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High court in Florida bans non-lawyers from certain Medicaid planning activities

A recent decision by Florida's Supreme Court has barred non-lawyers for certain aspects of Medicaid planning in that state. Non-lawyers who participate in certain aspects of Medicaid planning are now considered to be engaging in the unlicensed practice of law. Non-lawyers can still file Medicaid applications in Florida but certain activities are banned, including the drafting of personal service contracts, preparation and execution of qualified income trusts, and the rendering of legal advice implementing Florida law to obtain Medicaid benefits. (www.elderlawanswers.com).

In Florida, some Medicaid planning companies apparently claimed to use attorneys to draft legal documents. However, it was determined by Florida's Supreme Court that unless the client establishes an independent attorney-client relationship, payment from the client is directly to the attorney, and the attorney, not the company, determines that the documents are appropriate under the circumstances, the company is engaging in the unauthorized practice of law.

Medicaid planning is very state specific. For example, Pennsylvania does not permit qualified income trusts for Medicaid planning. However, there are companies in Pennsylvania who claimed to have attorneys drafting trusts for other purposes, including Revocable or Living trusts that affect Medicaid planning for the clients in ways that a non-lawyer, particularly a non-elder law attorney, cannot anticipate. At least one attorney has been disbarred for participating in such planning (drafting trusts without meeting with the client or determining that such a vehicle is appropriate). Other companies claim to be able to assist with Medicaid planning, such as irrevocable burial reserves (not a lawyer function so perfectly acceptable) but to also prepare Wills and Powers of Attorney.

The Elder Law bar is very interested in this case although the law does not apply to Pennsylvania. The unauthorized practice of law (UPL) can be very damaging to the consumer who does not know enough about the subject matter to realize that the advisor is potentially adversely affecting the future Medicaid planning process. At best it creates confusion and at worst such practices can result in denial for Medicaid with attendant turmoil and expense for family members and their loved ones. For instance, a living trust not properly explained and drafted might result in denial for Medicaid services due to a loss of protection for the marital home for the spouse who remains in the community.

There is a new financial Power of Attorney statute in Pennsylvania as of January 1, 2015. One of the intended purposes of the new law is to insure improved acceptance of such documents by financial institutions because they can rely on certain provisions being included in the document. A non-lawyer is likely not familiar with the new law and how to implement it in an appropriate document. Now it is even more likely that a financial institution will not accept a financial Power of Attorney signed after January 1, 2015 just when the family is relying on using such a document.

All UPL regulation should be consumer oriented not to protect specialized practices of law. The consumer should be wary of advisors who are practicing law when they are not lawyers. The end result might work for now but can be an issue later.