

**IN THE SUPREME COURT OF FLORIDA**  
**CASE NO. SC 14-211**

THE FLORIDA BAR

RE: ADVISORY OPINION  
MEDICAID PLANNING ACTIVITIES  
BY NONLAWYERS

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**BRIEF IN OPPOSITION TO THE  
PROPOSED ADVISORY OPINION**

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## **INTRODUCTION**

Pursuant to rule 10-9.1(g)(3) of the Rules Regulating The Florida Bar, William D. Burns, by and through undersigned counsel, files this objection to the Proposed Advisory Opinion regarding certain activities of nonlawyer Medicaid Planners. William D. Burns (“Burns”), as more fully described herein, holds a securities license and an insurance license. As a part of his business, Burns provides Medicaid planning services for his clients.

## **STATEMENT OF THE CASE**

The Unauthorized Practice of Law (“UPL”) Subcommittee of the Elder Law Section of The Florida Bar (“Elder Law Section”) petitioned the Standing Committee on the Unauthorized Practice of Law of The Florida Bar (“Standing Committee on UPL”) to seek an Advisory Opinion from this Court regarding certain activities of nonlawyer Medicaid planners. The procedural history of that process is accurately described in the Proposed Advisory Opinion.

In this brief, Burns does not challenge the basic contentions argued in the POA that the drafting of trusts and contracts are the practice of law. Burns does not dispute the long standing rules concerning the appropriate relationship between a lawyer and a nonlawyer. The remaining issue presented in the POA is the focus of

Burns' concern. The POA, in addressing the definition of legal advice, fails to take into consideration the participation of other licensed and regulated professionals in Medicaid planning, thus the proposed definition improperly restricts and interferes with the duties and responsibility of other professions and improperly infringes upon the rights of the public to utilize the services of nonlawyer professionals. The PAO, contrary to its stated goal of clarifying the definition of the unauthorized practice of law, adds confusion to that determination.

### **STATEMENT OF THE FACTS**

#### A. Summary of Evidence

The Elder Law Section of The Florida Bar petitioned the Standing Committee on the Unauthorized Practice of Law of The Florida Bar ("Standing Committee") for an advisory opinion on certain activities of nonlawyer Medicaid planners. The petition alleged that the services that are provided by nonattorney planners include: 1) The drafting of personal service contracts. 2) The preparation and execution of qualified income trusts. 3) Legal advice regarding the implementation of Florida law to obtain Medicaid benefits. (TAB A)<sup>1</sup>

The PAO acknowledges that the Standing Committee on UPL previously addressed this issue and provided direction on the subject in a letter dated May 13, 2009. (TAB B). The 2009 letter reported that the committee, based upon existing

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<sup>1</sup> References will be to the PAO and to the tabs attached to the PAO, following the format utilized in the PAO.

case law, had determined that “the following activities would constitute the unauthorized practice of law: establishing irrevocable trusts, establishing qualified income trusts, and hiring an attorney to review, prepare, or modify documents for customers if payment to the attorney was through the company” that was providing nonlawyer Medicaid planning services. The Standing Committee further advised that “[t]he following activities would be determined on a case-by-case basis: restructuring assets, counseling customers on the best way to get Medicaid approval, and advertising as an ‘elder counselor’.” *Id.*

Pursuant to Rule 10-9.1(f) of the Rules Regulating The Florida Bar, public notice of the hearing was provided on The Florida Bar’s website, in *The Florida Bar News*, and in the *Tampa Bay Times*. On February 22, 2013, the Standing Committee held a public hearing.

Testifying on behalf of the petitioner were Twyla Sketchley, Chair of the Elder Law Section of The Florida Bar, and John Frazier, Chair of the UPL Subcommittee of the Elder Law Section. In addition to the two representatives of the Elder Law Section, live testimony was received from eight (8) people. Four (4) of the witnesses were lawyers. The Committee also received written testimony, primarily from lawyers who are members of the Elder Law Section.

Sketchley, testifying in her capacity as the chair of the Elder Law Section, represented to the Committee that

Other than attorneys who do Medicaid planning, the entire Medicaid planning industry is unregulated in every way. There is no licensing requirements [sic]. There is no education requirements [sic]. And there is no governmental entity or private entity through which you can file complaints against the perpetrators in this industry, other than to file unlicensed practice of law complaints.

(TAB D, p. 11, ll. 2 – 10). Sketchley then characterized nonlawyer Medicaid planners “because of lack of any and all regulation whatsoever, [as] everything from individuals who have lost their securities licenses for fraudulent practices, to felons charged with defrauding the elderly. These are the people that get to give Medicaid advice.” (TAB D, p. 11, ll. 13 – 18). She further testified, “They’re not a regulated industry, so they’re not doing it for altruistic reasons.” (TAB D, p. 17, l. 22 – p. 18, l. 3).

Sketchley testified that “there are few complaints in this area because the population that would complain cannot do so.” (TAB D, p. 12, ll. 22 – 24). She uses the term “predator” repeatedly in her testimony when referring to nonlawyer Medicaid planners. (TAB D, p. 13) Acknowledging that “[t]here are some good nonattorney Medicaid planners,” Sketchley requested the Standing Committee issue “clear guidelines on what the practice of law is.” (TAB D, p. 14, ll. 16 – 21). She summarized her request to the Standing Committee as follows:

If you don’t issue an advisory opinion that states Medicaid planning and the advice surrounding the placement of assets is the practice of law, you’re holding the public to a dramatically different standard than you’re holding the dues paying mandatory members of The Florida Bar.

(TAB D, p. 17, ll. 6 – 11).

John Frazier, the chair of the UPL Subcommittee of the Elder Law Section, testified that the Standing Committee’s 2009 letter (TAB A) was “a great starting point,” but that he felt nonattorney Medicaid planners were not aware of the letter. He suggested the letter did not have “the public recognition that an advisory opinion would have.” Further, he did not believe the “letter is comprehensive enough to address all the issues that are involved in nonattorney Medicaid planning.” (TAB D, p. 25, ll. 5 – 13). Frazier offered verbal reports of the various nonattorney Medicaid planners who are indicative of the problem in this field. He cited “a life insurance agent who was convicted of two felonies, lost his license and now he’s a Medicaid planner;” “another individual, it’s my understanding, who had his securities license suspended [and now] is a Medicaid planner;” “a disbarred lawyer” who then began Medicaid planning; and “a report of an attorney who has established a nonattorney Medicaid planning company.” (TAB D, p. 26, l. 17 – p. 27, l. 4.)

Both the oral and written testimony contain references to apparent abuses that have occurred in the field of Medicaid planning. The testimony addressed examples of nonlawyers preparing legal documents, (TABs D, F, I, M, O, and Q) improper affiliation with attorneys, (TABs D, I, and J) improper advertising, (TABs D, H, M, O, and P) referral to nonlawyer/paralegal services, (TABs A and

J) and excessive fees and kick-backs. (TABs D, H, and M) Reports of nonlawyers providing legal advice were provided. (TABs D, F, K, O, and Q).

The testimony included two examples of lawyers who were apparently abusing the Medicaid planning process. (TAB G and O) In the first example (TAB G), no name was provided. In the second examples (TAB O), the alleged wrongdoer was identified as Linda Littlefield, who was criminally charged and disbarred. She then started a nonlawyer Medicaid planning business.

The former chair of the Elder Law Section, Leonard E. Mondschien, provided written testimony (TAB M) in which he stated:

7. All non-attorney Medicaid Planners have the following in common: They have no licence [sic] of any kind, they have no rules regulating their conduct, can advertise themselves as experts to the public, they can engage in high pressure unsolicited sales practices and scare tactics, carry no malpractice or liability insurance, never have to pass a bar exam or certification exam, have no requirement to have any education or training, and owe absolutely no duty of loyalty or ethical behavior to those who pay them fees.

#### B. Standing Committee on UPL Findings

The PAO presented the findings of the Standing Committee on UPL under separate headings. The Standing Committee found that the drafting of personal services contracts, the preparation and execution of qualified income trusts, and the rendering of legal advice regarding the implementation of Florida law to obtain Medicaid benefits, and attorney involvement with a nonlawyer Medicaid planner

where an independent attorney/client relationship does not exist between the client and the lawyer are each activities that constitute the unlicensed practice of law.

At page 9 of the PAO, the Committee interprets the opinion rendered in *In re: The Joint Petition of The Florida Bar and Raymond James and Associates, Inc.*, 215 So. 2d 613 (Fla. 1968). The PAO states “[t]he holding did not allow for the gathering of any information, it allowed for the gathering of facts about a customer’s assets, an activity a licensed securities broker would need to be able to perform to conduct the business of selling securities.” ( PAO, p. 9) The PAO also acknowledges the holding in *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1993), that “a life insurance agent would have to be able to gather facts about a person’s assets to perform” the business of selling “life insurance that will fund a living trust and may offer advice on funding the trust from a financial standpoint.” *Id.*

While the PAO acknowledges that “the information a nonlawyer may gather is limited to information about a customer’s assets when such information is necessary for the nonlawyer to conduct business for which they are licensed and regulated,” (PAO, p. 9) the conclusion of the PAO is that “advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract or Qualified Income Trust” is the unauthorized practice of law. (PAO, p. 19)

C. The Petitioner and the Regulatory Environment of Nonlawyer Regulated Professionals.

This brief is submitted by William D. Burns, who has held a Series 7 Securities license for twenty-five (25) years. He also holds a 0214 Life incl. Variable Annuity, 0215 Life incl. Variable Annuity & Health, a 0216 Life, a 0218 Life & Health and a 0240 Health license. He, along with all others holding these licenses, is regulated by the Office of Insurance Regulation of the Florida Department of Financial Services. His insurance licenses fall under the provisions of Chapter 624, Florida Statutes, and Chapter 690, Florida Administrative Code.

Securities brokers in Florida must be members of and regulated by the Financial Industry Regulatory Authority (hereafter “FINRA”). FINRA has promulgated extensive regulations governing the securities industry. In addition to regulation by FINRA, a securities broker in Florida falls under the jurisdiction of the Florida Department of Banking and Finance. Chapter 517, Florida Statutes, and Florida Administrative Code Rule 69W-1000.001. A threshold qualification for application with FINRA is an affiliation with a broker/dealer firm. Broker/dealers are required to provide supervision of their affiliated persons (the term for stock brokers who hold their licenses under that firm). Such supervision includes the designation of a chief compliance officer who establishes policies and procedures. The firm reviews the transactions and practices of its affiliated persons. FINRA Rule 3110. One of the important functions of such oversight is to ensure

compliance with the “know your customer” rule, FINRA Rule 2090, that requires a stockbroker “[u]se reasonable diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted . . .” The information that is required to be obtained includes the investor’s financial status, the investor’s tax status, the investor’s planning objectives, and other all other information reasonably needed by such financial representative in order to make suitable financial and/or a securities recommendation to the client.

Stockbrokers and insurance agents must pass licensing exams and then are subject to ongoing continuing education requirements. A Series 7 Securities licensed stockbroker must complete an annual continuing education program known as “Firm Element” and must also complete a “Regulatory Element” continuing education program every three years, including a comprehensive, proctored exam, to maintain his license. FINRA Rule 1250. The average Florida licensed insurance agent must complete 28 hours of continuing education every 2 years, including a mandatory senior suitability component.

To maintain a Securities license, the licensed individual must abide by the rules of the Financial Industry Regulatory Authority. To maintain a state insurance license, a licensed individual must comply with the regulations of the Florida Department of Financial Services. A Series 7 Securities licensed stock broker must

submit all forms of advertising, including correspondence that is sent to more than 25 people, to their broker/dealer for pre-approval. FINRA Rule 2210.

Non-attorney Medicaid Planners who possess various nonlawyer professional licenses are in fact subject to having complaints filed against them with the relevant regulatory authority. *See, e.g.* Chapter 8000, Investigations and Sanctions, FINRA Rules.

Upon knowledge and belief, most regulated professionals are required by the firms with which they are affiliated to carry errors and omissions insurance. For instance, most broker/dealers required Series 7 Securities licensed stockbroker to carry minimum coverage of at least \$3,000,000.00.

With regard to ethical standards, Chapter 2000, Duties and Conflicts, FINRA Rules, codifies an extensive set of conduct rules, including duties to the customer, communications with the public, and the standards for transactions involving particular financial products.

### **SUMMARY OF ARGUMENT**

The Standing Committee on UPL's petition to adopt its Proposed Advisory Opinion should be denied. The evidence presented to the Standing Committee failed to demonstrate a need for action on this subject. The existing law, as summarized in the 2009 letter from the Standing Committee on UPL, provides clear guidance with regard to specific conduct that constitutes the unauthorized

practice of law. There is no disagreement on the specific activities that letter declared to be the practice of law. The difficulty arises in determining when legal advice becomes the practice of law. The 2009 letter further advised that “restructuring assets, counseling customers on the best way to get Medicaid approval, and advertising as an ‘elder counselor’” would be considered on a case-by-case basis. Nothing in the Proposed Advisory Opinion provides additional guidance to that consideration. By assuming that “all nonlawyer Medicaid planners” are unlicensed and unregulated, the Proposed Advisory Opinion fails to take into consideration the various licensed, regulated professionals engaged in Medicaid planning. Further, the Proposed Advisory Opinion rejects the applicability of the cases that define what is and is not the unauthorized practice of law for stockbrokers and insurance agents, thus injecting confusion rather than clarity to this problem.

Finally, the use of several extreme examples to characterize nonlawyer Medicaid planners is highly inappropriate. Presenting these isolated cases as representative of the various people who provide these services is both a disservice to the public and to the professionals who provide Medicaid planning. The record is clear that there are very few complaints of nonlawyer Medicaid planners engaging in the unauthorized practice of law. Thus, there is no basis for the adoption of the Proposed Advisory Opinion.

## ARGUMENT

Issues Not in Dispute. Burns respectfully contends that the PAO does not achieve the ultimate goal of protecting the public. The recommendations regarding the drafting and execution of personal service contracts, qualified income trusts, and other legal documents are clearly the practice of law. This Court has spoken on those issues in various cases. *See, e.g. The Florida Bar v. Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1993) (hereafter “*Living Trust case*”); *In re: The Joint Petition of The Florida Bar and Raymond, James and Associates, Inc.*, 215 So. 2d 613 (Fla. 1968) (hereafter “*Raymond James case*”); *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997) (hereafter “*American Senior Citizens Alliance*”); and, *State ex rel. The Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963); and *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978).

The law is equally clear regarding the involvement of lawyers in the business of a nonlawyer Medicaid planner. Under both the *Living Trust* and *American Senior Citizens Alliance* cases a lawyer who participates with a nonlawyer Medicaid planning business must establish an independent relationship with the client. Payment to the lawyer must be made directly to the lawyer by the client. R. Regulating Fla. Bar 4—1.8(f). The lawyer must make the determination that the particular document or Medicaid planning strategy is appropriate for the

client in light of the client's particular factual circumstances. *See* R. Regulating Fla. Bar 4—1.2.

Burns fully agrees that our elderly population is vulnerable to unscrupulous or incompetent Medicaid planners and a host of other unsavory people in our society who take advantage of the elderly, regardless of the services being provided. One of the examples given repeatedly was of the disbarred lawyer (PAO, pp. 17—18) who opened a Medicaid planning company. Before that person was disbarred, she was taking advantage of people as a licensed lawyer. Sadly, we see far too many lawyers who abuse their trust when ostensibly serving our older population. Burns agrees that these abuses exist. However, he believes that the PAO will do nothing to address the abuses described in the testimony provided to the Standing Committee, rather if approved it will create confusion and uncertainty, as described below.

Regulated Medicaid Planners. There is no dispute that no Florida law requires Medicaid planners to be licensed. In part that state of affairs exists because federal regulations mandate that a Medicaid applicant be permitted to have “an individual or individuals of the applicant's choice to accompany, assist, and represent the applicant in the application process or a redetermination of eligibility.” This federal requirement complicates the task of crafting regulations. While this Court cannot create such a regulation, in addressing the UPL issues there must be

consideration given to the role of other regulated professions. This Court has laid a solid foundation such interdisciplinary guidelines in *Raymond James, Living Trust, Brumbaugh*, and *Sperry, supra*.

The *Raymond James* opinion is a powerful example of a cooperative approach to establishing rules regarding what are clearly overlap roles of the various regulated professionals and the regulatory authorities that supervise those professionals. It clearly acknowledges that stockbrokers are regulated. In fact, the regulation of stock brokers is rather extensive. However, in considering the perceived problem of UPL by Medicaid planners, there was no effort to obtain the input and cooperation of the other regulated professionals involved in Medicaid planning. Rather than view *Raymond James* as a model for moving forward, it was rejected as not applicable to Medicaid planning.

As more fully described above, Burns is licensed by the State of Florida as a Life, Health and Annuity agent. He, along with all others holding these licenses, is regulated by the Office of Insurance Regulation of the Florida Department of Financial Services. As a licensed stockbroker, he is subject to the extensive regulation outlined above.

In addition to omitting discussion of the role of stockbrokers and insurance agents, the extent to which other regulated nonlawyer professionals may provide assistance with Medicaid planning was not addressed in the evidence provided to

the Standing Committee. There was no discussion of certified public accountants. Testimony was received from Amy O'Rourke, who stated she is a certified care manager. She was asked how many people with her qualifications are practicing in Florida, but she did not provide an answer to the question. (TAB D, p. 83, ll. 6 – 24). She was not asked who provided her certification or whether she is regulated by the state. She was not asked whether continuing education is required to maintain her certification.

Burns respectfully urges that before any clarification of the rules regulating UPL issues relevant to Medicaid planning should be considered, there must be a more complete investigation of the qualifications of those who provide such services. Further, Burns contends that Medicaid planning is not a purely legal problem, but instead is a complex financial discipline that requires legal assistance to execute an appropriate plan. In addition to financial and legal considerations, tax issues are an inherent component. There are appropriate financial planning strategies available for spending down and restructuring assets that require the use of insurance related products. Burns believes thoughtful nonlawyer Medicaid planners will recommend that their clients seek assistance from both legal and tax experts. Conversely, the thoughtful lawyer will refer the client those persons qualified to explain and recommend suitable financial instruments to achieve Medicaid planning goals.

**I. THE PROPOSED ADVISORY OPINION IS LARGELY BASED UPON CONCLUSIONS AND ASSUMPTIONS UNSUPPORTED BY THE RECORD**

The PAO, and the testimony upon which it is based, makes assumptions and draws conclusions that are not based upon a proper factual foundation. Undisputed testimony indicates that there are very few UPL complaints filed regarding Medicaid planning services. (TAB D, p. 11, ll. 19 – 21) While it was suggested that the lack of complaints is due to an inability of this population to complain and/or fear (TAB D, p. 11, l. 22 – p. 12 l. 8), the record is devoid of a single lay witness who came forward to describe such circumstances. This contention was unsupported by any nonlawyer testimony or documentary evidence. The testimony of Jeff Brown (TAB D, pp. 86 – 99) is consistent with common experience and common sense. Typically one or more family members, not the elderly Medicaid applicant, come to the Medicaid planner seeking assistance. (TAB D, p. 90, ll. 16 – 22). Medicaid planning affects the entire family. Thus, the Medicaid planner typically works with the Medicaid applicant’s legal representative, such as the spouse or adult children. Because the consequences of poor planning or abuse will impact other family members, such affected parties will be motivated to complain. Two witnesses, Ms. Norton (TAB d, p. 19) and Ms. Crabbe (TAB D, p. 39) described apparent unhappy associations with Medicaid planners, but did not state

they were in fear or unable to complain. There is no support in the record to demonstrate that the lack of complaints is due to an inability to tender such complaints.

While the PAO, and some of the testimony, alluded to the participation of professionals other than lawyers in Medicaid planning, the conclusions seem to reject the role of such professionals. For instance, the *Living Trust* case was discussed, but the PAO finds that “the limited exception is not applicable here” relevant to the gathering of necessary information. (PAO, p. 8) In the following paragraph the PAO also rejects the applicability of the *Raymond James* case and misstates the holding in that case, “The holding did not allow for the gathering of information, it allowed for the gathering of facts about a customer’s assets, an activity a licensed securities broker would need to be able to perform to conduct the business of selling securities.” Burns is confused regarding the distinction of “gathering information” and “gathering facts.” But more importantly, in rejecting *Raymond James* as applicable, the PAO creates uncertainty rather than clarity to this problem.

In discussing the *Living Trust* and *Raymond James* cases, the PAO seems to reject the notion that securities brokers and licensed insurance agents are engaged in Medicaid planning. The two cases are distinguished and found to be not applicable. (PAO, p. 10). The underlying assumption, repeated several times in

both the PAO and the testimony, is that nonlawyer Medicaid planners are unregulated. “The testimony revealed that nonlawyer Medicaid planners are essentially unregulated, as there is no licensing, education, or advertising requirements.” (PAO, p. 10; TAB D, p. 11, ll. 2—10, TAB J; TAB M). Just as lawyers who engage in Medicaid planning have no separate license to do so, stockbrokers and insurance agents are licensed and regulated, but are not separately licensed to do Medicaid planning. There was no testimony or documentary evidence regarding the other various professionals who may participate in Medicaid planning. In addition to stockbrokers and insurance agents, it is likely that certified public accountants are also engaged in this work. The wholesale characterization of nonlawyer Medicaid planners as totally unregulated ignores the fact that there are licensed, regulated persons engaged in this work. The total lack of evidence or discussion regarding the role of other licensed, regulated professionals that participate in this work and the extent of their authority to do so under the scope of their respective licenses results an unfortunate and inaccurate profile of nonlawyer Medicaid planners that is more caricature than fact based.

The repeated references to “a disbarred Florida lawyer, an individual who lost his securities license for fraudulent practices, and a life insurance agent who was convicted of two felonies and his insurance license” (PAO, p. 18) presents both a highly inappropriate characterization of nonlawyer Medicaid planners and a

contradiction of the often repeated charge that Medicaid planning is in need of attention because it is unregulated. First, these extreme examples were repeated several times. However, there were no specific offenses or named offenders offered to illustrate any prevalent practice of giving legal advice that constituted UPL. Most of the testimony addressed the drafting and execution of legal instruments. In the case of the disbarred lawyer, she is described as having abused her trust while practicing as a lawyer. The testimony indicates a cease and desist order directed her to not engage in Medicaid planning. The fact that after she was disbarred she established a business as a nonlawyer planner, apparently in violation of the order, begs the question: what regulation would prevent this person from abusive practices? Likewise, the stockbroker who lost his license for fraudulent practices and the insurance agent who lost his license for committing felonies operated under regulatory systems. It could be argued that the examples of the disbarred lawyer, the de-licensed stock broker, and the de-licensed insurance agent are evidence suggestive more of ineffective policing of these professions rather than evidence of the lack of oversight in Medicaid planning. In reality, no regulation will prevent bad people from engaging in harmful practices.

**II. THE PROPOSED ADVISORY OPINION ADDRESSES ISSUES THAT ARE MORE APPROPRIATELY FOR THE LEGISLATURE**

The PAO acknowledges that the federal regulations mandate that “[t]he agency must allow an individual or individuals of the applicant's choice to accompany, assist, and represent the applicant in the application process or a redetermination of eligibility.” 42 C.F.R. 435.908. State regulation of Medicaid planning must be established in harmony with that federal rule.

The testimony provided to the Standing Committee repeatedly stated that nonlawyer Medicaid planners are unregulated. The PAO adopts that conclusion. (PAO, p. 17) Though, as stated above, there are regulated professions aside from lawyers engaged in this work, the PAO offers no remedy for the lack of overall regulatory authority for Medicaid planning. Clearly the establishment of such regulatory authority would be in the province of the legislature. This is a complex and complicated subject. Various disciplines are involved in the care of our elderly citizens and in assisting the families of those citizens. To further complicate the subject, it is obvious that there is an overlap of the licensing authorities of these regulated professionals. That was the challenge recognized and addressed in *Raymond James*.

The testimony before the Standing Committee and common sense indicates that the need for Medicaid planning will often be identified by nonlawyers. Most people, at some point in their adult life, turn their attention to planning for retirement and the eventuality of death. It is a common practice that accountants,

financial advisors, insurance agents and other licensed professionals suggest to their clients that they see a lawyer to prepare a will, establish trusts, and consider other legal matters. The testimony in this record indicates that nursing homes make recommendation to patients and their families to engage in Medicaid planning because the immediate financial need is obvious. While the examples given were of cases where apparent abuse or incompetence affected the clients, it could as easily be deduced that the lack of a significant number of complaints suggests that most people are directed to professionals, whether lawyer or nonlawyers, who provide reasonably good assistance. It is not uncommon for a nonlawyer Medicaid planner to recommend their client(s) see a lawyer for the legal services necessary to carry out a Medicaid plan, including consideration, drafting and execution of the various documents discussed above, and other aspects of their legal needs.

However, if further regulation is warranted, that may only be established by legislative action. Art. II, § 3 and Art. III, § 7, Fla. Const.

### **III. THE PROPOSED ADVISORY OPINION DOES NOT PROVIDE MEANINGFUL CLARIFICATION OF EXISTING LAW**

The May 13, 2009 letter from the Standing Committee (TAB B) accurately summarized the UPL standards for Medicaid planning activities. While testimony was presented before the Standing Committee that the 2009 letter lacks sufficient authority to address the problem (TAB D, p. 25, ll. 5 – 13), that letter was based upon opinions of this Court that clearly define the rules that govern the abuses that

were described in the testimony. The letter provided clear guidance that establishing various kinds of trusts is the practice of law. That activity would include the drafting and execution of various legal documents. The letter provided clear rules regarding the involvement of lawyers with nonlawyer Medicaid planners. The letter advised that the Standing Committee had determined that whether activities such as “restructuring assets, counseling customers on the best way to get Medicaid approval, and advertising as an ‘elder counselor’” constitutes the UPL would be determined on a case-by-case basis.

Nothing in the PAO provides further clarity to the 2009 letter. By both acknowledging that certain professionals can engage in activities falling within their licenses, and rejecting *Raymond James* and *Living Trust* as inapplicable, the PAO will create confusion. Analyzing UPL issues is generally not difficult when it involves most of the examples presented to the Standing Committee. Drafting documents such as personal services contracts or creating trusts are indisputably the practice of law. In a society that is driven by law, where many people must have a basic understanding of the law to carry out their trade or profession, determining when giving legal advice becomes the practice of law is not conducive to bright line rules. Does a mechanic who tells his customer that the failure to install a catalytic converter would violate clean air standards practicing law? Does

a contractor's advice to a commercial property owner regarding compliance with OSHA warrant UPL investigation?

While there clearly are circumstances requiring the knowledge and skill of a practicing attorney, consumers generally benefit from the nonlawyer competition to provide many services. That notion is codified at 42 C.F.R. 435.908, the provision quoted above that grants Medicaid applicants the right to seek assistance from the person of their choice in the application process. For example, a certified public accountant can represent individuals before the IRS. *The Florida Bar v. Sperry*, 363 U.S. 379 (1963). A nonlawyer may represent an entity in an administrative proceeding. *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). A nonlawyer can prepare a pension plan. *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Pension Plans*, 571 So. 2d 430 (Fla. 1990). A nonlawyer licensed real estate agent may prepare a contract for sale of real estate. *Keyes Co. v. Dade County Bar Ass'n*, 46 So. 2d 605 (Fla. 1950). Title insurance companies may conduct closings and prepare documents incident to the issuance of title insurance. *The Florida Bar v. McPhee*, 195 So. 2d 552 (Fla. 1967). A nonlawyer property manager may file court documents and appear in court on behalf of a landlord in an uncontested residential eviction proceeding. *The Florida Bar re: Advisory Opinion: Nonlawyer Preparation of Landlord Uncontested Evictions*, 605 So. 2d 867 (Fla. 1992) *clarified*, 627 So. 2d 485 (Fla. 1993). A

nonlawyer may prepare the statutorily required notice to owner and notice to contract for mechanic's liens. *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Notice to Owner and Notice to Contractor*, 544 So. 2d 1013 (Fla. 1989).

The prohibition against the unauthorized practice of law should serve the public interest. The inquiry required the consideration of both the harm a consumer may suffer if a nonlawyer performs certain tasks, as well as the benefits that a consumer accrues when lawyer and nonlawyers compete. *See, Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) or, as in the case of Medicaid planning, when nonlawyer professionals and lawyers are encouraged to work together to achieve the client's needs. The ultimate touchstone is the public interest, and the public interest is determined through balancing the risks and benefits to the public of allowing and disallowing such activities.

### **CONCLUSION**

For the reasons set forth above, Burns objects to the proposed advisory opinion because the proposed opinion not only fails to provide clear guidance regarding what constitutes the unauthorized practice of law in the field of Medicaid planning, but it injects confusion regarding the long established rules rendered in the *Raymond James, Living Trust*, and other opinions cited above. The proposed

advisory opinion specifically rejects and distinguishes those opinions as inapplicable to the process of Medicaid planning. The Standing Committee's 2009 letter provides a concise summary of the established law on this subject and provided clear guidance to the public and nonlawyer Medicaid Planners.

The record is devoid of meaningful information upon which to provide any further guidance on this subject. The references to egregious misconduct by the disbarred lawyer, the felonious insurance agent and the fraudulent stockbroker do not present a reason for disrupting the well established rules on this subject. Further, nothing in the proposed advisory opinion would have prevented or provided a remedy for such conduct.

For these reasons, Burns respectfully urges that the Court decline to adopt the Proposed Advisory Opinion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of this Brief in Opposition was sent by Email to the following this 4<sup>th</sup> day of March, 2014.

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the font requirements of Florida rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14 – point font.

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