

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 53

**Non-Lawyer Medicaid Advisors
(Including “Application
Assistors”) and the Unauthorized
Practice of Law**

The Committee received an inquiry concerning permissible and impermissible activities of non-lawyer Medicaid advisors, including so-called “Application Assistors.” Inquirer stated that non-lawyers who are retained by families or nursing homes to assist with the Medicaid application process are providing erroneous or incomplete law-related advice. It asked the Committee to issue an opinion specifying what activities such non-lawyers may engage in and what activities are the unauthorized practice of law.

Lawyers have also called the attorney ethics research assistance hotline reporting that non-lawyers and companies that are not law firms have charged “clients” large sums of money for faulty Medicaid-planning legal assistance, causing the elderly victims significant financial loss. Some of these non-lawyers and companies may be associated with nursing homes. The Committee notes that such unauthorized practice of law is not only a criminal offense, *N.J.S.A. 2C:21-22*, it also may violate the Consumer Fraud Act, *N.J.S.A. 56:8-1 et seq.*

According to Inquirer, non-lawyer advisors advised a family member that she could receive monies as a caregiver when the family member did not qualify for that status; advised a family member to spend down an IRA when it would have been more reasonable to purchase an

annuity with those monies; advised a family member to draw down her assets when it would have been more sensible to transfer monies to a disabled child; advised a family member to transfer real estate when it would have been prudent to address the significant tax implications of that plan; and the like. It stated that these advisors also counseled people on wills and powers of attorney; on the need for guardianships and the authority to transfer assets; on the standards for Medicaid coverage; on nursing home laws; on transfers of property; on the impact of marriage and divorce; on estate administration and the elective share; and similar legal matters. It stated that such erroneous or incomplete legal advice causes the applicant, beneficiary, and family significant harm.

Medicaid is a federal benefit program that provides health insurance to eligible persons. If the beneficiary is eligible, the program pays for hospital services, doctor visits, prescriptions, nursing home care, and other services. The program is implemented through the State Department of Human Services, Division of Medical Assistance & Health Services. The State agency is required to provide assistance to persons who may be eligible for services. 42 *C.F.R.* Sections 435.904(e) and 435.908(a). In addition, the federal regulations require that States “must allow individual(s) of the applicant or beneficiary’s choice to assist in the application process or during a renewal of eligibility.” 42 *C.F.R.* Section 435.908(b).

An applicant or beneficiary is also expressly permitted to “represent himself or use legal counsel, a relative, a friend, or other spokesman” in any hearing on agency action or decisions. 42 *C.F.R.* Section 431.206(b)(3). The applicant or beneficiary, or his or her representative, has procedural rights, including the right to establish pertinent facts and present arguments at the hearing. 42 *C.F.R.* Section 431.242. Finally, the regulations require the State agency to permit applicants and beneficiaries to “designate an individual or organization to act responsibly on

their behalf in assisting with the individual's application and renewal of eligibility and other ongoing communications with the agency." 42 *C.F.R.* Section 435.923(a)(1).

The federal regulations permit States to certify staff and volunteers to act as application assistors. 42 *C.F.R.* Section 435.908(c). "Certified" assistance includes "providing information on insurance affordability programs and coverage options, helping individuals complete an application or renewal, working with the individual to provide required documentation, submitting applications and renewals to the agency, interacting with the agency on the status of such applications and renewals, assisting individuals with responding to any requests from the agency, and managing their case between the eligibility determination and regularly scheduled renewals." *Id.* at (c)(2). Certified assistors may not receive payment or compensation for their services. *Id.* at (c)(4).

The Committee acknowledges that the federal program requires States to permit non-lawyers to assist applicants and beneficiaries with Medicaid applications and represent persons in hearings. While non-lawyer Medicaid advisors may provide these limited services, the Committee finds that it is the unauthorized practice of law when non-lawyers provide advice in matters that require the professional judgment of a lawyer. Hence, only a lawyer may provide legal advice on issues such as strategies for Medicaid eligibility, including provisions of wills and powers of attorney; on the need for guardianships and the authority to transfer assets; on nursing home laws; on transfers of property; on the impact of marriage and divorce; and on estate administration and the elective share.

The Committee considered and agrees with published opinions issued by Ohio, Florida, and Tennessee regarding activities of Medicaid advisors and the unauthorized practice of law. These jurisdictions similarly acknowledge that federal law permits non-lawyers to assist individuals in Medicaid applications but conclude that, in more complex cases, providing advice

on strategies to become eligible for Medicaid is not sanctioned and is the unauthorized practice of law.

The Ohio Board noted the broad grant of authority to non-lawyers in the federal regulations and acknowledged that the general task of consulting with the applicant, reviewing documents to determine the applicant's resources for Medicaid purposes, preparing and filing an application for Medicaid, and attending hearings with the individual or on behalf of the individual, are all permissible. Board on the Unauthorized Practice of Law of the Supreme Court of Ohio Advisory Opinion UPL 11-01 (October 7, 2011). The Ohio Board stated:

Medicaid planning in many, if not most, instances involves estate planning according to the prevailing legal literature. Individuals in need of long-term care often use estate tools such as trusts, gifts, and asset transfers to meet Medicaid income and resource-eligibility thresholds. Such estate planning requires specialized legal training, skill, and experience because it incorporates analysis, interpretations, and the preparation of legal documents. . . . The Board concludes that Medicaid planning requiring specialized legal training, skill, and experience constitutes the practice of law. However, especially in situations where the applicant's income and resource levels are near the Medicaid limits, there may be some Medicaid planning scenarios involving only document review and a financial calculation. As a result, the Board further concludes that the question of whether nonattorney involvement in Medicaid planning constitutes the unauthorized practice of law must be determined on a case-by-case basis.

[Ohio Board Opinion, section III (internal citations omitted).]

The Florida Opinion provides that rendering legal advice on the implementation of Florida law is the practice of law. Florida Bar Standing Committee on the Unlicensed Practice of Law FAO #2011-4 "Medicaid Planning Activities by Nonlawyers," (October 14, 2014).

"Assessing the facts relevant to a client's situation, applying those facts to the laws governing Medicaid, developing a plan to structure or spend the client's assets in compliance with those laws, and drafting legal documents to execute the plan, would constitute the practice of law

It is the opinion of the Standing Committee that when a nonlawyer engages in these activities or

renders legal advice regarding the implementation of Florida law to obtain Medicaid benefits the nonlawyer is engaged in the unlicensed practice of law. This includes advising an individual on which legal strategy or strategies under federal or Florida law are appropriate given the individual's factual circumstances." *Id.* at p. 17.

The Tennessee Opinion concludes that "whether conduct by a non-attorney in this specific circumstance would constitute unauthorized practice depends on whether the legal assessments or advice at issue would require the professional judgment of a lawyer and is offered for a valuable consideration." State of Tennessee Office of the Attorney General Opinion No. 07-166, "Practice of Law; Medicaid Eligibility" (December 18, 2007), at page 3, paragraph 2. In other words, if it is a complicated question that should be considered only by a lawyer, then it is the practice of law.

The Committee agrees with these opinions. Applying the law to an individual's specific circumstances generally is the "practice of law." A Medicaid advisor or Application Assistor may provide information on insurance programs and coverage options; help individuals complete the application or renewal; help them with gathering and providing required documentation; assist in counting income and assets; submit the application to the agency; and assist with communication between the agency and the individual. But the advisor may not provide legal advice on strategies to become eligible for Medicaid benefits, including advice on spending down resources, tax implications, guardianships, sale or transfer of assets, creation of trusts or service contracts, and the like.