



## THE DANGERS OF REFERRING YOUR FACILITY'S MEDICAID APPLICATIONS TO A MEDICAID CONSULTANT

A case study in "good things aren't cheap and cheap things aren't good"

It seems like everyday there's a new "Medicaid Consultant" advertising in the local paper, on-line or soliciting at nursing homes. But here's the problem with these agencies: they're not attorneys. We all know that the Medicaid Program, especially Institutional a/k/a "nursing home" Medicaid, is governed by an exceedingly complex set of statutes, regulations and codes (i.e., the law). When a layperson accepts compensation to research the law and then interprets that law and provides advice, that layperson has now committed a Class E Felony in the State of New York. By way of example, when a Medicaid Consultant accepts payment and then advises a client as to the exempt Medicaid transfers they can avail themselves of or how to meet the elements of an undue hardship waiver, they have already crossed the line into the unauthorized practice of law. Consider this case study that is based on a true story:

While living in the community, the Resident, Rose, sells her home and moves in with her daughter, Dolores. Under the "guidance" of a Medicaid Consultant, a life estate agreement is executed by both Rose and Dolores which provides that the proceeds from the sale of Rose's home will be transferred to Dolores (approximately \$130K) in exchange for Dolores giving Rose a life estate in Dolores' home. The Resident resides in her daughter's home for two (2) years preceding Rose's admission to a nursing home. Although the life estate agreement was signed two (2) years prior, the sale proceeds were never transferred into Dolores' name, nor did Dolores sign a deed giving her mother a life estate interest in Dolores' home. Then, two (2) months after Rose's admission to the nursing home and **after** a balance has already accrued for Rose's stay at the nursing home, the Medicaid Consultant, citing the life estate agreement, directs the daughter to transfer the proceeds from her mother's sale of her home, which have remained in Rose's name since the closing, to herself. Three months after that and a full five months after Rose's nursing home admission, the daughter executes a deed giving Rose a life estate, even though she has been, and will continue to be, a long-term resident of the nursing home. Not surprisingly, the Medicaid Program imposed an excess resource penalty for the first two months of Rose's nursing home stay and thereafter a transfer of assets penalty. The nursing home, based upon the Medicaid Consultant's representations that they will succeed by arguing the appeal at Fair Hearing, waits several months before referring this matter to Cona Elder Law. When contacted by Cona Elder Law, the Medicaid Consultant maintains that he will appear at the next scheduled Fair Hearing and "straighten this out". In response, Cona Elder Law sends him a copy of the statute governing a Medicaid applicant's purchase of a life estate, which requires that the Medicaid applicant must reside in subject real property in which the life estate was given continuously for one (1) year after the deed granting the life estate is executed. Not surprisingly, the Medicaid Consultant stopped responding to Cona Elder Law when he realized the predicament he was in. In the end, Cona Elder Law was able to collect the outstanding private pay monies due to the nursing home and the Medicaid Consultant was sued for negligence. The Complaint filed against the Medicaid

Consultant noted that the Medicaid Consultant was engaging in the unauthorized practice of law and criminal charges may follow.

While this story ended well for the nursing facility, let's imagine a scenario where the nursing home referred the Resident's daughter to the Medicaid Consultant for the handling of the application. Had it made the referral, the SNF would have likely found itself in a precarious situation. Why? Because in the collection action, Dolores would have had a very strong affirmative defense, since the SNF referred her to an agency that was engaging in the unauthorized practice of law. This defense could have very likely resulted in the SNF receiving substantially less in the collections action, if anything at all.

Likewise, when an SNF itself retains a Medicaid Consultant to secure benefits for a resident it is taking a huge risk in order to save what will likely amount to a few thousand dollars in fees, while exposing itself to a five or six figure loss when the Medicaid Consultant misinterprets the law and the application is unsalvageable. It's important to note that the same rules apply to your very own Medicaid Coordinators that apply to Medicaid Consultants. It is permissible for the facility's coordinators to compile the necessary documents and submit them to the agency without crossing the line into the unauthorized practice of law but neither should ever give advice regarding Medicaid planning, appeals or addressing uncompensated transfers made in the look-back period. The only proper action that any SNF should take under these circumstances is to refer the matter to an Elder Law firm with a proven track record in this field, such as Cona Elder Law.



*Ken Kern is a member of Cona Elder Law. Mr. Kern leads the firm's Health Care Reimbursement and Recovery Department, concentrating his practice in health care facility representation, civil litigation, complex Medicaid eligibility matters, Fair Hearings, Article 78 proceedings, guardianships and resolution of all issues related to resident financial accounts and health care facilities' bottom line. Mr. Kern handles a wide range of complex matters affecting not only health care facilities but older adults and the disabled as well.*