S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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December 18, 2007

Opinion No. 07-166

Practice of Law; Medicaid Eligibility

QUESTIONS

1. Whether Tenn. Code Ann. § 23-3-103(a) prohibits a person who is not an 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.

2. Whether Tenn. Code Ann. § 23-3-103(a) prohibits a person who is not an 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.

3. Whether the answers to Questions One or Two 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.

OPINIONS

1. No. Federal law expressly grants applicants for or recipients of Medicaid benefits the right to represent themselves or to be represented by a relative, friend or other spokesman during administrative appeals.

2. 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 under Tenn. Code Ann. § 23-3-103(a).

3. No. Expertise or certification is not a requirement of the federal regulations that govern the answer to Question One nor can expertise or certification other than a license to practice law exempt persons from the prohibition against the unauthorized practice of law.

ANALYSIS

1. This Office has previously opined that a non-attorney who represents or acts as a "spokesman" for a Medicaid recipient or applicant in an administrative hearing held pursuant to 42 C.F.R. § 431.206(b) "would not be subject to penalty for the unauthorized practice of law under Tennessee law because the above-mentioned federal regulation preempts the Tennessee statutes on this particular question." Op. Tenn. Att'y Gen. 85-241 (Sept. 11, 1985). This Office has not changed its opinion on the matter. The unauthorized practice of law is statutorily prohibited in Tennessee. The Tennessee Code states:

> No person shall engage in the practice of law or do law business, or both, as defined in § 23-3-101, unless the person has been duly licensed, and while the person's license is in full force and effect, nor shall any association or corporation engage in the practice of the law or do law business, or both.

Tenn. Code Ann. § 23-3-103(a). The "practice of law" has been defined by the legislature as:

> the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(3). Likewise, "law business" is defined as:

> the advising or counseling for a valuable consideration of any person as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(1). However, the prohibitions against unauthorized practices "shall not apply to any person while practicing before state administrative boards and agencies who is authorized by statute to practice and act in a representative capacity before such state or local administrative boards and agencies." Tenn. Code Ann. § 23-3-113. Thus, the question in relation to Medicaid hearings is whether non-lawyer representation is authorized by law.

The United States Congress created the Medicaid program in 1965 by adding Title XIX to the Social Security Act "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980); 42 U.S.C.A. § 1396. The United States Supreme Court has stated that

"[a]lthough participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX." *Harris*, 448 U.S. at 301. Therefore, because the State of Tennessee accepts federal funding for its Medicaid program, the State must comply with the federal requirements of the Medicaid program.

Administrative appeals of denials of Medicaid eligibility are heard by hearing officers employed by a state administrative agency, the Appeals and Hearings Division of the Department of Human Services. These hearings are mandated by federal statute and must adhere to federal regulations. *See* Social Security Act of 1965, as amended, 42 U.S.C.A. § 1396 *et seq*., and 42 C.F.R. Part 431. These federal regulations state that the state agency must inform every applicant or recipient of Medicaid benefits in writing of specific rights. 42 C.F.R. § 431.206(b). In particular, the state agency must inform the individual "that he may represent himself or use legal counsel, a relative, a friend, or other spokesman." 42 C.F.R. § 431.206(b)(3). Because the State of Tennessee accepts federal funding for its Medicaid program, it must therefore comply with this regulation. Accordingly, it follows that an individual may use a non-attorney, whether a relative, friend, spokesperson, or other, to act on his or her behalf in administrative appeal hearings, even if the conduct by the non-attorney might otherwise constitute the unauthorized practice of law. This opinion is limited to representation by non-attorneys at the administrative Medicaid hearings held pursuant to 42 C.F.R. § 431.206(b).

2. 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 offered by the State of Tennessee are performed for valuable consideration and require the "professional judgment of a lawyer," this conduct may constitute "law business" within the meaning of the unauthorized practice of law statutes under Tenn. Code Ann. § 23-3-103(a). As discussed above, the definition of "law business" includes "the advising or counseling for a valuable consideration of any person as to any secular law . . . ." Tenn. Code Ann. § 23-3-101(1).

The Tennessee Supreme Court, which is the final arbiter regarding unauthorized practice of law issues, has held that the conduct described in the statutory definition of "law business," "if performed by a non-attorney[,] constitute[s] the unauthorized practice of law only if the doing of those acts requires the 'professional judgment of a lawyer.'" *In re Petition of Burson*, 909 S.W.2d 768, 776 (Tenn. 1995). Whether conduct constitutes the unauthorized practice of law thus depends upon the particular facts of each case. Accordingly, 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.

3. Whether or not the conduct described in Questions One and Two is performed by a non-attorney with an expertise in this area of the law -- for instance, by 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 -- would not change our opinions concerning these questions. The federal regulations affording applicants for or recipients of Medicaid benefits the right to be represented by non-attorneys during administrative appeal

hearings do not require that such non-attorney representatives possess any particular expertise in the laws governing Medicaid eligibility or otherwise. Likewise, expertise or certification other than a license to practice law would not exempt the conduct described in Question Two from the prohibition against the unauthorized practice of law if the legal assessments and advice provided are for a fee and require the "professional judgment of a lawyer."

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