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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
RE: ADVISORY OPINION
MEDICAID PLANNING ACTIVITIES
BY NONLAWYERS

CASE NO. SC14-211

BRIEF OF INTERESTED PARTY
Florida Legal Services, Inc.,
Responding In Qualified Support of the Proposed Advisory Opinion

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STATEMENT OF THE CASE AND FACTS

A. Preliminary Statement

All citations to the Florida Statutes, Code of Federal Regulations, and United States Code are to the 2013 versions unless otherwise noted. The Elder Law Section's Unauthorized Practice of Law ("UPL") Subcommittee will be referred to as the "Elder Law Section." The Standing Committee on Unlicensed Practice of Law will be referred to as "the Standing Committee." The Standing Committee's Proposed Advisory Opinion at issue here is called the "Proposed Advisory Opinion" or "Opinion." The Florida Department of Children and Families will be referred to as "the Department" or "DCF." DCF's ACCESS Florida Program Policy Manual will be referred to as "Policy Manual" or "Manual." The Appendix will be cited as "App." Interested party Florida Legal Services, Inc., will be referred to as "FLS."

B. Facts, Course of Proceedings, and Disposition in Standing Committee

The Elder Law Section petitioned the Standing Committee for an advisory opinion on activities of nonlawyer Medicaid planners pursuant to Rule 10-9.1 of the Rules Regulating the Florida Bar. The petition sought an opinion as to whether certain activities, including but not limited to rendering "legal advice regarding the implementation of Florida law to obtain Medicaid benefits," are the unlicensed practice of law. (Opinion at 2.)

The Standing Committee accepted the request and issued a Proposed Advisory Opinion stating, among other things, that, although "a nonlawyer's preparation of the Medicaid application itself would not constitute the unlicensed practice of law…as it is authorized by federal law," it is the unlicensed practice of law for a nonlawyer to render "legal advice regarding the implementation of Florida law to obtain Medicaid benefits." (Opinion at 19.) The Proposed Advisory Opinion cautions that a nonlawyer may not advise "an individual on which legal strategy or strategies under federal or Florida law are appropriate given the individual's factual circumstances" or "assess[]…facts relevant to a client's situation" and "develop[]... a plan" to minimize the impact of those finances. (Opinion at 13.) In sum, the Proposed Advisory Opinion concludes that it is the unlicensed practice of law for a nonlawyer to advise "an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a…Qualified Income Trust." (Opinion at 19.)

The Standing Committee filed its Proposed Advisory Opinion with this Court pursuant to Rule 10-9.1 of the Rules Regulating the Florida Bar on January 16, 2014.

STATEMENT OF INTEREST

FLS is the state support center for more than twenty (20) local legal services and legal aid programs ("local programs") in Florida, which represent low-income persons free-of-charge in civil matters. Ensuring that Floridians have access to the full array of Medicaid services available under the law is a top priority for FLS. To that end, FLS, and the local programs that FLS supports, advocate for hundreds of Medicaid applicants annually, not only in the courts but also at the Florida Legislature and with state agencies. Neither FLS nor local programs charge fees for representing Medicaid applicants.

FLS has considerable expertise and interest in the intricacies of Medicaid law and its impact on applicants and recipients. In addition to FLS's ongoing legislative and administrative advocacy, examples of state and federal litigation filed by FLS to protect the interests of Medicaid applicants and recipients include *Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. Sep. 20, 2013), o*n remand, K.G. ex rel. Garrido v. Dudek*,--- F.Supp.2d ----, 2013, WL 5930764, (S.D. Fla. 2013) (holding that Florida's exclusion of Medicaid coverage for Applied Behavioral Analysis treatment for minors diagnosed with autism violates federal Medicaid law); *Hernandez v. Medows*, Case No.02-20964 Civ-Gold/Simonton (S.D. Fla. 2003) (settling class action on behalf of two million Florida Medicaid recipients who were denied due process when their prescription drug coverage was

suspended, denied or terminated); *Lott v. Department of Children and Family Servs.*, Case No. 4:02CV253-RH (N.D. Fla. 2002) (settling class action on behalf of 5,400 elderly and disabled individuals terminated from the Medicaid program due to a reduction of the income eligibility standards); *Grant v. Kearney*, Case No. 99-2147 CIV (S.D. Fla. 1999) (settling class action on behalf of low income families who lost cash assistance and Medicaid subsequent to implementation of 1996 federal welfare reform law); *Moreau v. Lewis*, 648 So.2d 124 (Fla. 1995) (invalidating a portion of the General Appropriations Act that required Medicaid recipients to make a $1 copayment for pharmacy services); *Courts v. Agency for Health Care Admin.*, 965 So. 2d 154 (Fla. 1st DCA 2007) (reversing Medicaid fair hearing decision that terminated home health services for an individual with spinal cord injuries); and, *C.F. v. Department of Children and Families*, 934 So. 2d 1 (Fla. 3rd DCA 2005) (reversing Florida's reduction of Medicaid personal care services based on definitions of personal care and medical necessity that conflict with federal Medicaid law). In the course of conducting much of this litigation on behalf of impoverished Floridians, FLS has become very knowledgeable about the information government is required to give to applicants for public assistance.

Given its experience with and expertise in Medicaid, FLS believes that the scope of the Proposed Advisory Opinion undercuts DCF's express federal obligation to provide information to Medicaid applicants about specific policies

relevant to the applicant's situation. For example, the Proposed Advisory Opinion warns that it is the unauthorized practice of law for a nonlawyer to advise "an individual on which legal strategy or strategies under federal or Florida law are appropriate given the individual's factual circumstances" or to "assess[]…facts relevant to a client's situation, [and] apply[] those facts to the laws governing Medicaid..." (Opinion at 13.) Although FLS agrees that DCF should not prepare and execute legal documents related to a Medicaid planning strategy, (Opinion at 18), or make decisions for clients about how they should spend their income and assets, DCF must be allowed to give applicants the information they need to make those decision for themselves. To that end, clarification from this Court is necessary so that the prohibition on the unlicensed practice of law by nonlawyer DCF staff is not extended beyond its appropriate and legal scope. FLS respectfully suggests that the Court approve the Proposed Advisory Opinion with the following specific clarification:

> Nonlawyer DCF staff are government employees responsible for assisting in the application process. DCF staff has an affirmative duty to tell a Medicaid applicant about Medicaid trusts and other eligibility laws and policies governing the structuring of income and assets when relevant to the applicant's facts and financial situation. These activities are not the unlicensed practice of law. They will allow each applicant, and the applicant's attorney, the ability to choose the course of action for qualifying for assistance that best suits the applicant.

FLS is unique in that it has no direct financial stake in the Proposed Advisory Opinion. Nonetheless, if this Court approves the Proposed Advisory Opinion without clarification, low-income Floridians who cannot afford to hire private attorneys will be forced to seek legal assistance from FLS and local programs to obtain routine Medicaid eligibility information that they used to get from their government caseworkers. In a time of diminishing resources for FLS and these programs, there is less capacity to meet such a demand. As a result, the ability for clients to access comprehensive, timely and accurate information about Medicaid eligibility laws from nonattorney government employees is all the more critical.

SUMMARY OF ARGUMENT

FLS wholeheartedly supports the Standing Committee's stance on proprietary Medicaid planners who exploit elderly Medicaid applicants and their families for personal gain. At the same time, FLS urges the Court to ensure that the Standing Committee's laudable attempts to protect this vulnerable population do not threaten the duty of DCF staff to disclose relevant eligibility policies to applicants based on their individual facts and circumstances. Although it is inappropriate for nonlawyer DCF staff to fill out trust forms or other Medicaid planning legal documents for Medicaid applicants or make decisions for applicants about how they should spend their income and assets, DCF should not be prevented from telling Medicaid applicants about the existence of policies that allow applicants to choose the best course of action for themselves. Indeed, in some cases, this may require DCF workers to tell Medicaid applicants that they may, in their discretion, seek legal assistance in order to effectuate a Medicaid planning strategy.

However, the Proposed Advisory Opinion cautions in overly broad strokes that "it constitutes the unlicensed practice of law for a nonlawyer to …advis[e]… an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a…Qualified Income Trust." (Opinion at 19.) Such a sweeping generalization interferes with DCF's affirmative legal duty under

42 C.F.R. § 435.905(a) to tell Medicaid applicants about policies relevant to their unique facts and circumstances, especially when those policies would enable applicants to qualify for benefits. Spending-down, permissible transfers of assets, restructuring of assets and setting up trusts, such as Qualified Income Trusts, are all specified eligibility concepts expressly set out in federal and state law as legitimate policies to establish entitlement to benefits. *See* 42 U.S.C.§§1396p(c)(2) & (d)(4); Fla. Admin. Code Rules 65A-1.712(3)(c) & 65A-1.701(25), (26) & (27). Telling applicants about eligibility provisions set forth in state and federal law governing the Medicaid program is not the unauthorized practice of law. To the contrary, DCF has an affirmative legal duty to tell applicants about these laws and policies when their facts and circumstances dictate, not keep their existence a secret. *Garcia v Department of Children and Families*, 106 So. 3d 961, 964 (Fla. 3d DCA 2013). *See also Gonzalez v. Department of Health and Rehabilitative Servs.*, 558 So. 2d 32 (Fla. 1st DCA 1989); *Buckley v. Department of Health and Rehabilitative Servs*., 516 So. 2d 1008, 1010 (Fla. 1st DCA 1987*); Pond v. Department of Health and Rehabilitative Servs.*, 503 So. 2d 1330, 1332-1333 (Fla. 1st DCA 1987); *Forman v. Department of Children and Families*, 956 So. 2d 477, 480 (Fla. 4th DCA 2007).

ARGUMENT

I. The Proposed Advisory Opinion Overreaches in Seeking to Protect Medicaid Applicants from Exploitive Medicaid Planners by Forbidding DCF from Telling Medicaid Applicants about Relevant Eligibility Laws and Policies that would Assist those Applicants in Establishing Eligibility as is Required by Federal Law

In its stand against unscrupulous Medicaid planners on behalf of vulnerable Floridians, the Standing Committee overextends the constraints it proposes. As discussed *infra* at (I)(A), DCF is required by federal law to tell an applicant about discrete Medicaid law and policy when the applicant's unique facts and circumstances raise a red flag over conditions of eligibility. 42 C.F.R. § 435.905(a). *See also Gonzalez*, 558 So. 2d at 32; *Buckley*, 516 So. 2d at 1010; *Pond*, 503 So. 2d at 1332-1333; *Garcia*, 106 So. 3d at 964; *Forman*, 956 So. 2d at 480.

However, contrary to this mandate, the Proposed Advisory Opinion would prevent DCF staff from telling an otherwise qualified Medicaid applicant about "spending down," "restructuring assets," and "Qualified Income Trusts," even when uniquely relevant to the applicant's situation. This goes too far. "Spending down," "restructuring assets," and "Qualified Income Trusts" are all eligibility concepts explicitly set out in federal Medicaid law and policy and specified by such law as legitimate actions or plans to establish entitlement to benefits. They are

not legal ploys. DCF has a legal duty to affirmatively disclose information about them when a red flag is raised in individual cases, not to suppress their existence.

A. Federal Medicaid Law Imposes an Affirmative Duty on DCF to Tell an Applicant about Policies Relevant to the Applicant's Peculiar Facts and Circumstances, such as "Spending Down," "Restructuring Assets," and "Qualified Income Trusts"

Federal law governing the administration of the Medicaid program requires states to tell applicants about policies relevant to their peculiar situations. To fully comply with this mandate, not only must the state agency give applicants relevant policy information in writing, it must also verbally communicate policy that is germane to the applicant's particular situation. 42 C.F.R. § 435.905(a) provides:

> **(a)** The agency must furnish the following information in electronic and paper formats…and orally as appropriate, to all [Medicaid] applicants and to all other individuals who request it:
> **(1)** The eligibility requirements.
> **(2)** Available Medicaid services.
> **(3)** The rights and responsibilities of applicants and beneficiaries…

Appellate courts in Florida interpreting a virtually identical federal mandate all agree that DCF has a duty to tell Medicaid applicants about distinct policies that govern income and resources, such as Qualified Income Trusts, when appropriate to an applicant's unique situation.

For example, in *Forman*, Sarah Leftow, the daughter of 90-year old Sylvia Forman, applied for Medicaid Institutional Care Program ("ICP") benefits for her mother. *Forman*, 956 So. 2d at 478-480. Although DCF said it was giving Ms.

Leftow "all the papers and documents…required for Medicaid eligibility," DCF did not tell Ms. Leftow about its policy concerning setting up an income trust account for her mother's $1,904 pension check. *Id*. at 478. It was only when Ms. Leftow received a denial notice from DCF that she learned that setting up an income trust account was a prerequisite to her mother's eligibility for ICP. *Id.* Although Ms. Forman's daughter did not properly establish an income trust account, the court notes that, had DCF informed her of this requirement, she would have established one. *Id.* Because DCF had an obligation to disclose its income trust policy under, *inter alia*, 45 C.F.R. § 206.10(a)(2)(i),[1] the Fourth District Court of Appeal reverses the denial of benefits. *Forman*, 956 So. 2d at 479-480.

[1] The federal regulation interpreted by the *Forman* court, 45 C.F.R. § 206.10, is nearly identical to the applicable Medicaid regulation at 42 C.F.R. § 435.905(a). *Compare*, 45 C.F.R. § 206.10 (a) (2)(i):

> Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility….and the rights and responsibilities of applicants…

with 42 C.F.R. § 435.905(a):

> The agency must furnish the following information in electronic and paper formats….and orally as appropriate, to all applicants…(1) the eligibility requirements; (2) available Medicaid services; and (3) the rights and responsibilities of applicants…

Similarly, in *Pond*, 503 So. 2d at 1330, Ms. Pond informed the Department that friends were giving her money for rent when she applied for assistance. Under Department policy, if an applicant is given money by a friend to pay for rent, that money is considered income. On the other hand, DCF policy provides that, if a friend pays the applicant's rent directly to the landlord, that money is considered a vendor payment and does not count ("vendor payment policy"). *Id*. at 1332. Although the Department's vendor payment policy was relevant to Ms. Pond's situation, the Department deliberately withheld information about vendor payments from her. The Department explained that its practice was to keep silent about policies that may enable applicants to qualify. According to the Department, the only exception to this practice was if the applicant "directly questioned" about a relevant policy. *Id*. at 1333. The First District Court of Appeal in *Pond* finds that, when the Department is aware of policy relevant to that applicant's unique circumstances, the Department has an affirmative duty under 45 C.F.R. § 206.10(a)(2)(i) to tell them about those policies.[2] *Id*. at 1332-1333. In such cases, federal law prohibits the Department from "even passively… allow[ing] activity leading to ineligibility." *Id*. at 1333. *See also Gonzalez*, 558 So. 2d at 32.

[2] Although the public benefit at issue in *Pond* is cash assistance, not Medicaid, the wording of the federal obligation at issue in that case is, for all intents and purposes, the same as the language used for the Medicaid obligation. *See supra* at n. 1.

The Third District Court of Appeal also agrees that DCF has an affirmative duty to tell Medicaid applicants about distinct eligibility options, including the availability of Qualified Income Trusts ("QIT"), when relevant to their financial situation. *Garcia,* 106 So. 3d at 964. In *Garcia*, 92-year old Sergio Garcia was denied Medicaid nursing home coverage for almost an entire year after DCF failed to tell him that he needed to create a QIT for his teacher pension. Mr. Garcia appealed and, as in *Forman,* 956 So. 2d at 477, stated that he would have created a QIT had he known he needed one. *Garcia,* 106 So. 3d at 964. Because DCF "breached its legal obligation" to tell Mr. Garcia about QITs, the court reverses DCF's final order. *Id.*

Spending down, restructuring of assets, and Qualified Medicaid Income Trusts are all specified eligibility concepts expressly set out in federal and state law and policy as legitimate policies to establish entitlement to benefits, not inventions by lawyers to artificially manufacture eligibility. *See* 42 U.S.C. 1396p(c)(2) & 1396p(d)(4) (exempting from Medicaid eligibility penalty periods certain transfers of a home to specified relatives or transfers of other assets into specified types of trusts, including Qualified Income Trusts). *See also* Fla. Admin. Code Rules 65A-1.701(25), (26) & (27) (defining, respectively, "Qualified Disabled Trust," "Qualified Income Trust" and "Qualified Pooled Trust for the Disabled") and Rule 65A- 1.712 (entitled "SSI-Related Medicaid Resource Eligibility Criteria")(setting

out transfer of asset policies based on federal Medicaid law). Indeed, DCF even includes an entire section devoted exclusively to allowable Medicaid transfers of assets in its Manual. Department of Children and Families, ACCESS Florida Program Policy Manual § 1640.0609.05 at http://www.dcf.state.fl.us/programs/access/docs/esspolicymanual/1630.pdf (last visited Jan.29, 2014). Similarly, the Department has a myriad of express policies governing use of Qualified Income Trusts by applicants in nursing homes who are attempting to enroll in the Medicaid program. Department of Children and Families, ACCESS Florida Program Policy Manual, § 1840.0110 at http://www.dcf.state.fl.us/programs/access/docs/esspolicymanual/1830.pdf (last visited Jan. 29, 2014).[3] There is no reason why DCF should not be allowed to inform an applicant about these laws and policies. Indeed, by law, that is exactly what DCF is required to do.[4]

[3] This policy states that, "If an individual has income above the [institutional care program] ICP income limit, they may become eligible for institutional care…if they set up and fund a qualified income trust." *Id.* Under this policy, a DCF lawyer must review and approve all such trusts. *Id.* *See also* Department of Children and Families, Qualified Income Trust Information Sheet at http://www.dcf.state.fl.us/programs/access/docs/qualified_income_trust_factsheet.pdf (last visited Jan. 29, 2014).

[4] Informing applicants about their policy choices early on helps them avoid the havoc that ignorance wreaked on Ms. Forman and Mr. Garcia in *Forman*, 956 So. 2d at 477 and *Garcia*, 106 So. 3d at 961, respectively. Information from DCF at an early stage in the application process also encourages applicants, when appropriate,

The Proposed Advisory Opinion recognizes the obligation of DCF staff under 42 C.F.R. § 435.908[5] to "assist [Medicaid applicants] in the application process"[6] (Opinion at n. 1, 4) by "prepar[ing] []…the application" and "gather[ing] information about an individual's assets to complete the application" (Opinion at n.4). But assisting with the application process by gathering information and helping fill out a Medicaid application falls short of DCF's obligation to Medicaid applicants. To the contrary, 42 C.F.R § 435.905(a) , which is not mentioned in the Proposed Advisory Opinion, imposes an affirmative duty on DCF to go beyond filling in application blanks. DCF must also tell applicants about policies that would enable them to qualify for benefits. Yet, the Proposed Advisory Opinion would prohibit DCF nonlawyers from going any further than completion of spaces on an application form. By stating that the unauthorized practice of law includes "advising[7] an individual on the appropriate legal strategies

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to seek professional advice from legal counsel in order to implement the Medicaid planning strategies best for them.

[5] 42 C.F.R. § 435.908, entitled "Assistance with application and renewal," instructs state agencies to "provide assistance to any individual seeking help with the application or renewal process…"

[6] The Proposed Advisory Opinion at n. 4 states that "to the extent a Federal or State statute or regulation allows a government [nonlawyer] employee to assist in the application process, the conduct is authorized and not unlicensed."

[7] The Proposed Advisory Opinion does not define "advise," the term it uses in framing the parameters of its prohibition on Medicaid planning activities by

available for spending down and restructuring assets and the need for a…Qualified Income Trust" (Opinion at 19.), the Proposed Advisory Opinion inhibits DCF nonlawyers from doing the very thing the law compels them to do. FLS believes that clarification from this Court is necessary so that the prohibition on the unlicensed practice of law at issue in this case is not extended beyond its appropriate and legal scope.

Fear of committing UPL has already had a chilling effect on the free sharing of eligibility information between DCF and Medicaid applicants. On July 1, 2013, DCF issued a memorandum cautioning staff not to "advise customers or their representatives, either verbally or in writing, about actions to take in utilizing their resources and income." Department of Children and Families, *Unlicensed Practice of Law*, Transmittal No. 1-13-07-009, July 1, 2013. (App.1.) This transmittal states that DCF staff are not to "tell[]…a customer how to spend down accumulated assets to qualify for Medicaid." *Id.*[8] While FLS agrees that DCF should not direct Medicaid applicants to take specific action or make decisions for them about how they should spend their income and assets, DCF should not be

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nonlawyers. However, the plain meaning of "advise" is so broad that it would encompass telling applicants about their options for becoming Medicaid eligible. *See* American Heritage Dictionary 82 (1985 ed.) (defining "advise" as including to "inform" or "notify").

[8] Telling Medicaid applicants about their choices under state and federal Medicaid law for disposing of assets is appropriate. *See* discussion *supra*.

prevented from telling applicants about the existence of any of the myriad of policies for disposing of assets. Yet, as stated in the transmittal, DCF's admonition would prevent staff from telling Medicaid applicants about legitimate DCF policies governing excluded resources, such as the burial expense exclusion. *See* Fla. Admin. Code Rule 65A- 1.712 (2) (d) & Department of Children and Families, ACCESS Florida Program Policy Manual, § 1640.0514 (stating that "An individual… may set aside funds of up to $2,500 each for burial expenses…".[9] at http://www.dcf.state.fl.us/programs/access/docs/esspolicymanual/1630.pdf (last visited Jan. 29, 2014). This violates the directive in *Pond* that DCF "eschew its wall of silence" and not "even passively allow…activity leading to ineligibility." *Pond*, 503. So. 2d at 1333.

FLS wants only to ensure that Medicaid applicants are informed about policies that are relevant to their unique situations. Unfortunately, it is not at all certain that this information would be freely communicated to affected applicants

[9] Likewise, under the terms of the Proposed Advisory Opinion, a DCF worker who learns that an applicant's resources exceeds the eligibility limit and advises the applicant that they can designate up to $2,500 of their resources for a burial fund may be engaged in the "unauthorized practice of law" *(e.g.,* the worker would be "assessing the facts relevant to the client's situation" and "applying those facts to the laws governing Medicaid," (Opinion at 13), and advising the applicant "…on the appropriate legal strategies available for spending down…" (Opinion at 19)). Whether the exclusion for "preparation of the Medicaid application" set out in the Proposed Advisory Opinion on page 19 and in footnote 4 is intended to encompass these activities remains unclear. In any case, under Medicaid law, the Proposed Advisory Opinion must not interfere with this type of communication between a DCF worker and a Medicaid applicant.

under the broad strokes of the Proposed Advisory Opinion. This is improper.[10] Not only would it be wrong under federal law for DCF to keep policies that are uniquely relevant to an applicant's eligibility secret, DCF has an affirmative legal duty to divulge those policies when relevant to an applicant's situation.[11]

[10] *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980), states that the "single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical or irresponsible representation." It is important to note that DCF employees perform their duties pursuant to a comprehensive federal and state regulatory framework which provides legal protections for Medicaid applicants improperly denied benefits due to agency errors. See 42 C.F.R. § 431.200, *et seq.*; Fla. Admin. Rules 65-2.042 & 65-2.044 (providing the right to an administrative hearing, including the opportunity for judicial review, if an applicant believes their application has been incorrectly denied).

[11] As noted *supra* at p.8, FLS respectfully suggests that the Court clarify the Proposed Advisory Opinion as follows:

> Nonlawyer DCF staff are government employees responsible for assisting in the application process. DCF staff has an affirmative duty to tell a Medicaid applicant about Medicaid trusts and other eligibility laws and policies governing the structuring of income and assets when relevant to the applicant's facts and financial situation. These activities are not the unlicensed practice of law. They will allow each applicant, and the applicant's attorney, the ability to choose the course of action for qualifying for assistance that best suits the applicant.

CONCLUSION

DCF has an affirmative duty to disclose information to Medicaid applicants when that information is relevant to their individual facts and circumstances. *Forman,* 956 So. 2d at 479-480. This duty even requires DCF to tell applicants about specific policies that allow those applicants to structure their income and assets so that they will qualify for Medicaid. *Id.* at 480. Although the Proposed Advisory Opinion recognizes the obligation of DCF staff under 42 C.F.R. § 435.908 to "assist [Medicaid applicants] in the application process," it ignores the requirements at 42 C.F.R. § 435.905 when it warns DCF nonlawyers against "advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal services contract or Qualified Income Trust." (Opinion at 13.) Accordingly, while FLS supports the Standing Committee's attempt to curtail exploitive Medicaid planners who prey on elderly Medicaid applicants and persons with disabilities, FLS respectfully suggests that the Court approve the Proposed Advisory Opinion with the following clarification:

> Nonlawyer DCF staff are government employees responsible for assisting in the application process. DCF staff has an affirmative duty to tell a Medicaid applicant about Medicaid trusts and other eligibility laws and policies governing the structuring of income and assets when relevant to the applicant's facts and financial situation. These activities are not the unlicensed practice of law. They will allow each applicant, and the applicant's attorney, the ability to choose the course of action for qualifying for assistance that best suits the applicant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that this brief is in Time New Roman 14-point font in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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