

**Board on the Unauthorized Practice of Law of  
The Supreme Court of Ohio**

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Advisory Opinion **UPL 11-01**

Issued: October 7, 2011

***Medicaid Assistance and Planning by Nonattorneys***

**SYLLABUS:** A nonattorney may review documents to identify an individual's "countable" resources for purposes of applying for Medicaid nursing-home benefits. Additionally, a nonattorney 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 nonattorney may not, however, engage in "Medicaid planning" if it requires specialized legal training, skill, and experience.

**OPINION:** This opinion addresses whether a nonattorney, for a fee and in the course of a business enterprise, may provide advice and assistance to current and prospective nursing-home patients and/or their families regarding qualification for Medicaid benefits. For purposes of this opinion, the nonattorney's "advice and assistance" consists of the following services:

1. Reviewing documents to determine an individual's countable resources for Medicaid purposes;
2. Establishing a Medicaid planning strategy specific to an individual, including (a) a determination of the exact amount and nature of the resources the individual will be able to retain; (b) a determination of the date of Medicaid eligibility; and (c) a specific plan for reduction of the individual's assets to qualify for Medicaid, including advice on how to "spend down," gift resources, change title to resources, and convert one type of asset to another type of asset in order to maximize the assets transferred to others while qualifying for the maximum benefits at the earliest time;
3. Preparing and filing a Medicaid application on behalf of the individual with a county department of job and family services;
4. Attending hearings with the individual, on behalf of the individual, or both.

**Background:** Medicaid is a federal program created by the United States Congress in 1965 through which individuals below a specified income level receive assistance with medical expenses. See Section 1396a, Title 42, U. S. Code. Through Medicaid, the federal government provides funding to states for coverage of medical and nursing-home services for those who meet certain financial criteria. *Id.*

The national average cost of a semi-private room in a nursing home is currently \$5,870 per month. Cost of Care Survey, Genworth Financial Inc. (April 2011), 22. The Medicare program<sup>1</sup> does not pay for nonskilled nursing-home care, and that care is not typically covered by private health insurance. 42 C.F.R. 411.15; Ershow-Levenberg, *Court Approval of Medicaid Spend-Down Planning by Guardians* (2005), 6 Marq. Elder's Advisor 197, 199. Unless an individual has long-term care insurance or is eligible for Medicaid, he or she must pay out of pocket for nursing-home care. Ershow-Levenberg at 199. Because long-term care insurance is expensive and nursing home costs can quickly deplete one's life savings, the elderly and their families "implement strategies to become eligible for Medicaid." *Id.* This process is commonly known as "Medicaid planning."

"Medicaid planning,' or arranging assets and income for an individual or couple in order to achieve earlier Medicaid eligibility for nursing home benefits and protect assets for other uses than nursing home payments, is an important legal service that is identified with the broader field of elder law." Barnes, *An Assessment of Medicaid Planning* (2003), 3 Hous.J. Health L. & Pol. 265, 267. Applicable Medicaid laws and rules do allow some methods for participation in Medicaid planning, such as certain transfers of assets through trusts, cash gifts, and conversion of assets from "countable" to "noncountable" assets. Medicaid Estate Planning, United States General Accounting Office, GAO/HRD-93-29R (1993), at 4. Overall, Medicaid planning is a "multi-faceted phenomenon. It involves the creation of trusts, the conversion of countable assets, the maximization of spousal resource allowance, and so on." Medicaid Estate Planning and Estate Recovery in Ohio, Ohio Dept. of Human Servs. (Aug.1999), 107. Medicaid planning also "often necessitates the assistance of an attorney." GAO/HRD-93-29R at 4.

In Ohio, the Medicaid program is administered by the Department of Job and Family Services,<sup>2</sup> which has promulgated over 80 regulations governing Medicaid application procedures and income and resource eligibility. See R.C. 5111.01; Ohio Adm.Code 5101:1-39 et seq. To be eligible for Medicaid long-term care coverage based upon age alone, an Ohio applicant must be 65 or older and meet established income and resource standards. Ohio Adm.Code 5101:1-39-05, 5101:1-39-08. If an applicant has incurred medical expenses, he or she may be able to deduct these expenses from income to qualify for Medicaid. This process is called Medicaid "spenddown," and the date of Medicaid eligibility is determined by the date the spenddown amount has been satisfied. Ohio Adm.Code 5101:1-39-10. In addition, some assets, such as a home and car, may be exempt from the resource calculation. Ohio Adm.Code 5101:1-39-05, 5101:1-39-26.

Due to the stringent financial-eligibility requirements for Medicaid, transfers of resources are carefully scrutinized. Ohio law mandates that caseworkers conduct a review of resources transferred to another person within five years of applying for Medicaid. Ohio Adm.Code 5101:1-39-05, 5101:1-39-07. Some transfers are permissible within this period, such as conveyances of the family home to a spouse or other designated individuals. Ohio Adm.Code

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<sup>1</sup> The Medicare program provides health insurance for the aged and disabled, regardless of income. See Section 1395 et seq, Title 42, U.S. Code. Although the terms "Medicare" and "Medicaid" are at times confused, the two are separate federal programs.

<sup>2</sup> As of January 2011, the Department's Office of Ohio Health Plans, which administers the Ohio Medicaid program, reports to the newly created Governor's Office of Health Transformation. See Executive Order 2011-02K.

5101:1-39-07. The transfer of other resources to a spouse or blind or disabled child is also permitted, as is establishing a trust for the sole benefit of a blind or disabled person younger than 65. *Id.*

Some transfers made during the five-year “lookback” period are assumed improper, such as transfers for less than fair-market value, transfers that reduce resources in order to qualify for Medicaid, transfers that could be sold to pay for care, and annuities not expected to finish paying out in the Medicaid applicant’s lifetime (the state of Ohio must be a remainder beneficiary on the annuity as a condition of eligibility). *Id.* An improper transfer of resources results in a failure to qualify for Medicaid for a designated period of time. *Id.* The period of ineligibility is determined by dividing the transferred amount by the average private pay cost of a nursing home in Ohio for one month. See Ohio Adm.Code 5101:1-39-07(J)(2)(b).

In summary, a vast system of highly technical laws and regulations, both on the federal and state level, governs Medicaid eligibility. One commenter underscored the need for legal assistance to help individuals navigate Medicaid’s complexities: “Congress made the laws governing Medicaid transfers and qualification too complicated for citizens to follow without specialized legal advice. Medicaid planning is primarily an estate-planning tool for the working middle class who cannot afford private [long-term care] insurance. Middle class clients considering Medicaid estate planning depend on legal counsel to make informed decisions about it.” Lisa Schreiber Joire, Note, *After New York State Bar Association v. Reno: Ethical Problems in Limiting Medicaid Estate Planning* (1999), 12 *Geo.J. Legal Ethics* 789, 796. Having identified the regulatory environment in which the hypothetical business enterprise is operating, the board now turns to the specific questions presented.

## **Discussion:**

### *I. Practice of Law Generally*

The Supreme Court of Ohio has original jurisdiction regarding admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Section 2(B)(1)(g), Article IV, Ohio Constitution; *Judd v. City Trust & Savs. Bank* (1937), 133 Ohio St. 81, 012 N.E.2d 288. Accordingly, the court has exclusive jurisdiction over the regulation of the unauthorized practice of law in Ohio. *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567.

The court regulates the unauthorized practice of law in order to “protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, at Paragraph 40.

The court has defined the unauthorized practice of law as “the rendering of legal services for another by any person not admitted [or otherwise registered or certified] to practice [law] in Ohio.” Gov.Bar R. VII(2)(A). Although “rendering of legal services” is not defined by statute or rule in Ohio, it has been addressed in a body of Supreme Court decisions dating back to the 1930’s. In the seminal *Dworken* case, the court held, “the practice of law is not limited to the

conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.” *Land Title Abstract & Trust Co. v. Dworken* (1934), 129 Ohio St. 23, 28, 1 O.O. 313, 193 N.E. 650, 652, quoting *People v. Alfani* (1919), 125 N.E. 671. From *Judd* in 1937 to the most recent unauthorized-practice cases, the court has consistently reaffirmed this fairly broad definition of the practice of law. See, e.g., *Judd*, 133 Ohio St. 81, 12 N.E.2d 288.; *Ohio State Bar Assn. v. Dalton*, 124 Ohio St.3d 514, 2010-Ohio-619, 924 N.E.2d 821; *Ohio State Bar Assn. v. Heath*, 123 Ohio St.3d 483, 2009-Ohio-5958, 918 N.E.2d 145; *Cincinnati Bar Assn. v. Foreclosure Solutions, L.L.C.*, 123 Ohio St.3d 107, 2009-Ohio-4174, 914 N.E.2d 386; *Lorain Cty. Bar Assn. v. Kocak*, 121 Ohio St.3d 396, 2009-Ohio-1430, 904 N.E.2d 885; *Cleveland Metro. Assn. v. Boyd*, 121 Ohio St.3d 36, 2009-Ohio-305, 901 N.E.2d 795; *Disciplinary Counsel v. Brown*, 121 Ohio St.3d 423, 2009-Ohio-1152, 905 N.E.2d 163.

Within these broad boundaries, the court has also permitted limited nonattorney representation in situations not requiring specialized legal training, skill, and experience. Specifically, the court has allowed some nonattorney representation in small claims court, unemployment-compensation hearings, board of revision proceedings, workers’ compensation hearings, and labor negotiations. See, e.g., *Cleveland Bar Assn. v. Pearlman* (2005), 106 Ohio St.3d 136, 141-145, 2005-Ohio-4107, 832 N.E.2d 1193, 1198 (small claims court proceedings); *Heinze v. Giles* (1986), 22 Ohio St.3d 213, 220, 490 N.E.2d 585, 590 (unemployment compensation hearings); *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision*, 111 Ohio St.3d 367, 375, 2006-Ohio-5852, 856 N.E.2d 926, 934 (board of revision proceedings); *Cleveland Bar Assn. v. CompManagement, Inc. II*, 111 Ohio St.3d 444, 478 2006-Ohio-6108, 857 N.E.2d 95, 126 (workers’ compensation hearings); *Ohio State Bar Assn. v. Burdzinski, Brinkman, Czarzasty & Landwehr, Inc.*, 112 Ohio St.3d 107, 112, 2006-Ohio-6511, 858 N.E.2d 372, 377 (labor negotiations). The court has further held that the mere act of representing another is not necessarily considered the practice of law unless it is accompanied by an act that requires or involves legal skills. *CompManagement II* at Paragraph 108, citing *Gustafson v. V.C. Taylor & Sons, Inc.* (1941), 138 Ohio St. 392, 397. Examples of “legal skills” identified by the court include cross-examination, legal argument, and other acts of advocacy. *Pearlman, supra* at Paragraph 27.

In the federal arena, there are also several examples of permitted nonattorney assistance and representation. See 8 C.F.R. 292.1 (immigration representatives); Section 110, Title 11, U.S. Code (bankruptcy-petition preparers); 37 C.F.R. 1.31 and 11.5-11.9 (patent practitioners); and Section 406, Title 42, U. S. Code (Social Security hearing representatives). When federal law authorizes nonattorney practice, the Supremacy Clause requires state regulation of the unauthorized practice of law to “yield” to federal provisions. Clause 2, Article VI, United States Constitution; *Sperry v. State ex rel. Florida Bar* (1963), 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (Florida could not enjoin conduct of nonattorney authorized to practice before the United States Patent Office).

The questions presented to the board involve a hypothetical business entity that assists potential nursing-home patients with qualifying for Medicaid. While the questioned activities

compose a single business enterprise, the board has chosen to examine each activity individually, as the proposed enterprise may involve both permissible and impermissible activities.

## *II. Review of Documents to Determine Countable Resources for Medicaid Purposes*

As noted earlier, Medicaid eligibility is dependent upon an individual's income and resource levels. Some assets are "countable" for Medicaid purposes, and some are exempt. The board has been asked for an opinion on whether a review of documents to determine countable resources constitutes the unauthorized practice of law. The types of documents are not specified, but presumably the reference is to financial records such as bank records, brokerage statements, annuities, and life insurance policies.

The Supreme Court has determined in the context of labor relations that "[g]athering information, even on a matter that may come before a tribunal," and development of strictly business-oriented strategies based upon that information is not the practice of law. *Burdzinski, supra* at Paragraph 16. Similarly, collecting financial information for the purposes of investments or asset management does not constitute the practice of law. *Trumbull Cty. Bar Assn. v. Hanna* (1997), 80 Ohio St.3d 58, 684 N.E.2d 329, citing *Green v. Huntington Natl. Bank* (1965), 4 Ohio St.2d 78, 33 O.O.2d 442, 212 N.E.2d 585.

Based upon this authority, and the line of nonattorney cases indicating that the "rendering of legal services" analysis should focus on whether an activity requires specialized legal training, skill, and experience, the board concludes that the review of financial documents for a potential Medicaid applicant to evaluate income and resource levels does not constitute the unauthorized practice of law. This activity is more akin to financial planning, and is a task performed by Medicaid caseworkers during the application process. See Fact Sheet, Medicaid for Older Adults and People with Disabilities, Ohio Department of Job and Family Services (2010), [http://jfs.ohio.gov/OHP/bcps/FactSheets/ABD\\_Medicaid.pdf](http://jfs.ohio.gov/OHP/bcps/FactSheets/ABD_Medicaid.pdf). The review of financial records alone does not involve the specialized legal training, skill, and experience requiring attorney representation.

## *III. Establishment of a Medicaid-Planning Strategy Specific to the Client*

It appears that the document review discussed in section II inevitably leads to "Medicaid planning." As reflected in the questions presented, Medicaid planning includes assessing resources, identifying the date of Medicaid eligibility, and recommending ways to reduce asset levels to qualify for Medicaid.

The Medicaid program is governed by a highly complicated network of federal and state regulations. Advising a client on how to satisfy the requirements of a "regulatory scheme" is typically the practice of law. *Burdzinski, supra* at Paragraph 18. However, advice on such compliance can also fall outside the boundaries of the practice of law if it fails to involve legal analysis or interpretation. *Id.* In regard to Medicaid planning, the Tennessee Attorney General has determined that "[i]f the legal assessments and advice regarding the application of federal or state laws relating to Medicaid eligibility offered by nonattorneys to persons seeking to become eligible for Medicaid benefits\*\*\*require the 'professional judgment of a lawyer,' such conduct

would constitute the unauthorized practice of law.” 2007 Tenn. Atty. Gen. Ops. No. 07-166 at 4. The Tennessee opinion is aligned with Supreme Court case law authorizing some nonattorney representation in administrative proceedings if specialized legal training, skill, and experience are not required. See *Pearlman, supra* at 141, *Heinze, supra* at 217, *Dayton Supply, supra* at 368, *CompManagement, supra* at 478, and *Burdzinski, supra* at 112.

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, interpretation, and the preparation of legal documents. See *Columbus Bar Assn. v. Am. Family Prepaid Legal Corp.*, 123 Ohio St.3d 353, 365 2009-Ohio-4174, 916 N.E.2d 784, 795, citing *Trumbull Cty. Bar Assn. v. Hanna* (1997), 80 Ohio St.3d 58, 684 N.E.2d 329. At least one state has recognized this issue and allows only attorneys to perform Medicaid planning for a fee. See Texas Code Ann. 12.001. 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.<sup>3</sup>

#### IV. *Preparing and Filing a Medicaid Application*

The board is next asked to consider the preparation and filing of an application for Medicaid benefits on behalf of another. This service appears to follow any Medicaid planning activities provided to the applicant.

Ohio participates in the Medicaid program and to receive federal funding must comply with the federal laws and regulations governing Medicaid. U.S.C. Section 1396a., Title 42, U. S. Code. See also *Harris v. McRae* (1980), 448 U.S. 297 100 S.Ct. 2671, 65 L.Ed.2d 784. Regarding the preparation and filing of a Medicaid application, state Medicaid plans must “provide that all individuals wishing to make application\*\*\*shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.” Section 1396a(a)(8) Title 42, U. S. Code. Assistance with Medicaid applications is specifically addressed in Ohio Adm.Code 5101:1-38-01.2(E). That provision defines an “authorized representative” as a person designated in writing by the Medicaid applicant to perform duties on the applicant’s behalf. Unless otherwise specified, the authorized representative “shares all responsibility of an individual,” and the “acts and omissions of an authorized representative shall be deemed to be the acts or omissions of the individual.” *Id.* The authorized representative may “accompany, assist, and represent the individual” during the application process. Additionally,

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<sup>3</sup> Medicaid planning has been perceived by some as cheating the system. The views expressed in this Advisory Opinion should not be construed as any indication by the board that particular Medicaid planning activities are either permitted or prohibited under federal law.

the county Medicaid agency is required to assist with completion of a Medicaid application if needed. Ohio Adm.Code 5101:1-38-01.2(E)(3).

As directed by federal law, Ohio Medicaid regulations permit an applicant to designate a representative to assist with eligibility paperwork. The regulations do not require that the representative be an attorney. Even if the board believed that preparing an application for Medicaid benefits on behalf of another is the practice of law, under federal law and *Sperry, supra*, the board cannot intrude upon federal Medicaid procedural requirements. For these reasons, it is the board's view that the preparation and filing of a Medicaid application on behalf of another cannot be enjoined as the unauthorized practice of law.

#### V. *Attending Medicaid Hearings*

The final service offered by the business enterprise is attending hearings on the Medicaid applicant's behalf. Under Section 1396a(a)(3), Title 42, U. S. Code a state Medicaid program must "provide\*\*\*an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." The federal regulations promulgated pursuant to Section 1396a require state Medicaid agencies to maintain a hearing system and notify applicants and recipients of their right to a hearing, and that they may be represented at the hearing by "legal counsel, *a relative, a friend, or other spokesman.*" (emphasis added.) 42 C.F.R. 431.205, 431.206. This requirement is set out in Ohio Adm.Code 5101:6-6(C), which indicates that the individual and/or "authorized representative" may attend the hearing as well as legal counsel. The individual and authorized representative "shall have the opportunity to present their case in their own way," the hearing is informal, and the rules of evidence do not apply. Ohio Adm.Code 5101:6-6-02(B). They may also present witnesses, submit evidence, advance arguments, and "[q]uestion or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses." *Id.*

In other contexts, these activities performed by a nonattorney constitute the unauthorized practice of law. *Pearlman, supra* at Paragraph 27. However, federal law requires an opportunity for nonattorney representation if Ohio is to receive funding through the Medicaid program. It follows that the Supreme Court's ability to regulate the practice of law in Medicaid state hearings is preempted by the federal "fair hearing requirements." *Sperry, supra*. The board therefore concludes that nonattorneys may appear at state Medicaid hearings as the authorized representative of an applicant or recipient and participate in compliance with Ohio Adm.Code 5101:6-6-02 without engaging in the unauthorized practice of law.<sup>4</sup>

#### VI. *Conclusion*

It is the board's opinion that in the context of applying for Medicaid nursing-home benefits, federal law allows nonattorneys to assist and represent applicants. This assistance and representation include reviewing documents to identify countable resources, preparing and filing an application for Medicaid nursing-home benefits, and attending state hearings with the

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<sup>4</sup> The board's opinion is limited to Medicaid administrative hearings and should not be extended to Medicaid appeals before an Ohio court.

applicant or on the applicant's behalf. Because the state of Ohio participates in the Medicaid program, the Supremacy Clause preempts any potential state unauthorized practice-of-law enforcement in regard to this conduct. Therefore, such document review, application preparation, and hearing attendance cannot be enjoined as the unauthorized practice of law.

Medicaid planning, which consists of arranging assets and income to meet Medicaid eligibility requirements, is outside the scope of the nonattorney 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 nonattorney constitutes the unauthorized practice of law if the Medicaid planning requires specialized legal training, skill, and experience.

Minerva B. Elizaga, Secretary  
**BOARD ON THE UNAUTHORIZED  
PRACTICE OF LAW**

**Advisory opinions of the Board on the Unauthorized Practice of Law are informal and nonbinding pursuant to Gov. Bar R. VII(2) and issued in response to prospective or hypothetical questions submitted by unauthorized-practice-of-law committees of local or state bar associations, the Office of Disciplinary Counsel, or the Attorney General.**