

Corporate Transparency Act: Can CPAs Or Wealth Adviser Help You?

[Martin Shenkman](#)

Contributor

I write about charitable giving and estate planning ideas.

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Corporate Transparency Act (CTA) Beneficial Owner report filings are due by 12/31/2024 but who will ... [+]

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CTA and Estate Plans and Trusts

The Corporate Transparency Act (“CTA”) is a mandate that requires most smaller closely held business entities to file a rather invasive report with the Financial Crimes Enforcement Network of the Treasury Department. The CTA has been written about extensively, but it seems that most business entities, and their owners and those controlling them have not addressed compliance yet. When it comes to estate planning, and particularly entities owned by trusts, determining who has to file as a beneficial owner is particularly complicated. That is a real issue because the penalties are about \$600/day and jail time for non-compliance is even possible. So, if you might be affected, or any entity you are involved with might be a reporting company, or a trust you created or serve on, or hold powers over, might be impacted, you need to investigate filing. With wealth advisers often being the primary or initial advisers people call, they may be the first to help clients understand that they have to look into whether the CTA applies to them. Also, as wealth advisers often have the most frequent contact with clients of any advisers, they may be the ones present when the questions about the CTA arise. CPAs, who file tax returns, seem like a natural to call as the data reported for the CTA feels similar to the income tax filings CPAs routinely deal with. Yes, but. The “but” is a big one, the risk of the unauthorized practice of law or “UPL.” While this all sounds too technical for non-professionals to have to deal with, the three letter U-P-L may have a huge impact on what happens with CTA filing obligations.

The Bottom Line

CPAs and wealth advisers may be reticent or even prohibited from helping advise you on the CTA because of their risking UPL, the unauthorized practice of law. So, who do you call for help? Some lawyers are hesitant to get involved in the CTA because it can be incredibly nuanced and the rules are not intuitive. The CTA pronouncements (the law, FAQs, Small Business Guide, and more) are probably more than 500 pages of materials, and not an easy read. Consider the time any professional will have to invest to become conversant with the CTA (and many more scores of hours to become proficient). Many professional advisers have determined the investment of time is just too costly to make. To properly address your specific CTA filing questions can be costly in terms of lawyer time beyond what many people will want to pay. Where is the value proposition in paying thousands of dollars for advice to fill out a simple online FinCEN form? Hint – avoiding harsh penalties. So, given the complexity of many CTA issues and the harsh potential penalties, now compounded by the UPL risk, you may be left with no option for getting help other than:

If it's somethin' weird, And it don't look good Who ya gonna call? - Ghostbusters!

Kidding aside, as the deadline of 12/31/24 draws close, who can you rely on for help? This article will explore the UPL, which seems to have become a potentially significant hurdle for non-lawyer advisers.

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What is UPL?

Legal services are work efforts that involve legal discretion or decision-making. When legal knowledge, training, skill, and ability are required to perform a task, that is the practice of law. If a non-lawyer provides legal services that can only be performed by a licensed attorney, it is a crime punishable by fines and even jail time. Ouch! That is serious stuff that non-lawyers need to be mindful of before deciding to help you with CTA questions. UPL rules aim to protect the general public from someone without appropriate legal training from giving advice that can be harmful. The potential penalties are intended to dissuade non-lawyers from providing advice or services when they should not. While this might all seem like lawyers trying to protect their turf, would you want to have your appendix removed by someone who trained on You Tube instead of at a licensed medical school?

Practical Exceptions from UPL Restrictions

The realities of modern commerce and life have resulted in the laws restricting the practice of law to make exceptions. For example, in some jurisdictions, real estate brokers may be given some latitude in creating an initial contract to sell a home. The issue of non-lawyers handling limited real estate legal contracts is discussed below in the context of evaluating the implications of recent legal actions in Iowa on non-lawyers helping with the CTA. CPAs

are given the right to prepare tax returns and provide tax advice. These exceptions were made to serve consumers better because the Courts and legal system recognized that some flexibility, with appropriate limitations, benefited the general public. As the world continues to evolve, websites that enable consumers to prepare legal documents, such as wills, have become common. Again, some exceptions to UPL were carved out, again with guardrails. Artificial intelligence will be a new frontier in UPL, and the law will likely struggle to keep up. The services websites can offer in preparing a will, and other documents will grow exponentially.

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UPL and the CTA

Yeah, that is too many acronyms, but this discussion will address what exceptions will be made to the unauthorized practice of law rules in various states so non-lawyers can advise their clients about the Corporate Transparency Act.

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Right now, and of concern to your obligations of filing to comply with the CTA, can non-lawyers help you, and to what extent? The UPL risks in the context of the CTA worry many CPAs and wealth advisers to the point where they may be reluctant to give advice or assist in filings. That will be a disaster for consumers struggling to comply with these new rules by year-end. While all these issues will be sorted out over time, the requirement that initial filings for entities formed before 2024 be made by year-end may not provide adequate time for clarity on the CTA and UPL for CPAs and wealth advisers to help. Entities formed in 2024 must have CTA filings completed within 90 days of formation. Entities formed in 2025 and later must have CTA filings completed within 30 days of formation.

Whose Opinion Matters on UPL?

While FinCEN indicated that accounts and other professional advisers may help consumers, that doesn't offer sufficient comfort to CPAs, wealth advisers, and other non-lawyers to get involved. See FinCEN FAQ B.7, July 9, 2024.

The UPL issue remains in the purview of each state's court system. FinCEN's comments might be considered by a state judiciary in evaluating what it might do, but each state's laws on this matter. And that is what CPAs, wealth advisers, and others must consider.

Another important consideration is that each adviser considering giving advice on the CTA to clients should evaluate their professional malpractice liability insurance coverage. While there has been much discussion in the accounting world about this, the responses have evolved and may again evolve based on the New Jersey and Iowa changes discussed below. So, step one for many advisers may be to review their policies and speak to their insurance carriers. The latter step will be necessary given its dynamic nature.

Another consideration for non-lawyers is that if their services are characterized as UPL under applicable state law (which itself is uncertain and developing), will that adversely affect the insurance coverage they thought they had?

Many non-lawyers will consider all the uncertainty above and determine that either they will have no involvement with any CTA matters or that they will limit their participation to general discussions with clients and not give specific advice. Consider the burdens just evaluating all of this puts on a CPA or wealth adviser! And that is in addition to wading through the CTA rules to understand them!

A Key New Jersey Opinion Letter on UPL and the CTA

The Supreme Court Committee on the Unauthorized Practice of Law issued an opinion to the New Jersey Society of Certified Public Accountants on July 9, 2024, directly addressing this issue. We'll call this the "NJ Opinion." The analysis in the NJ Opinion is essential for

CPAs and wealth advisers seeking to help clients with the challenges of the CTA to understand and assess the risk of their getting involved. It may also inform non-lawyer advisers on the level of assistance they wish to provide. This may even include the many filing services that have sprung up to charge consumers for help with CTA filings.

NJ Determined That Advising on the CTA is a Legal Advice

The NJ Opinion concluded that advising on the CTA, a complex law, is legal advice. It then concluded that some limited exceptions should be provided to help consumers.

The NJ Opinion stated: “The Committee finds that filing beneficial owner information reports is the practice of law, as it entails applying the terms of a dense statute to a set of potentially complicated facts.” It is hard to argue that the CTA is “a dense statute.” Further, the CTA is not just a statute but an ongoing stream of FAQs, a Small Business Guide, and other pronouncements from FinCEN. It also seems pretty clear that the guidance FinCEN continues to issue makes compliance more complicated and nuanced. This is pretty important as it means that, at least in New Jersey, advising on the CTA is legal advice. Unless the reasonable conclusion that the CTA is a complex law requiring legal analysis to apply is contradicted by other state courts, it seems that this will be the starting point in any UPL analysis.

Does Determining Who Files Under the CTA Really Require Legal Training?

If the reasoning behind the NJ Opinion doesn’t make sense to you at first blush, consider just the one question of what might be necessary to determine who may exert “substantial control” over a Reporting Company as that may characterize them as a Beneficial Owner who is required to report. For an S Corporation, someone may have to read the by-laws and shareholders’ agreement and perhaps even consult state corporate law. The powers found for each person under those documents would then have to be evaluated under the guidance provided by FinCEN and the definitions of what constitutes “substantial control” under the CTA. Is that a task someone without legal training would have the knowledge and expertise to evaluate?

Will an Exemption from UPL Be Provided

The NJ Opinion considered whether preparing and filing a New Jersey Inheritance Tax Return is the practice of law and whether a licensed CPA may engage in that activity. It is given the legal nature of the filings. However, because of the unique skills of CPAs and the general public's need for this help, the courts in New Jersey found that as an exception to the rules governing UPL, it was permissible for CPAs to file these returns relating to an estate. In other words, an exception to the UPL rule was provided. This framework is important to understand. If a state court views providing guidance on the CTA as practicing

law, which seems reasonable if not likely based on the complexity of the rules and the NJ Opinion, CPAs and wealth advisers would have to rely on an exemption to guide their clients. Unless an exemption exists, and that would seem to have to be on a state-by-state basis, CPAs, wealth advisers, and perhaps even the companies providing filing services would have to be wary that they were practicing law.

Guardrails For UPL Exemption

Another part of the analysis in the NJ Opinion was the discussion of guardrails, as explained above. When the Court in New Jersey permitted CPAs an exemption from UPL to file New Jersey inheritance tax returns, they required a guardrail. The CPA must notify their client that a review of the inheritance tax return by a lawyer would be advisable. The Court stated that this requirement of notification was "essential for the protection of members of the public who might otherwise be willing to rely entirely on the skill of the accountant to protect their interest."

3-Step UPL Process for CPAs, Wealth Advisers and Others

Generalizing from the analysis under the NJ Opinion might suggest the following sequence:

First, unless there is a contrary view, providing guidance to a consumer on their obligations under the CTA is likely the practice of law. This determination may differ from state to state, but there only seems to be limited guidance so far. And, as illustrated above, the conclusion in the NJ Opinion seems reasonable as illustrated above.

Second, there would then have to be an exemption provided in your state from the application of the UPL rules for a non-lawyer to help clients. You have to be sure that you fit in that exemption. For example, the NJ Opinion provided a limited exemption from UPL for CPAs and enrolled agents, not for wealth advisers. So, if the state you practice in has an exemption for UPL as to the CTA, you have to see who it covers and under what circumstances (see below). If they address this UPL issue and the CTA in time for the initial filing, other states may make broader or lesser exemptions (see the discussion of Iowa below). But timing is a real issue as filings are done by year-end.

Third, when the exemption is provided, guardrails may also be provided. You would have to find out what those are, as they might differ state by state, and be sure you adhere to them. For example, the NJ Opinion limited when CPAs and enrolled Agents can provide help. Other states may have no guardrails or different guardrails.

Consider wealth advisory, CPA, and other firms that operate in many different states. There is little guidance today, perhaps only in New Jersey and Iowa. The rules may differ, perhaps in both material and subtle ways, from state to state. If you are a CPA firm practicing in five

states, you might need a legal analysis of the UPL rules in each of those states. But it might even be more complicated. What if you are a wealth advisory firm practicing in only one state, but you service clients in more than a dozen states who have entities in a score of states? Which state law UPL rules apply to the advice you give?

Details of the NJ Opinion's Exemption

The NJ Opinion is detailed and logical in its presentation (whether or not you agree with the conclusions) and may be the only detailed guidance available on this issue. So, digging a bit deeper into what it said might be helpful. Here is the exact language from the NJ Opinion, as it is important to understand:

“With regard to beneficial owner information reports under the Corporate Transparency Act, the Committee finds that the public needs protection, given the complexity of some matters and the significant civil and criminal penalties for noncompliance with the Act. Complex filings require a lawyer's judgment, training, and expertise - the analysis may be tricky and the risk of penalties, if the analysis is faulty, is greater. While the public needs protection in complex matters, however, most filings will be straightforward. For example, all matters where there is a single owner of a limited liability company will be simple - that single owner is the beneficial owner of the entity for purposes of the Act. In such cases, one does not need to be a lawyer to determine the necessary information to include in a beneficial owner information report.

Corporate entities that have straightforward filings would have a cost savings if they do not need to hire a lawyer to file the report. The remaining factors to consider whether corporate entities are aware of the risks of using a nonlawyer for the services and voluntarily forego a lawyer for this task - are not known since the Act is so new.

Given that most filings are likely to be straightforward, the Committee finds that a licensed CPA can engage in this conduct provided the CPA notifies the client that it may be advisable to consult with a lawyer. The Committee relies on the professionalism of CPAs to ensure that such licensees will recognize when a filing is more complex and it is in the client's interests for a lawyer to be retained in the matter.

While small businesses are now faced with retaining a lawyer or a CPA (or Enrolled Agent) to submit such reports, the businesses with straightforward filings should be able to do the task themselves, with guidance from FinCEN, the U.S. Chamber of Commerce, and other entities. Corporations may file the forms on their own, but if they hire someone to do it on their behalf, it must be a lawyer or a CPA/Enrolled Agent.”

Comments on the NJ Opinion's Exemption

As part of the guardrails for CPAs or enrolled agents providing CTA guidance, the NJ Opinion makes several points:

1. “whether ... entities are aware of the risks of using a nonlawyer for the services and voluntarily forego a lawyer for this task - are not known since the Act is so new.” It may be required, and even if not prudent, for a non-lawyer advising a consumer on the CTA filings to inform their client that there are legal decisions and using a non-lawyer may raise risks, especially since the CTA is so new. That probably should be done in writing to that the non-lawyer can corroborate that this was done. CPA and wealth advisory firms may want to put this into their engagement letter or some other document their clients sign when accepting CTA advice. This is one of the guardrails the NJ Opinion appears to impose.

2. The NJ Opinion states: “where there is a single owner of a limited liability company will be simple - that single owner is the beneficial owner of the entity for purposes of the Act.” This statement proves the point of the NJ Opinion that the CTA is not simple. Even in a single-member LLC, complexity abounds if that member is a trust. Even in a single-member LLC, if a key employee has “substantial control,” that person may be deemed a beneficial owner and may, therefore, have to file. Caution is thus in order for any non-lawyer providing CTA guidance in New Jersey.

3. The NJ Opinion states: “The Committee relies on the professionalism of CPAs to ensure that such licensees will recognize when a filing is more complex and it is in the client's interests for a lawyer to be retained in the matter.” This is a guardrail imposed on non-lawyers, but a difficult one perhaps to delineate. When a CTA filing is “more complex” the CPA or enrolled agent must inform their client that it is in that client’s interest to retain an attorney. It may not be clear whether the CPA must cease assisting the client or inform them that their issue is complex and that legal counsel should be used. However, if the CPA continues to help, and the matter is found to be “complex,” then the CPA may, in addition to any other claims if an issue arises, potentially face the risk of violating the UPL rules. That might also taint the availability of the CPA's malpractice coverage.

4. As stated above, the exemption, with guardrails, provided by the NJ Opinion only applies to CPAs and Enrolled Agents, not wealth advisers or others.

Iowa Weighs In

Iowa has taken a more lenient approach to non-lawyers, who provide their clients guidance with the CTA. The Iowa Chief Justice Christensen signed an order on September 9, 2024, approving amendments to the Iowa Court Rules, including one addressing the CTA. The amendment will permit non-attorneys to assist clients in filing CTA reports. It is unclear from the limited information available so far whether Iowa also determined that advising on

the CTA was the practice of law, and then providing an exemption from that UPL, or perhaps Iowa simply determined that providing guidance on the CTA is not the practice of law. Given the illustration above about the legal documentation that has to be analyzed to determine if filing is required, is that likely? The language used stated: “New rule 37.6 clarifies that it is not the unauthorized practice of law for nonattorneys to assist clients in preparing, filing, or determining whether to file, BOI reports.” So, it is possible that Iowa in fact determined the opposite of New Jersey. “The Iowa State Bar Association’s Business Law Section and other stakeholders recommended a rule change to allow nonattorneys to assist clients to file Corporate Transparency Act Beneficial Ownership Information (BOI) reports with the U.S. Department of the Treasury. New rule 37.6 may thus conclude that it is not the unauthorized practice of law for non-attorneys to assist clients in preparing, filing, or determining whether to file BOI reports.” There do not seem to be any guardrails or limitations on any non-attorney, CPA, wealth advisor, or other adviser providing these services. There appear to be no restrictions on determining whether to file, which will require the analysis of the CTA in all of its complexity, a partnership agreement, or trust instrument for a trust owning an entity or a complex employment agreement. But is this the final language for the new Court Rule?

The above language of new Rule 37.6 seems quite different than the Iowa exception for Rule 37.5 for limited real estate practice. Iowa’s UPL rules for real estate transactions follow a similar approach to the reasoning of New Jersey for the CTA. The Iowa exception to the unauthorized practice of law for preparing real estate contracts is limited and has several guardrails similar to the New Jersey rules above. Is it possible that the new exception for CTA work will have similar guidelines?

“37.5(1) Purpose. The purpose of this rule is to authorize nonlawyers to select, prepare, and complete certain legal documents incident to residential real estate transactions of four units or less. The preparation of documents beyond that authorized by this rule may constitute the unauthorized practice of law.

37.5(2) Scope of practice authorized. Except to the extent authorized by this rule, the selection, preparation, and completion of legal documents in connection with real estate transactions by nonlawyers constitutes the unauthorized practice of law unless the nonlawyer is acting on his or her own behalf as a buyer or seller. a. Upon written request of a buyer or seller, a non lawyer may select, prepare, and complete form documents for use incident to a residential real estate transaction of four units or less. Such documents shall be limited to: (1) Purchase offers or purchase agreements, provided the parties are given written notice that these are binding legal documents and competent legal advice should be sought before signing (2) Groundwater hazard statements; and (3) Declaration of value

forms. Nonlawyers may not charge for preparation of the legal documents authorized by this rule. b. Nonlawyers shall not select, prepare or complete: (1) Deeds; (2) Real estate installment sales contracts; (3) Affidavits of identity or nonidentity; (4) Affidavits of payment of spousal or child support; or (5) Any other documents necessary to correct title problems or deficiencies.”

Will the Iowa approach to CTA work be completely different and much more lenient than Iowa’s approach to real estate transactions? Did Iowa enact such a broad, sweeping determination on the CTA that is so different from Iowa’s real estate approach? Perhaps more guidance will be forthcoming.

What Does this All Mean?

It appears that only two states have weighed in on whether nonlawyers can provide advice on the CTA. It is not clear whether Iowa’s actions above is the final word on their view. Will other states adopt a perspective similar to New Jersey?

For consumers trying to figure out how to comply with the CTA none of this is good news. The complexity and uncertainty obvious from the discussion above may cause many non-lawyers to be very cautious in how much advice they will give or help they will render in assisting their clients in addressing the CTA requirements. As professional advisers assess whether their helping clients could constitute the unauthorized practice of law and whether that might prevent coverage under their professional malpractice policies, that could be worse. This all comes when the deadline for compliance with the CTA is near. And the FinCEN continues to issue new FAQs that complicate and expand filing requirements. While hiring an attorney is an option, not all law firms will address the CTA; some have consciously decided not to do so. Even if you hire an attorney and find one that addresses CTA matters, what availability will they have to help you as year-end approaches? Any availability may evaporate. Further, if your CTA filings require analyzing partnership, operating, or employment agreements, you may need the help of corporate counsel. If trusts own your reporting companies, you may require trusts and estate counsel to address those issues. If this is starting to sound worse than a root canal, you may be right.

If you might still have to file under the CTA, you should treat all of this as a warning to act quickly so you can get the guidance you might need before the deadline.

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