 - If the agency or its personnel (including family members) who are directly involved in making referrals in the provider to which the client is referred, a provision stating that the agency or such personnel have an ownership interest, and an explanation of the interest.

QUESTION

- **What information do we need to include in the Disclosure Statement to document our business practice?**
 - Verbiage regarding process/policy?
Handbook?
 - Form must contain clear description of services provided.

QUESTIONS

- **What is the risk to a referral company whose disclosure of services does not meet the requirements of the law?**
- **Where do you see the disclosure statement with respect to AGO priority?**

Elder and Vulnerable Adult Placement Referrals

- Intake Form:
 - Known medical diagnoses, health concerns, and the reason the client is seeking services;
 - Significant known behaviors or symptoms that may cause concern or require special care; **Question**
 - Mental illnesses, dementia, or developmental disability diagnosis, if any;
 - Assistance needed for daily living;
 - Particular cultural or language access needs and accommodations.

Kickbacks

Elder and Vulnerable Adult Placement Referrals

- **Anti-Kickback Provision:**
 - In accordance with RCW 74.09.240, the agency may not solicit or receive any remuneration directly or indirectly, overtly or covertly, in cash or in kind, **in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under chapter 74.09 RCW.**

QUESTIONS

- **WHAT DOES THIS MEAN?** Elder placement legislation is problematic.
- **How sophisticated is the AGO with respect to these kickback issues?**
 - This is not a classic kickback, but the way the legislation is drafted can be problematic. There are risks.
 - Transparency, full disclosure.

QUESTION

- Remember, a “referral” means the act of an agency giving a client a name.
- Be very careful.
- Can you keep the provider out of the mix? Probably not.

Elder and Vulnerable Adult Placement Referrals

- RCW 74.09.240 Bribes, kickbacks, rebates — Self-referrals — Penalties.
 - (1) Any person, including any corporation, that solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind
 - (a) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this chapter, or
 - (b) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any goods, facility, service, or item for which payment may be made in whole or in part under this chapter,
- shall be guilty of a class C felony; however, the fine, if imposed, shall not be in an amount more than twenty-five thousand dollars, except as authorized by RCW 9A.20.030.

Elder and Vulnerable Adult Placement Referrals

- RCW 74.09.240:
- (2) Any person, including any corporation, that offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person

(a) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under this chapter, or

(b) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any goods, facility, service, or item for which payment may be made in whole or in part under this chapter,

shall be guilty of a class C felony; however, the fine, if imposed, shall not be in an amount more than twenty-five thousand dollars, except as authorized by RCW 9A.20.030.

Elder and Vulnerable Adult Placement Referrals

QUESTIONS

Does 74.09.240 apply only to Medicaid and Medicare referrals?

Can the referral professional, with full disclosure, charge the family of the Medicare or Medicaid client for assistance with finding housing or care services?

Health Care Information Release

Sources of Privacy Protection:

Physician/Patient Privilege

RCW 5.60.060

State Privacy Laws

(Intrusion upon Seclusion)

***Washington Health Care Information
Act (“mini-HIPAA”) 1991**

***Federal Health Insurance Portability
and Accountability Act of 1996
 (“HIPAA”)**

Washington Health Care Information Act 1991 RCW 70.02 *et seq.*

Extends the principle of confidentiality into areas not covered by the traditional physician-patient privilege.

One primary purpose of the Act is to restrict the dissemination of medical information for commercial purposes.

A violation of the Act may form a basis for a civil claim against the agency (but not a CPA violation).

Washington Health Care Information Act 1991 *RCW 70.02 et seq.*

It is the public policy of Washington that a patient's interest in the use and disclosure of the health care information survives *even when the information is held by persons other than health care providers.*

Federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

Purpose is to reduce health care costs by standardizing electronic processing of health care claims.

The statutory provisions are scattered throughout the United States Code, primarily in Titles 18, 29, and 42 but there are (3) three general components (privacy standards, security standards and transaction standards):

- **Privacy Rules (45 C.F.R. §§ 160 and 164). Discusses who is authorized to access information and the right of individuals to determine how their information can be disclosed.**

Federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

Generally, HIPAA only applies to “Covered Entities”:

- **Health Plans;**
- **Health care clearinghouses;**
- **Health Care Providers who transmit PHI electronically;**
- **Medicare Subscription Drug Sponsors**
- **Business Associates (if access to PHI of a covered entity)**

Federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

Just because you possess health care information does not mean you are a covered entity.

Most referral agencies ARE NOT covered entities under HIPAA.

Most health care providers that provide information to referral agencies are covered entities (use electronic records).

Health Care Information Release

QUESTIONS

What is the major difference between HIPAA and Health Care Information Release?

Washington Health Care Information Act 1991 RCW 70.02 *et seq.*

A health care provider (referral agency) may not disclose health care information about a patient to any other person without the patients *written* authorization.

Health care provider (referral agency) may charge a reasonable fee for the reproduction of the files.

Intersection of the Health Care Information Act and the Elder Care Referral Act

The Elder Care Act provides that a referral agency's records identifying a client are considered "health care information" subject to the Health Care Information Act but only if the records meet the definition of health care information under the Health Care Information Act.

Intersection Cont.

“Health care information” means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care.

Most information obtained via Section 7 intake constitutes health care information: medical history, diagnoses, health concerns, medication and medication management, mental illness . . .

Washington Health Care Information Act 1991 *RCW 70.02 et seq.*

Accordingly, to disclose health care information, the referral agency must obtain a written authorization that comports with the Health Care Information Act:

- Writing, dated and signed by the patient;
- Identify the nature of the information to be disclosed;
- Identify the name and institutional affiliation of the person or class of persons to whom the information is to be disclosed;
- Identify the provider or class of providers who are to make the disclosure;
- Identify the patient; and
- Contain an expiration date or expiration event that relates to the patient or purpose of the disclosure.

Health Care Information Release

QUESTIONS Cont.

When working with a client to obtain information from a nursing home/hospital or provider:

- Is the referral professional required to provide the nursing home/hospital a health care release form in order to obtain records from the provider?

Health Care Information Release

The holder of the information has the obligation to ensure compliance with HIPAA and the Washington Health Care Information Act.

In this case, the provider will likely have a form that they would like the client to sign or the referral agency may provide its own form to expedite the process.

Health Care Information Release

QUESTIONS Cont.

When working with a client to obtain information from a nursing home/hospital or provider:

- Is the referral professional required to provide the nursing home/hospital or provider a copy of the health care release form in order to make a referral to the provider?

Health Care Information Release

Providing a copy of the health care release form is not required by the Act but is a good practice.

If a request for information is obtained, must keep the authorization for at least a year after the request was made.

Health Care Information Release

QUESTIONS Cont.

Is the nursing home or hospital required by HIPAA to obtain a signature from the client in order to release information to the referral professional?

Health Care Information Release

HIPAA requires health care providers (SNFs, rehabilitation facility, home health agency, hospice, sometimes assisted living facilities but remember must use electronic format) to release health care information to other entities including referral professional.

Client or family member can obtain information and share with referral agency.

Health Care Information Release

QUESTIONS Cont.

Can a referral company refer without obtaining a release of information from client and still comply with Section 5 record keeping requirements?

Health Care Information Release

Depends on what information is being shared with the provider.

At a minimum, if intake form or information is being shared then the referral agency should obtain a release of information from the client.

Health Care Information Release

QUESTIONS Cont.

Where do you see the Health Care Release in order of priority for the AG's office?

Questions?

Robin Dale
Lane Powell PC
111 Market Street NE
Suite 360
Olympia, WA 98501
T. 360.754.6001
F. 360.754.1605
www.lanepowell.com
daler@lanepowell.com

Michelle Peterson
Lane Powell PC
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2338
T. 206.223.7000
F. 206.223.7107
www.lanepowell.com
peterm@lanepowell.com

Seattle
Olympia
Portland

Portland
Anchorage
London

www.lanepowell.com