

# The Unlicensed Practice of Law in Medicaid Planning: A Fresh Look at an Old Problem

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The unlicensed practice of law (UPL) generally occurs when a person who is not a licensed attorney engages in the practice of law.<sup>1</sup> UPL can happen in any area of law; however, there is a growing segment of UPL of special concern to Elder Law clients.

Medicaid planning often involves some of the most vulnerable groups of people in the United States: the elderly, and people with mental and/or physical disabilities. Many individuals who are not licensed as attorneys hold themselves out as “Medicaid Planners.” Those who practice law without the proper training and licensure can cause great harm to elders and people with special needs.

## The Challenges UPL Brings to the Legal Profession Generally

In 2011-2012, the American Bar Association Standing Committee on Client Protection conducted a survey on unlicensed practice of law programs in the United States jurisdictions.<sup>2</sup> This is the fourth of such surveys conducted by the Committee since 1999.

How the unlicensed practice of law is dealt with varies from state to state. Variability ranges from a rather elastic set of definitions of what constitutes the unlicensed practice of law, to the manner in which complaints of UPL are lodged, handled and investigated in each jurisdiction.

In short, the challenges that have always riddled the management of UPL programs continue to prevail, such as:

- **There is no universal definition of the unlicensed practice of law.** UPL definitions are found in case law, court rule, statute, advisory opinion, or a combination thereof. Essential to any discussion of the unlicensed practice of law is what constitutes the “practice of law.” While some states have adopted broad definitions of law practice without wholly defining the

practice of law for all purposes, some states have no clear definition of what really constitutes the practice of law.

- **The process of investigating UPL actions is generally “complaint driven.”** In order for UPL to be managed, somebody must report it. In effect, jurisdictions may rely on citizens to be the watchdogs and whistleblowers, with respect to investigating the unlicensed practice of law.
- **Each jurisdiction is responsible for budgeting UPL enforcement.** Annual budgets vary from \$0.00 to \$1.6 million.
- **Each jurisdiction has its own regulatory entity authorized to enforce its UPL regulation.** This authority can include state bar committees/counsel, state supreme court committees/commissions, states attorneys general, and local and county attorneys.
- **Penalties and sanctions for UPL violations** that are available to enforcement authorities include: civil injunctions, criminal fines, prison sentence, civil contempt, restitution, and civil fines. Other remedies may be available, and most jurisdictions have several available remedies.
- **Some jurisdictions allow non-lawyers to engage in certain limited practices.** These non-lawyer practices may or may not be regulated, and the majority of these practices consist of: preparing pleadings, wills and other legal documents, attending real estate closings, pre-trial activities, negotiating legal matters, appearing in court, participating in state administrative proceedings, participating in alternative dispute resolution proceedings, and preparation of immigration forms. Other jurisdictions do not allow non-attorney practice.

The survey undertaken by the ABA of the UPL programs in each jurisdiction certainly illuminates the scope of the complexities involved in UPL generally. However, to understand the true implications of UPL in the arena of Medicaid planning, it is important to pursue this further by looking at specific examples at the state level with respect to non-lawyers providing Medicaid planning services.

## **A Sampling of Jurisdictional Efforts Regarding UPL in Medicaid Planning**

The following synopsis reflects recent activities in three states - Florida, Tennessee and Ohio - that are specific to Medicaid planning and the unlicensed practice of law.

## **Medicaid Planning and UPL in Florida**

Florida does not have a definition of unlicensed practice of law. Instead, UPL is defined through case law. To determine whether a non-attorney's actions constitute UPL, the court must examine existing case law and view the non-lawyer's actions (or non-actions) in the context of these other cases.

Practicing law without a license in Florida is a third degree felony, punishable by up to five years in prison.<sup>3</sup>

The Florida Supreme Court has given The Florida Bar the responsibility for investigating and prosecuting unlicensed practices of law.<sup>4</sup>

Before the Florida Bar can or will take investigative or prosecutorial action in a UPL allegation, someone must file a written allegation of UPL with the Florida Bar. The Florida Bar website provides information available for both attorneys and consumers.<sup>5</sup>

### **The Florida Bar Standing Committee on UPL Addresses Non-Lawyers Providing Medicaid Planning Services**

Recently there has been a great increase in the number of non-attorney Medicaid planners who are advising the public on how to obtain Medicaid benefits in Florida. These services appear to be very similar to the services provided by attorneys who practice in Elder Law and Medicaid planning.<sup>6</sup>

The Florida Bar Standing Committee on the Unlicensed Practice of Law issued a public letter on May 13, 2009, that established certain activities that constitute clear UPL violations and some activities that would be considered on a case-by-case basis.<sup>7</sup> The letter was specific to the issue of non-attorneys providing Medicaid planning services.

The Committee stated the activities that constitute clear UPL include: 1) establishing irrevocable trusts; 2) establishing qualified income trusts; and 3) the hiring of an attorney by a third-party company to review, prepare or modify documents for customers if payment to the attorney was through the company.<sup>8</sup>

Activities determined on a case-by-case basis included: 1) restructuring assets; 2) counseling customers on the best way to get Medicaid approval; and 3) advertising as an "elder counselor."<sup>9</sup>

The May 13, 2009 letter, in association with the Rules Regulating The Florida Bar, also pointed out there is substantial risk that an attorney could violate Florida Bar rules by affiliating with non-attorney Medicaid planners in three significant ways:<sup>10</sup>

1. an attorney receives a payment directly from a non-attorney Medicaid planner for services provided to a client;<sup>11</sup>
2. an attorney assists a non-attorney Medicaid planner in the unlicensed practice of law;<sup>12</sup>
3. an attorney forms a partnership with a non-attorney Medicaid planner.<sup>13</sup>

The committee also voted, based on existing case law, that the hiring of an attorney to review, prepare or modify documents for customers—if there was a direct relationship with the attorney and payment was made directly to the attorney—would *not* be UPL.<sup>14</sup>

### **Florida Bar Standing Committee on UPL Petitions the Florida Supreme Court to Issue an Advisory Opinion on What Constitutes UPL in Florida Medicaid Planning**

In the interest of protecting the public from harm, the Florida Bar's Standing Committee on UPL held that a formal advisory opinion was needed. The Standing Committee provided notice of and held a public hearing to address Medicaid planning UPL issues and to receive input from interested parties. The public hearing took place in Tampa, Florida on February 22, 2013.

Numerous examples of non-lawyers engaging in Medicaid planning activities were presented. Oral and written testimony revealed that non-lawyer Medicaid planners are essentially unregulated, as there is no licensing, education, or advertising requirements. 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.<sup>15</sup>

Testimony presented at the Tampa Florida Bar hearing established that there was harm and the potential for harm to the public, regarding the activities of non-attorney Medicaid planners.

On January 15, 2014, The Florida Bar Standing Committee on UPL submitted a request for a formal advisory opinion from the Florida Supreme Court on whether it constitutes the unlicensed practice of law for a non-attorney to engage in Medicaid planning activities leading up to the Medicaid application, specifically:<sup>16</sup>

- drafting of personal service contracts
- preparation and execution of qualified income trusts
- rendering legal advice regarding the implementation of Florida law to obtain Medicaid benefits.

### **Florida Advisory Opinion No. SC14-211: The Florida Bar Re: Advisory Opinion – Medicaid Planning Activities by NonLawyers**

Following extensive hearings and related proceedings, on January 15, 2015, The Florida Supreme Court adopted the proposed opinion of the Standing Committee on UPL of the Florida Bar Association. The Florida Supreme Court ruled that it is UPL for Medicaid planners who are not lawyers to engage in certain Medicaid planning activities.<sup>17</sup>

Except for licensed attorneys, anyone who advises Florida Medicaid applicants on how to structure their income and assets in order to become eligible for Medicaid benefits is practicing law without a license.

The Florida Advisory Opinion is an important step towards heightened public awareness of UPL activities. With proper stewardship, it can serve as incentive for the public to become a more willing partner in reporting alleged instances of UPL to the Florida Bar.

#### **Medicaid planning activities that are UPL when practiced by a non-lawyer:**

The Advisory Opinion states clearly the rules whereby a non-lawyer crosses the line into the practice of law. **A non-attorney individual may not:**

- Draft **personal service contracts**
- Determine the need for, prepare, and execute a **Qualified Income Trust**
- **Sell personal service contracts or Qualified Income Trust forms or kits** in the area of Medicaid planning;
- **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.

## **Medicaid planning activities that a non-lawyer may legally engage in:**

A non-lawyer may assist a Medicaid applicant with the preparation of the actual Medicaid application, as it is authorized by federal law.

In addition, Florida Department of Children and Families (DCF) employees who are non-lawyers may legally assist Medicaid applicants with the application process as well as inform Medicaid applicants about Medicaid planning tools and eligibility laws.

## **A legal reason for the complaint-driven process in Florida**

As a general rule, the Florida Bar will not investigate the unlicensed practice of law in Florida, unless someone files a written UPL complaint under penalties of perjury with the Florida Bar.

The following case is a legal reason why the investigation of alleged UPL activity in Florida is complaint driven.

In *Surety Title Insurance Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), vacated and remanded with instructions, 571 F.2d 205 (4th Cir. 1978), the plaintiff filed an action against the Virginia State Bar. The plaintiff claimed that certain advisory opinions issued by the Virginia State Bar, coupled with the threat of disciplinary proceedings against those non-attorneys who disregard the advisory opinions, illegally restrain commerce in the area of title insurance and constitute an illegal group boycott, and an attempt to monopolize, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C §§ 1 and 2.

The United States District Court for the Eastern District of Virginia held that the actions by the Virginia State Bar were in violation of federal laws that prohibit the restraint of commerce. The court held that the procedures followed by the Virginia State Bar in its efforts to regulate UPL in Virginia violated federal antitrust laws.<sup>18</sup>

The district court opinion was vacated by the Fourth Circuit on procedural grounds, after which the case was settled. Therefore, there was no final judicial resolution of the antitrust issue. In view of the potential antitrust exposure, state bar associations, including The Florida Bar, ceased issuing advisory opinions.<sup>19</sup>

## Medicaid Planning and UPL in Tennessee

Tennessee has a definition of UPL which is stated in Tenn. Code Ann. §23-3-103(a) (2008). The definition is sourced from statute and case law. Regulatory entities authorized to enforce the UPL regulations are the State Bar Committee, Supreme Court Committee/Commission, Attorney General, County Prosecutor, and there is also a private right of action.<sup>20</sup>

Complaints are generally filed with the Tennessee Attorney General's Office. The Tennessee Bar Association Standing Committee on the Protection of the Public from the Unauthorized Practice of Law has also developed a sample protocol for use by local bar associations handling complaints about individuals and businesses endangering Tennessee consumers through the unauthorized practice of law. A complaint form is provided on the office of Attorney General website.<sup>21</sup> The Tennessee Bar Association website<sup>22</sup> has information for handling UPL complaints as well.

### **Tennessee Opinion No. 07-166: Practice of Law; Medicaid Eligibility**

On December 18, 2007, the State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility. In this opinion, the following questions were examined:

1. Whether Tenn. Code Ann. §23-3-103(a) prohibits a non-attorney from representing the appellant in an administrative appeal of a denial of Medicaid eligibility in which the non-attorney prepares legal documents relating to the proceedings and engages in the direct and cross-examination of witnesses;  
*Opinion rendered: No*<sup>23</sup>
2. Whether Tenn. Code Ann. §23-3-103(a) prohibits a non-attorney from giving legal advice to persons seeking to become eligible for Medicaid benefits concerning the application of state and federal laws relating to Medicaid eligibility;  
*Opinion rendered: If the legal assessments and advice regarding the application of federal or state laws relating to Medicaid eligibility offered by non-attorneys to persons seeking to become eligible for Medicaid benefits are performed for valuable consideration and require the “professional judgment of a lawyer,” such conduct would constitute the unauthorized practice of law.*<sup>24</sup>
3. Whether the answers to Questions 1 or 2 would be different if the legal services are being provided by a non-attorney with an expertise in a pertinent subject matter of the law – for instance a Certified Senior Advisor (CSA), Certified Estate Planner (CEP), Certified Charitable

Advisor (CCA), or Certified Long-Term Care Counselor (CLTCC) with a working knowledge of the Medicaid laws;

*Opinion rendered:* No.<sup>25</sup>

## **Medicaid Planning and UPL in Ohio**

In Ohio, UPL is defined through definition, under Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio.<sup>26</sup> The definition of the unauthorized practice of law is further developed on a case-by-case basis by the Supreme Court of Ohio.<sup>27</sup>

Practicing law without a license in Ohio is subject to civil injunction, civil contempt and civil fine.<sup>28</sup> Complaints of Unauthorized Practice of Law are to be lodged with the Office of Disciplinary Counsel, the local bar association's Unauthorized Practice of Law Committee, or to the Secretary of the Board on the Unauthorized Practice of Law. Complaints received will be investigated and if considered probable cause to warrant a hearing, a formal complaint will be filed with the Board on the Unauthorized Practice of Law.<sup>29</sup>

### **Ohio Advisory Opinion UPL 11-01: Medicaid Assistance and Planning by Non-Attorneys**

On October 7, 2011, the Board on the Unauthorized Practice of Law of The Supreme Court of Ohio issued Advisory Opinion UPL 11-01 entitled "Medicaid Assistance and Planning by Non-attorneys." In this opinion, the Court examined whether Medicaid planning and application activities constitute the practice of law.

The Court concluded that non-attorneys may review documents, prepare and file Medicaid applications and attend state hearings on behalf of an individual "to the extent that those activities are authorized by federal law." However, only attorneys may engage in Medicaid planning activity.<sup>30</sup>

The opinion goes on to specify:

"Medicaid planning, which consists of arranging assets and income to meet Medicaid eligibility requirements, is outside the scope of the non-attorney assistance permitted by federal law. State regulation of Medicaid planning is therefore not preempted by federal law. In many cases, 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.”<sup>31</sup>

In forming this opinion, UPL 11-01 cites Tennessee Attorney General Opinion 07-166.

### **Problems with the Complaint Driven Approach**

- Since it is up to the UPL victim to lodge the complaint, actual reported complaints represent a mere fraction of the UPL sum. If we are to consider a state’s complaint data, we only have a partial picture of the extent of this problem in the Elder Law field. The elderly and disabled – and their families - are often unaware they have been victimized, at least at first. Overwhelmed seniors may be ashamed that they were not sophisticated enough to know they were victimized. They may be afraid to come forth, unaware of the proper channels through which to lodge a complaint, or intimidated by the legal system.
- Nobody wants to be the whistleblower. There is an historic reluctance for people to report on and expose an individual’s or a company’s wrong or damaging actions upon others. This creates a kind of “code of silence’ from the stigma of being labeled an informant.
- In today’s litigious society, individuals who file UPL complaints may have a concern they themselves may be sued by the person they report to the regulatory entity of their jurisdiction.
- Considering the Virginia State Bar was sued on antitrust grounds, the potential for future antitrust lawsuits against state bar associations likely perpetuates the complaint-driven nature of the UPL disciplinary process.

### **Moving forward: Our duty as elder law practitioners**

The absence of reporting UPL in turn only encourages its continuance. By reporting UPL, a higher virtue is served by respecting the well-being of others. It is acting responsibly on behalf of society by reporting wrong behavior.

We must take a proactive stand to inform our clients and their families about UPL within the framework of Medicaid Planning, and encourage them to report alleged instances of UPL to regulatory authorities.

As Elder Law practitioners, our involvement in increasing the awareness among the public as well as among nursing home and assisted living employees may be one of the most effective ways to combat UPL in Medicaid planning throughout the United States.

Endnotes:

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- <sup>1</sup> John R. Frazier, “The Cost of Remaining Silent about the Unlicensed Practice Of Law,” <http://www.estatelegalplanning.com/unlicensed-practice-of-law.html> (accessed June 6, 2015)
- <sup>2</sup> [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2012\\_upl\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf) (accessed June 6, 2015)
- <sup>3</sup> Florida Statutes, Title XXXII, Ch. 454.23, [http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0400-0499/0454/0454.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0400-0499/0454/0454.html) (accessed June 6, 2015)
- <sup>4</sup> “Rules Regulating The Florida Bar,” Rule 10-1.2, <http://www.floridabar.org/divexe/rrtfb.nsf/FV/3AA92E254CA01FB585256BC200450EC5> (accessed June 6, 2015)
- <sup>5</sup> <http://www.floridabar.org/DIVCOM/PI/WebNodes.nsf/Nodes/2462A48BF92BCBE3852577E000485BA7> (accessed June 6, 2015)
- <sup>6</sup> John R. Frazier, *Protecting your Family’s Assets: How to Legally Use Medicaid to Pay for Nursing Home and Assisted Living Care*, 2nd ed. Florida, Rainbow Books Inc., 2012, 170.
- <sup>7</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>8</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>9</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>10</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>11</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>12</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>13</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>14</sup> Public letter issued by The Florida Bar Standing Committee for Unlicensed Practice of Law, dated 13 May 2009.
- <sup>15</sup> FAO #2011-4, Medicaid Planning Activities by Nonlawyers, The Florida Bar Standing Committee on the Unlicensed Practice of Law, Revised Proposed Advisory Opinion, October 14, 2014.
- <sup>16</sup> <http://www.floridasupremecourt.org/decisions/2015/sc14-211.pdf> (accessed June 6, 2015)
- <sup>17</sup> <http://www.floridasupremecourt.org/decisions/2015/sc14-211.pdf> (accessed June 6, 2015)

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<sup>18</sup> Surety Title Insurance Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), vacated and remanded with instructions, 571 F.2d 205 (4th Cir. 1978)

<sup>19</sup> Robert M. Sondak, "Access to Courts and the Unauthorized Practice of Law--Ten Years of Unlicensed Practice of Law Advisory Opinions," <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/63732A4EBC94779F85256ADB005D6239> (accessed July 7, 2015)

<sup>20</sup> [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2012\\_upl\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf) (accessed June 6, 2015)

<sup>21</sup> <http://www.tn.gov/attorneygeneral/upl/upl.html> (accessed June 6, 2015)

<sup>22</sup> <http://www.tba.org/committee/unauthorized-practice-of-law/resources> (accessed June 6, 2015)

<sup>23</sup> State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility

<sup>24</sup> State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility

<sup>25</sup> State of Tennessee Office of the Attorney General issued Opinion No. 07-166; Practice of Law; Medicaid Eligibility

<sup>26</sup> <http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule7> (accessed June 6, 2015)

<sup>27</sup> <http://www.supremecourt.ohio.gov/Boards/UPL/faq/uplfaq.asp> (accessed June 6, 2015)

<sup>28</sup> [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2012\\_upl\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf) (accessed June 6, 2015)

<sup>29</sup> <http://www.supremecourt.ohio.gov/Boards/UPL/faq/uplfaq.asp> (accessed June 6, 2015)

<sup>30</sup> Board on the Unauthorized Practice of Law of The Supreme Court of Ohio; Advisory Opinion UPL 11-01; Issued: October 7, 2011; Medicaid Assistance and Planning by Nonattorneys; [http://www.sconet.state.oh.us/Boards/UPL/advisory\\_opinions/UPLAdvOp\\_11\\_01.pdf](http://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_11_01.pdf) (accessed June 6, 2015)

<sup>31</sup> Board on the Unauthorized Practice of Law of The Supreme Court of Ohio; Advisory Opinion UPL 11-01; Issued: October 7, 2011; Medicaid Assistance and Planning by Nonattorneys; [http://www.sconet.state.oh.us/Boards/UPL/advisory\\_opinions/UPLAdvOp\\_11\\_01.pdf](http://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_11_01.pdf) (accessed June 6, 2015)