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TOPIC: Florida Supreme Court Adopts Unauthorized Practice of Law Rules Dealing with Medicaid

CITES: *THE FLORIDA BAR re ADVISORY OPINION—MEDICAID PLANNING ACTIVITIES BY NONLAWYERS.*, No. SC14–211 2015 WL 174994 (Jan 15, 2015); *The Florida Bar v. Sperry*, 140 So.2d 587, 597 (Fla.1962).

SUMMARY: On January 15, 2014, The Standing Committee on Unlicensed Practice of Law of the Florida Bar Association submitted a request for formal advisory opinion from the Florida Supreme Court on whether it constitutes the unlicensed practice of law for a non-lawyer to engage in the following Medicaid planning activities leading up to the Medicaid application:

- 1) preparation of personal service contracts;
- 2) preparation and execution of qualified income trusts; or
- 3) rendering legal advice regarding the implementation of Florida law to obtain Medicaid benefits.

On January 15, 2015, the court adopted the proposed opinion of the Bar Association, and held that all three activities *would* constitute the unauthorized practice of law if performed by non-lawyers. The opinion specifically does *not* apply to the activity of completing an application for Medicaid.

RELEVANCE: The unauthorized practice of law is a complex and varied question. Each state is different, so individual statutes must be consulted. The Supreme Court of Ohio issued Advisory Opinion UPL 11-01 in 2011 on the issue of Medicaid planning by non-attorneys. It provides a useful, but general road map. It notes:

A non-attorney may review documents to identify an individual's "countable" resources for purposes of applying for Medicaid nursing-home benefits. Additionally, a non-attorney may prepare and file a Medicaid application for another and attend state hearings with that individual or on his or her behalf to the extent that those activities are authorized by federal law. A non-attorney may not, however, engage in Medicaid planning "if it requires specialized legal training, skill, and experience."

As for the planning question it generally prohibits non-lawyers from preparing plans.

Specifically it states:

Medicaid planning involves estate work and legal expertise. Accordingly, the board further concludes that the establishment of a Medicaid planning strategy for another by a non-attorney constitutes the unauthorized practice of law if the Medicaid planning requires specialized legal training, skill, and experience.

Finally, the opinion is worth studying because it gives an overview of the types of strategies that may be effective in Medicaid planning.

FACTS: The Florida Supreme Court has jurisdiction to review a proposed advisory opinion compiled by the Florida Bar. Further, if the court approves the advisory opinion, it then has the force and effect of an order of the court.

Specifically three issues were examined.

1) **Drafting of Personal Service Contracts**

A personal service contract is one of the strategies used by Medicaid applicants to spend down assets so that their countable assets are within the allowable asset limit provided by law for Medicaid eligibility. It is a contract for personal care services between the Medicaid applicant and a caregiver, often an adult child, for services that are not provided by the nursing home or assisted living facility. Florida law only requires nursing homes to give a little over two hours of care per day per resident, which leaves almost twenty-two hours of the day that the resident is not getting personal hands-on care. The personal service contract provides for care during that other time.

There are both legal and tax ramifications if a personal service contract is not done properly. If the personal services contract is improperly drafted, it can be rejected by Medicaid. This would result in the client not receiving Medicaid benefits for several months and could cost the client thousands of dollars. Likewise, inaccuracies in the proposed contract can leave family members open to charges for Medicaid fraud resulting in the client being no longer eligible for Medicaid benefits.

The payment for services under a personal service contract is based on the resident's life expectancy and is made to the caregiver in an up-front lump sum payment. The payment for services under a personal service contract is treated by the Internal Revenue Service as a taxable event for the caregiver. Without proper advice and planning, this may result in a huge tax liability, as well as fines by the IRS.

In Florida, the preparation of a contract is the practice of law. In *The Florida Bar v. Sperry*, the Florida Supreme Court held that

the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.

The opinion holds that a personal service contract is a contract which imposes duties and obligations on both parties to the contract. Under the contract, the caregiver agrees to provide a certain amount of care and specified services per week in exchange for payment for that care and services. As such, the Florida court held that when a Medicaid planner drafts a personal service contract the drafter is practicing law.

2) Preparation and Execution of Qualified Income Trusts (“QITs”)

If a Medicaid applicant’s gross monthly income exceeds a certain amount, a properly drafted Qualified Income Trust can be established. By so doing the income transferred to the trust is not used in computing eligibility for Medicaid. Under Florida law, the applicant is allowed to retain \$35 per month of the income; may be entitled to divert some of the income to the spouse if the spouse's income falls below \$1,966.25 per month (effective July 1, 2014); and pay a fixed amount towards his or her patient's responsibility for nursing home care. In the event that there are excess funds in the account after the applicant dies, Florida Medicaid is entitled to reimbursement from those funds. Specifically the QIT must have the following provisions:

- Be irrevocable (cannot be canceled).
- Require that the State will receive all funds remaining in the trust at the time of death (up to the amount of Medicaid benefits paid).
- Consist of income only, not assets.
- Be signed and dated by the claimant, the claimant’s spouse, or a person who has legal authority to act on behalf of the claimant or spouse.

Furthermore, a QIT checking account must be opened at a bank in order for the applicant to qualify for Medicaid. The income trust checking account must be funded each month with the income that exceeds the acceptable limit in order for the recipient to obtain Medicaid benefits. If a QIT is not properly established or properly funded each month, then the Medicaid applicant will not be eligible for Medicaid.

The opinion examined the collection of information on the client by professionals such as insurance agents and financial advisors. The opinion states that

...the information a non-lawyer may gather is limited to information about the customer’s assets when such information is necessary for the non-lawyer to conduct a business for which they are licensed and regulated.

3) Rendering Legal Advice Regarding the Implementation of Florida Law to Obtain Medicaid Benefits

Medicaid eligibility, as part of Medicaid planning, involves a highly technical set of federal and state statutes and regulations, which in Florida encompass well over 3,000 pages.

Medicaid planning involves: (1) the assessment of all facts relevant to a client's situation, including personal, financial, familial, and historical; (2) application of those particular facts to the laws governing Medicaid; (3) developing a plan to structure or spend those assets in compliance with those laws or planning to reverse actions already taken to correct potentially unauthorized activity to minimize negative legal consequences; (4) drafting legal documents to execute the plan; and (5) assisting the client in correctly executing a particular plan.

Medicaid planning includes making sure the applicant will meet the asset and income test for Medicaid eligibility. An unmarried Medicaid applicant can own no more than \$2,000 in "countable" assets. Typical countable assets include bank accounts, stocks, bonds, and annuities. Generally term insurance is exempt from the asset test. Most states exempt only permanent insurance with a face amount less than \$2,500.

The two primary non-countable assets are the homestead and one automobile. For married applicants, if both spouses are applying for Medicaid, there is a \$3,000 asset limit (\$5,000 if income is under \$844 per month). If only one spouse is applying for Medicaid, the nursing home resident may only have \$2,000 in assets, and the community spouse can have up to \$119,200 (2015 limit) in countable assets.

Federal and Florida law allow certain options to ensure that the spouse of the Medicaid applicant is not impoverished in attempting to obtain Medicaid benefits for an ill spouse. Some of the strategies used to spend down assets include: (1) the use of a personal service contract; (2) the use of a special needs irrevocable pooled trust; (3) the use of a Medicaid qualifying annuity; (4) the purchase of income producing property; (5) the purchase of a homestead; (6) gifting; (7) the purchase of other exempt assets; (8) repairs to the homestead; (9) payment of debts and expenses; (10) the purchase of an irrevocable funeral service or cremation contract; (11) a burial savings account; and (12) the purchase of an automobile.

Proper Medicaid planning can involve providing advice on the purchase and titling of exempt assets and the transfer of countable assets. As a result of these factors, the opinion holds that

... when a non-lawyer engages in these activities or renders legal advice regarding the implementation of Florida law to obtain Medicaid benefits, the non-lawyer 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.

RESULT: The opinion states that testimony revealed that non-lawyer Medicaid planners are essentially unregulated, as there are no licensing, education, or advertising requirements. Based on this conclusion, the opinion held:

Because of this lack of regulation, non-lawyer Medicaid planners include a disbarred Florida lawyer, an individual who lost his securities license for fraudulent practice, and a life insurance agent who was convicted of two felonies and lost his insurance license.

Testimony described the type of harm caused by non-lawyer Medicaid planners which includes denial of Medicaid eligibility, exploitation, catastrophic or severe tax liability, and the purchase of inappropriate financial products threatening or destroying clients' life savings. The potential for public harm is even greater when the non-lawyers put themselves in a position of reliance and advising the customer as to the proper course of action to take. In order to protect the public from harm, it is the opinion of [Court] that the activities described herein constitute the unlicensed practice of law and should not be authorized.

The conclusion on the three specific issues was:

- "...it constitutes the unlicensed practice of law for a non-lawyer to draft a personal service contract and to determine the need for, prepare, and execute a Qualified Income Trust including gathering the information necessary to complete the trust. Moreover, a non-lawyer should not be authorized to sell personal service or Qualified Income Trust forms or kits in the area of Medicaid planning..."
- "...it constitutes the unlicensed practice of law for a non-lawyer to render legal advice regarding the implementation of Florida law to obtain Medicaid benefits. This includes advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract or Qualified Income Trust..."
- "It is the position of the Standing Committee that a non-lawyer's preparation of the Medicaid application itself would not constitute the unlicensed practice of law as it is authorized by federal law. As noted earlier, it is also not the unlicensed practice of law for DCF [Florida Department of Children and Families] staff to tell Medicaid applicants about Medicaid trusts and other eligibility laws and policies governing the structuring of income and assets when relevant to the applicant's facts and financial situation."

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