

**IN THE SUPREME COURT OF FLORIDA**  
CASE NO.: SC14-211

THE FLORIDA BAR

RE: ADVISORY  
OPINION – MEDICAID PLANNING  
ACTIVITIES BY NONLAWYERS

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**ANSWER BRIEF OF PETITIONER, ELDER LAW  
SECTION OF THE FLORIDA BAR, IN REPLY TO  
BRIEFS OF INTERESTED PARTIES**

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On behalf of Elder Law Section of the  
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## STATEMENT OF THE CASE AND OF THE FACTS

### Preliminary Statement

The Elder Law Section of the Florida Bar (“Elder Law Section”) petitioned the Standing Committee on the Unlicensed Practice of Law (“Standing Committee”) on whether it constitutes the unlicensed practice of law for a non-lawyer to engage in medicaid planning activities including the preparation, drafting and execution of legal agreements such as personal service contracts and qualified income trusts, and the rendering of legal advice regarding the implementation of Florida law to obtain medicaid benefits. After holding a public hearing, the Standing Committee issued its proposed advisory opinion which was filed in this Court on January 16, 2014.

Petitioner agrees with the analysis set forth in the proposed advisory opinion and urges its adoption by this Court. This brief is filed to reply to the briefs filed by interested parties Florida Legal Services, Inc. and William D. Burns and to a response filed by Antony L. Turbeville. To avoid needless duplication, Petitioner adopts the statement of the case and of the facts set forth in the Standing Committee’s Brief, with the following additions.

### The Elder Law Section

The Elder Law Section was established in 1991. Its by-laws provide that its purpose is to “cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs.”

The Section offers seminars on Elder Law issues, mentoring, legislative and administrative advocacy, a newsletter with information on the legal rights of seniors and issues relevant to the elderly. The Section's website links to a variety of government and other websites and internet resources relevant to Elder Law.

The Record on this Request for Advisory Opinion<sup>1</sup>

Many members of the Elder Law Section practice in the area of medicaid planning and have seen the harm which has come to individuals seeking to qualify for medicaid benefits. The Chair of the Elder Law Section, Twyla Sketchly, explained at the public hearing that the petition for an advisory opinion:

“comes from an overwhelming need for the Florida Bar to protect a vulnerable population from significant harm that can come from individuals who have no training, no license and no regulation whatsoever, giving legal advice on the strategies of moving income and assets and doing other things in a legal capacity to obtain medicaid eligibility. The population being advised on medicaid planning is one that is vulnerable in many ways, physically, medically, mentally and financially.”(Tr. 10)

Ms. Sketchly explained that medicaid eligibility is a highly technical legal area which encompasses federal and state statutes, regulations and administrative rules.

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<sup>1</sup>The record includes the transcript of the February 22, 2013 Public Hearing, cited as “Tr.” and to the written submissions which were filed with the this Court which will be referred to by the name of the person submitting the materials.

In Florida alone, that volume of law is well over three thousand pages.<sup>2</sup> Lawyer are required to apply that highly technical complex set of laws, rules and regulations to an individual's or a couple's particular set of facts. (Id. at 9) In Ms. Sketchly's written testimony, she provided the Standing Committee with extensive documentary evidence including the advertising and website materials of nine non-attorney medicaid planners replete with representations of the expertise, superior knowledge and secret formulas for guaranteeing results, illustrating the high pressure sales tactics and harm to the consuming public.

Lee A. Rosenthal, a lawyer who practices in this area, provided the Standing Committee in written testimony with four examples from his personal knowledge of harm to the public from the activities of non-lawyer medicaid planners. A total of twenty-eight individuals submitted written testimony. Among the witnesses were several individuals who had been harmed by non-lawyer medicaid planners. The written record is in excess of four hundred pages. The one hundred pages of oral testimony at the hearing came from ten separate individuals.

The record reflects that members of the Elder Law Section come in contact with the consequences of the activities of medicaid planners on a daily basis. Often Elder Law Section members are retained to attempt to correct the deficiencies of

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<sup>2</sup>The Appendix to this Brief lists some of the most pertinent of these law, rules and regulations.

those non-lawyer medicaid planners. Many of the examples provided to the Standing Committee illustrate the sometimes tragic results of the conflict of interest from securities brokers and/or life insurance salesman holding themselves out as experts in medicaid planning in order to obtain substantial commissions on the sale of life insurance and securities. Individuals have hired these medicaid planners seeking strategies to protect their assets and also receive medicaid benefits in a manner made possible by governmental laws rules and regulations. Instead, they are advised based on the promotion of products sold. And, as the record also overwhelmingly reflects, the consuming public of these medicaid planning services are generally desperate from age, infirmity, and fear of impoverishment. It is hard to imagine another group more vulnerable to fraud and deceit, and less able to protect themselves.

It was established to the Standing Committee, that in spite of the growing number of medicaid eligibility cases in Florida and elsewhere, there is absolutely no regulatory system for ensuring proper training, licensing and oversight of individuals holding themselves as “medicaid planners.” To the contrary, anyone can and often does hold themselves out as experts in medicaid planning, providing glossy brochures and impressive looking websites to the consuming public.<sup>3</sup>

The Elder Law Section has also come upon many individuals and groups

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<sup>3</sup>As discussed below, insurance and securities sales licenses do not regulate medicaid planners in what they do.

attempting genuinely to assist the elderly and infirm in medicaid eligibility. As Ms. Sketchly pointed out in her oral testimony before the committee:

“We are asking also for the protection of non-attorney medicaid planners who are also members of the public and who do provide a service. We would like you to issue clear guidelines on what the practice of law is. There are some good non-attorney medicaid planners. ... [T]here are people out there who go into this with an altruistic view of helping people who went through the difficulties they did. By issuing an advisory opinion, you give those individuals clear guidelines about what they can and cannot do to the vulnerable population they are serving, and it will prevent them from having unfounded complaints against them.”  
(Tr. 14-15)

#### SUMMARY OF ARGUMENT

The proposed advisory opinion accurately states the law as to which activities of nonlawyer medicaid planners constitutes the practice of law and why this Court should prohibit that conduct. The Briefs and responses to the proposed advisory opinion further illustrate the need for this Court to issue an Advisory Opinion for the protection of the public.

#### ARGUMENT

Three interested parties have submitted briefs and responses to this Court.

These raise issues which the Elder Law Section will address in this brief.<sup>4</sup>

A. The Licenses Held By Mr. Burns Does Not Authorize the Practice of Law in Medicaid Planning

The brief filed by William D. Burns, a licensed securities salesman and licensed life insurance salesman argues, that his licenses authorize him to give legal advice to his customers on the eligibility requirements for medicaid. (Burns Brief at 14-16) He also asserts that the proposed advisory opinion does not clearly differentiate “when legal advice becomes the practice of law.” (Burns Brief at 11)

The Elder Law Section respectfully disagrees with Mr. Burns. An unbroken line of precedent over the past sixty years beginning with the Florida Bar v. Sperry, 140 So. 587, 597 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963) holds that:

“The practice of law includes the giving of legal advice and

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<sup>4</sup>The brief filed by Florida Legal Services urges this Court to recognize the legal duty of the Department of Children and Family Services (“DCF”) under 42 C.F.R. §435.905(a) to furnish information to medicaid applicants and others requesting information concerning eligibility requirements, available medicaid services and rights and responsibilities of applicants and beneficiaries. The Elder Law Section agrees. To the extent that Federal regulations authorize or require government employees to provide information about eligibility requirements, this is not the unauthorized practice of law, as it is authorized by Federal law. Sperry v. State of Florida in re: The Florida Bar, 373 U.S. 379 (1963). Nothing in 42 C.F.R. §435.905(a), however, purports to authorize DFC or anyone else to offer the type of legal advice needed to apply three thousand pages of laws, rules and regulations to the individual facts and circumstances of a potential applicant, that person’s spouse and family, as to how to attempt to conform to those legal requirements.

counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.”

This Court has repeatedly explained and elaborated on the distinction between the practice of law which must be conducted by lawyers licensed and regulated by this Court (and the exceptions for nonlawyers authorized by Federal or state law or regulations) and the activities of nonlawyers which are not within the definition of the practice of law. The Florida Bar re: Advisory Opinion– Nonlawyer Preparation of Living Trusts, 613 So.2d 426 (Fla. 1993); The Florida Bar re: Advisory Opinion– Nonlawyer Preparation of Pension Plans, 571 So.2d 430 (Fla. 1990); The Florida Bar re: Advisory Opinion– Nonlawyer Preparation of Notice to Owner and Notice to Contractor, 544 So.2d 1013 (Fla. 1989). The proposed advisory opinion accurately and adequately differentiates and delineates what constitutes the practice of law in the area of medicaid planning.

The remaining issue raised in Mr. Burns brief then, is whether a securities salesman’s license and an insurance salesman’s license “authorize” Mr. Burns to give legal advice in medicaid planning. As discussed below, neither of those licenses sanction Mr. Burns offering legal advice to his customers regarding medicaid eligibility.

The licenses Mr. Burns' holds requires his demonstrating to the licensing agencies his proficiency in areas involving the sale of securities and life insurance. He is required to maintain his proficiency through continuing education. Florida Statutes §§626.011 et. sec., 626.776 et. sec. (life insurance); <http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/Qualifications/P011051> (securities). The Elder Law Section does not dispute a licensed insurance sales agent's proficiency in understanding the different types of insurance products available on the market and the need to understand the financial situation and goals of the customer and how an insurance product may help achieve those goals. Likewise, the Elder Law Section does not dispute that a licensed securities salesman is obliged to "know your customer," to be able to determine whether a particular security is suitable to a customer. Mr. Burns is required to have an understanding of his customers' financial situations and goals. Further, should Mr. Burns recommend unsuitable life insurance or securities products to customers, he might be sanctioned, and certainly could be sued by those customers.

However, nothing in the licensing or regulation of securities and life insurance sales agents addresses the intricacies of the three thousand pages of laws and regulations needed to understand and advise on medicaid eligibility, and none of Mr. Burns' training or continuing education provides for proficiency in analyzing those

laws, rules and regulations, and applying them to the unique factual circumstances of a potential medicaid applicant. Mr. Burns is fundamentally wrong in saying that he may provide legal advice in this area based on his holding licenses to sell securities and life insurance products.

Mr. Burns seeks to rely on this Court's opinion in The Florida Bar and Raymond James and Associates, Inc., 215 So.2d 613 (Fla. 1968) and in particular the sentence in the opinion providing that securities brokers do not engage in the unlicensed practice of law when they "solicit specific facts about customers' or prospective customers' assets." 215 So.2d at 614. Mr. Burns argues that, by analogy, he may offer legal advice on the asset test embedded in the three thousand pages of laws, rules and regulations to medicaid applicants because he is authorized to "solicit specific facts about customers" or prospective customers "assets."

Plainly, Mr. Burns is misreading the Raymond James opinion. The opinion begins by stating that it constitutes the unauthorized practice of law for securities brokers "giving legal advice, directly or indirectly to individuals or groups concerning the application, preparation, advisability or quality of any legal instrument or document or forms thereof in connection with the disposition of property inter vivos or upon death, including inter vivos trusts and wills." 215 So.2d at 613-14. Throughout the Raymond James opinion, this Court repeatedly emphasized that

securities brokers may not give legal advice concerning the legal consequences of financial transactions, may not give specific tax liability advice, render legal services to the public or solicit their bringing legal problems to them for advice. 215 So.2d at 614 There is nothing in the Raymond James opinion which purports to justify the position taken by Mr. Burns in his brief. The distinction between the duty of a securities broker to understand the financial goals and abilities of customers in order to determine the suitability of a particular securities product on the one hand and the giving of legal advice as to how to meet the asset and income tests of the complex medicaid regulations on the other hand is a distinction which may elude Mr. Burns in his Brief, but can and should be made clearly and unambiguously by this Court, in order that there will be no further misunderstandings.

Mr. Burns states in his brief 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.” (Burns Brief at 16) The statement in Mr. Burns’ brief proves too much. Most matters which are handled by lawyers for clients in today’s world are not “merely” a legal matter. We assume that Mr. Burns is not meaning to suggest that he may give legal advice on any of the host of matters for which people consult lawyers on the disposition of their assets, the transfer of title to property, holding property in joint names, the various substitutes for wills which may

be utilized to avoid probate, or the legal aspects of retirement planning. If so, Mr. Burns would be well advised to reread the Raymond James opinion, and in particular the seven enumerated paragraphs in which this Court set forth the activities constituting the unauthorized practice of law which “may not be carried out by Raymond James and Associates, Inc., its individual officers, agents or employees and each of them” who are, “perpetually restrained and enjoined” from doing. 215 So.2d at 613.

Mr. Burns’ Brief cites (and in some instances misstates) six of this Court’s opinions as to the unauthorized practice of law. (Burns Brief at 24-25) In each of those cases, there was a specific provision of law, either Federal or state, which authorized a group of non-lawyers to perform certain narrowly defined legal services. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980)(the legislature (or an agency) could authorize by law (or rule) non-lawyers to appear before hearing officers in administrative proceedings where the legislature created these agencies); Florida Bar re: Advisory Opinion - NonLawyer Preparation of Pension Plans, 571 So.2d 430 (Fla. 1990)(accountants and actuaries who are licensed to practice before the IRS under Federal law are authorized to prepare pension plan documents); Keys Co. v. Dade County Bar Ass’n, 46 So.2d 605 (Fla. 1950)(under Chapter 475, Florida Statutes, licensed realtors may prepare deposit receipt or sales contracts reflecting the realtor’s

bringing the parties together, but a realtor may not examine abstracts or conduct closings); The Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967)(a title company may examine and give opinion of insurable title where the title company is hired to issue the title insurance); The Florida Bar re: Advisory Opinion: Nonlawyers Preparation of Landlord Uncontested Evictions, 605 So.2d 868 (Fla. 1993), second opinion 627 So.2d 485 (Fla. 1993)(property managers may file uncontested residential evictions for non payment of rent but not appear in contested hearings); The Florida Bar Advisory Opinion - Nonlawyer Preparation of Notice to Owner and Notice to Contractor, 554 So.2d 1013 (Fla. 1989)(because there was no evidence of a propensity for public harm from an industry which is trained and knowledgeable, nonlawyer preparation of the notices was authorized; giving legal advice or completing other forms is not authorized).

Here, however, apart from the Federal regulation allowing anyone to assist in filling out a medicaid eligibility application, there are no Federal or state regulations which sanction the conduct Mr. Burns would have this Court authorize, and the risk of public harm is substantial. The Elder Law Section respectfully requests that the Court overrule Mr. Burns' objections.

B. The Turbeville "Guidelines" Should Be Rejected By This Court

Mr. Turbeville has filed a response in opposition to the proposed advisory

opinion.<sup>5</sup>

Mr. Turbeville asks this Court to issue an order authorizing him (and apparently anyone else) as follows:

“The guidance of this Court is that Non-lawyer Medicaid application services or others assisting in applying for Medicaid Benefits and carrying out activities incident to such application, including the filling in, execution and instruction regarding documents drafted by a lawyer in good standing with the Florida Bar is not the Unlicensed Practice of Law. Such documents include qualified income trusts, durable powers of attorney, and personal service contracts. Further, the rendering of legal advice related to Florida laws, rules and regulations in applying for Medicaid benefits, the interpretation and argument regarding such laws within the Department of Children and Families and the Florida Office of Hearings, on behalf of another, with or without compensation, is not the Unlicensed Practice of Law.” (Turbeville Response at 26-

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<sup>5</sup>Mr. Turbeville takes offense at a statement in the record as to his being barred from the securities industry. (Turbeville Response at 3-4) The particular statement came from a news release issued by FINRA on June 4, 2012. That news release and accompanying news articles are among of the written submissions to the Standing Committee. Mr. Turbeville’s brief claims that he holds an “inactive” designation as a certified financial planner and has an “inactive” securities license, and further claims that he is appealing from the sanctions imposed by FINRA.

It is not appropriate in the brief to address the details of the dispute between Mr. Turbeville and FINRA. We note, however, that according to FINRA, its action barring Mr. Turbeville from the securities industry was the result of its order of restitution to customers for his having “intentionally made fraudulent misrepresentations and omissions to elderly and unsophisticated customers regarding the risks associated with investing in CMO’s” and his having “preyed on [his] elder customers greatest fears” of “losing their assets to nursing homes and becoming destitute during their retirement and old age.”

27)

If Mr. Turbeville were correct, and this Court were to adopt his proposal, it would overrule 60 years of unlicensed practice of law opinions of this Court. It would sanction virtually any activity by a non-lawyer, regardless of lack of training, licensing, continuing education, protection of client funds, or the inability of this Court to discipline them. Moreover, it would erase §454.23, Florida Statutes, which makes the unauthorized practice of law a third degree felony. And it would do so in the context of a written record demonstrating the need for precisely these rules against the unlicensed practice of law.

Plainly, Mr. Turbeville, and others who think as he does, are in need of this Court's clear and unambiguous ruling as to the limits on the activities of nonlawyer medicaid planners. Mr. Turbeville plainly has misread this Court's Sperry decision. In Sperry, the practice of law by a non-lawyer became authorized practice only because of Federal pre-exemption. Notably, it remains the unlicensed practice of law, punishable in Florida, for someone not licensed by the patent office to attempt to perform these services and give this advice. And, Mr. Turbeville is unable to point to any analogous Federal or state authorization for him to practice law in this area.

Mr. Turbeville tries to hide behind the Federal regulation allowing him to assist an applicant in filling out a medicaid application. Plainly, nothing in that regulation

which permits assistance in filling out a written form of application constitutes Federal authority to provide legal advice or legal services to the public.<sup>6</sup>

### SUMMARY AND CONCLUSIONS

The Elder Law Section believes that the written record in this case demonstrates far more potential for public harm and actual public harm from the activities of non-lawyers than that demonstrated to this Court in the Florida Bar re: Advisory Opinion - Non-Lawyer Preparation of Living Trusts, 613 So.2d 426 (Fla. 1992). And, just as this Court's opinion in the Living Trusts decision facilitated the enforcement of the unlicensed practice of law rules in later cases such as the Florida Bar v. American Senior Citizens Alliance, Inc., 689 So.2d 255 (Fla. 1997), the Elder Law Section urges this Court to issue an opinion as to medicaid planners so that the Florida Bar, and State Attorneys throughout the State will be better able to enforce the laws and rules against the unlicensed practice of law by medicaid planners.

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<sup>6</sup>Mr. Turbeville's company, Platinum Benefit Planning, Inc., has a website, the content of which is reproduced in the record. In that website, Platinum Benefit repeatedly states "remember, we are the medicaid experts." (Platinum Benefit purports to have registered that expression.) The advertising on that website, if done by an attorney, would plainly violate the existing advertising regulations and lead to disciplinary proceedings.

Respectfully submitted,

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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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