

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-211

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

ANSWER BRIEF OF THE STANDING COMMITTEE ON THE UNLICENSED
PRACTICE OF LAW OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND FACTS

The UPL Subcommittee of the Elder Law Section of The Florida Bar, pursuant to rule 10-9.1 of the Rules Regulating The Florida Bar, petitioned the Standing Committee on Unlicensed Practice of Law (hereinafter “the Standing Committee”) for an advisory opinion on certain activities of nonlawyer Medicaid planners. The request appears at Tab A of the proposed advisory opinion. The Standing Committee voted to hold a public hearing on the request. As the public hearing was held in Tampa, Florida, notice of the hearing was published in the *Tampa Bay Times* on January 18, 2013, in the January 15, 2013 edition of The Florida Bar *News*, and on The Florida Bar’s website. On February 22, 2013, the Standing Committee held a public hearing to receive input from interested parties. Several interested parties testified at the public hearing. The Standing Committee also received written testimony. The Standing Committee filed its proposed advisory opinion with this Court on January 16, 2014. Thereafter, several interested parties filed briefs in opposition to the proposed advisory opinion.

The transcript of the public hearing is attached to the proposed advisory opinion at Tab D. Reference to the transcript will be cited as Proposed Opinion, Tab D. The page on which the testimony appears is abbreviated as p.. Line numbers are noted where appropriate. The proposed advisory opinion is cited as Proposed Opinion, the page number is abbreviated as p..

SUMMARY OF THE ARGUMENT

The Proposed Opinion finds that it constitutes the unlicensed practice of law for nonlawyers to draft personal service contracts, prepare and execute Qualified Income Trusts, and render legal advice regarding the implementation of Florida law to obtain Medicaid benefits. The Proposed Opinion recognizes that federal and state regulations allow some nonlawyer participation in this area.

Consequently, the Proposed Opinion will not prohibit the Department of Children and Families from telling Medicaid applicants about relevant eligibility laws and policies that would assist Medicaid applicants to the extent permitted by state and federal regulations. The Standing Committee has no objection if clarifying language in this regard is added to the Proposed Opinion.

The Proposed Opinion also recognizes that federal regulations allow a nonlawyer to assist in the preparation of a Medicaid application. This regulation, as well as the regulation allowing a nonlawyer to participate in a fair hearing, does not extend to permit a nonlawyer to prepare and execute a Qualified Income Trust, draft a personal service contract, or render legal advice.

As noted in the testimony and briefs, some of the nonlawyers providing the services that are the subject of the Proposed Opinion have certain professional licenses, such as a license to sell insurance or securities. There is no state or federal agency that licenses and regulates Medicaid planners. While a nonlawyer

may possess a certain professional license, that license does not authorize the nonlawyer to engage in the Medicaid planning legal activities that are the subject of the Proposed Opinion.

The proposed formal advisory opinion process allows The Florida Bar Standing Committee on the Unlicensed Practice of Law to seek guidance from this Court where no precedent exists. There is no existing case law or advisory opinion that addresses the Medicaid planning activities at issue in the Proposed Opinion. The Proposed Opinion establishes needed precedent and is necessary to prevent the public harm that does and may take place when nonlawyers engage in these Medicaid planning activities. The Standing Committee therefore requests that this Court adopt the Proposed Opinion.

ARGUMENT

I. THE PROPOSED OPINION DOES NOT PROHIBIT THE DEPARTMENT OF CHILDREN AND FAMILIES FROM TELLING MEDICAID APPLICANTS ABOUT RELEVANT ELIGIBILITY LAWS AND POLICIES THAT WOULD ASSIST MEDICAID APPLICANTS

In its brief, Florida Legal Services, Inc. requests that this Court adopt language to clarify the role of the Department of Children and Families in the Medicaid application process. It is not the intent of the Proposed Opinion to prohibit the Department of Children and Families from telling Medicaid applicants about relevant eligibility laws and policies that would assist Medicaid applicants or

to perform any other activities authorized under federal regulations. In fact, the Proposed Opinion explicitly recognizes and acknowledges the role of governmental employees in the application process. Footnote 4 on p. 10 of the Proposed Opinion provides “... [t]o the extent a Federal or State statute or regulation allows a government employee to assist in the application process, the conduct is authorized and not the unlicensed practice of law.” While the Standing Committee believes that the concerns raised by Florida Legal Services, Inc. are already addressed in the Proposed Opinion, the Standing Committee would have no objection to the addition of clarifying language.

II. THE REGULATIONS ALLOWING A NONLAWYER TO ASSIST IN THE PREPARATION OF A MEDICAID APPLICATION AND PARTICIPATE IN A FAIR HEARING DO NOT PERMIT THE PREPARATION OF THE QUALIFIED INCOME TRUST OR PERSONAL SERVICE CONTRACT OR THE RENDERING OF LEGAL ADVICE

In his brief, Antony L. Turbeville¹ argues that the regulations allowing a nonlawyer to assist in the preparation of the Medicaid application and participate in a fair hearing also allow a nonlawyer to prepare the Qualified Income Trust and

¹ Mr. Turbeville claims the Standing Committee made false accusations about him and specifically “represents that Antony L. Turbeville has (i) lost his licenses to sell securities, (ii) that his licenses to sell securities were suspended, and (iii) ‘trouble’ with the Securities and Exchange Commission.” However, the Opinion does not even mention Mr. Turbeville’s name. His name appears within the following written testimony provided to the Standing Committee: excerpts from his company’s website, a FINRA news release, 3 online articles from TheLedger.com, and a letter included at TAB O of the Proposed Opinion.

personal service contract and to render legal advice on Medicaid matters. Mr. Turbeville cites to *Sperry v. Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963) as support for his argument.

The *Sperry* case holds that Florida may not enjoin an activity as the unlicensed practice of law if a Federal rule or regulation allows a nonlawyer to engage in the activity. The authorization extends to giving advice on matters that are incident to the activities allowed by the Federal rule or regulation. *State ex rel. The Florida Bar v. Sperry*, 159 So. 2d 229 (Fla. 1963). It does not however extend to any activity relating to the subject area as suggested by Mr. Turbeville. If it did, the nonlawyer specifically authorized to appear before the Patent agency would be allowed to draft a non-compete contract to prevent others from using the idea once patented as that would be incident to the activities allowed by the Federal regulation. Clearly this is not what *Sperry* intended.²

Rather than authorizing any activity related to the specific grant of authority in the Federal regulation, *Sperry* only authorizes those activities that are directly incident to the authorized activity. The Proposed Opinion recognizes this. As noted in footnote 4 on page 10 of the Proposed Opinion, Federal law authorizes nonlawyer assistance in the application process. The Proposed Opinion states that

² It is interesting to note that while Florida Legal Services, Inc. discusses the authority of the Department of Children and Families to assist in the preparation of the application, they do not suggest that the Department of Children and Families is authorized to prepare these pre-application documents.

to the extent it is necessary for a nonlawyer to gather information about an individual's assets to complete the application, the gathering of the information would be authorized. Gathering of this information, if necessary, would be incident to the application process. Preparation of the Qualified Income Trust and personal service contract, activities that take place prior to the application process and may not be necessary in all applications, are not incident to the application process. Consequently, preparation of these documents is not authorized by *Sperry* and may be found to be the unlicensed practice of law by this Court.

Mr. Turbeville also argues that the Federal regulation requiring a state to provide an opportunity for an applicant for Medicaid benefits “whose claim for assistance is denied or not acted upon promptly” to “use legal counsel, a relative, a friend, or other spokesman” at a fair hearing allows a nonlawyer to engage in the activities at issue in the Proposed Opinion. 42 C.F.R. § 431.206(b)(3). The Florida Administrative Code implements the Federal regulation. Fla. Admin. Code R. 65-2.042. As with the previous argument, this argument also extends the Florida and Federal grant of authority beyond what is intended. According to this argument, a nonlawyer could prepare the personal service contract and Qualified Income Trust because there is a possibility that the Medicaid application will be denied and the possibility that the applicant will use the nonlawyer as a spokesman at a fair hearing if a fair hearing is held. When this Court recognized that the

legislature had the authority to oust this Court's responsibility to protect the public from the unlicensed practice of law in administrative matters, certainly this Court did not intend to oust this responsibility for any activity surrounding the subject matter of the hearing. *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980).

III. THE FACT THAT NONLAWYER MEDICAID PLANNERS MAY HAVE CERTAIN PROFESSIONAL LICENSES DOES NOT ALLOW THE NONLAWYER TO ENGAGE IN THE MEDICAID PLANNING ACTIVITIES WHICH ARE THE SUBJECT OF THE PROPOSED OPINION

Briefs in opposition to the Proposed Opinion argue that because an individual is licensed as an insurance agent or securities broker, the individual is authorized to perform the activities that are the subject of the Proposed Opinion. As with the previous argument, this argument must be rejected.

Medicaid planners are not licensed or regulated by any state or federal agency.³ While an individual may have a securities broker's license or insurance license, those individuals are licensed and regulated to sell securities or insurance. They are not regulated or licensed to engage in Medicaid planning. The briefs appear to argue that because the nonlawyer is licensed to sell insurance or securities, the nonlawyer must be authorized to give legal advice regarding Medicaid planning. One does not lead to the other.

As a licensed insurance agent, the nonlawyer may advise on different types

³ Mr. Burns acknowledges this on p. 14 of his brief, "There is no dispute that no Florida law requires Medicaid planners to be licensed."

of insurance products, recommend amounts of coverage, and sell insurance policies appropriate to the client's particular needs. As a licensed securities broker the nonlawyer may give investment advice and buy and sell stocks, bonds, and other securities appropriate to the client's needs. It is possible that while selling insurance or securities, the subject of Medicaid planning may arise. Clearly, there are financial aspects to the process. It is those financial aspects that a licensed insurance agent or securities broker may discuss, not the legal aspects of Medicaid planning that are the subject of the Proposed Opinion. While Medicaid planning may also include insurance and financial planning services that would be appropriate to be performed by other licensed professionals, the legal services addressed in the Proposed Opinion -- drafting of a personal service contract, preparation and execution of a Qualified Income Trust and the rendering of legal advice -- may only be provided by a member of The Florida Bar.

The distinction between financial and legal advice has been recognized by this Court in other areas involving both financial and legal aspects. For example, in *The Florida Bar v. Turner*, 355 So. 2d 766 (Fla. 1978) a licensed life insurance agent was enjoined from preparing legal documents including corporate documents, pension plans, employment agreements and trust agreements. In enjoining Mr. Turner, this Court noted that a general discussion of "factors of a strictly financial and economic nature are proper for laymen" including a

discussion of general principles of law. *Id.* at 769. However, “the application of general rules of law to particular sets of facts as they relate to particular persons or legal entities constitutes the practice of law.” *Id.* In other words, a properly licensed professional may provide financial advice related to legal document. However, only a lawyer may provide legal advice and services and draft legal documents, including the legal advice and documents at issue in the Proposed Opinion.

In *Turner* this Court also recognized “that potential and actual conflict of interest exist where a lay person or entity not licensed to practice law attempts to give legal advice and/or provide legal services to a prospective client to whom he is attempting to sell a product, e.g., life insurance.” 355 So. 2d at 770. “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.” *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). The Proposed Opinion would protect the public from this harm.

IV. THE PROPOSED OPINION PROVIDES MEANINGFUL CLARIFICATION IN THE AREA OF MEDICAID PLANNING BY NONLAWYERS.

In his brief, William D. Burns argues that this Court should not adopt the Proposed Opinion because it does not provide meaningful clarification of existing law in this area. The problem with this argument is that there is no existing case

law or opinion that specifically addresses the Medicaid planning activities at issue in the Proposed Opinion.⁴ Because there is no case law and because there is public harm and the potential for public harm, the Standing Committee urges this Court to adopt the Committee's Proposed Opinion.

As noted in the Proposed Opinion, there is case law that addresses the preparation of living trusts, the preparation of contracts and the giving of legal advice. *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1993); *State ex rel. The Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963). However, there is no case law addressing the preparation of a Qualified Income Trust or personal service contract used for Medicaid planning or the giving of legal advice in the Medicaid planning process. The Proposed Opinion addresses these areas and would establish precedent that can be used by The Florida Bar in seeking injunctive relief and by individuals seeking damages for the unlicensed practice of law. *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 2d 905 (Fla. 2010).

Not only is the Proposed Opinion necessary to establish precedent in this area, it is necessary to prevent the public harm that is or may take place when nonlawyers engage in the conduct at issue. While it is the view of the Standing Committee that specific proof of harm is not required in the advisory opinion

⁴ The May 13, 2009 letter from the Standing Committee to the Elder Law Section (Opinion, TAB B) is not binding legal authority and has no precedential value.

process, the testimony at the public hearing provided examples of harm. The public harm is discussed in the Proposed Opinion at pp. 17-18 and includes TABS F, G, H, I, J, K, Q, and R to the Proposed Opinion. There is also the potential for public harm when the nonlawyer planners put themselves in a position of reliance and advise the customer as to the proper course of action to take. Although a finding of harm is not required to hold that an activity is the unlicensed practice of law, the harm and potential for harm supports the conclusions reached by the Standing Committee and the necessity of adopting the Proposed Opinion.

CONCLUSION

Adopting the proposed formal advisory opinion will provide guidance in the area of Medicaid planning, an area for which there is no case law or advisory opinion. The interested parties have not advanced any reason for this Court to limit the findings of the Standing Committee. The Florida Bar Standing Committee on the Unlicensed Practice of Law therefore requests that this Court adopt the proposed advisory opinion regarding the activities of nonlawyer Medicaid planners.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman, 14-point font, in compliance with Fla. R. App. P. 9.210.

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