Filing # 11870236 Electronically Filed 03/28/2014 11:36:39 AM

RECEIVED, 3/28/2014 11:38:39, John A. Tomasino, Clerk, Supreme Court

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

THE FLORIDA BAR

RE: ADVISORY OPINION
MEDICAID PLANNING ACTIVIES
BY NONLAWYERS

REPLYBRIEF OF

WILLIAM D. BURNS

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On behalf of William D. Burns

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42 C.F.R. § 435.908(b)

ABBREVIATIONS

The following abbreviations are used in this brief:

CPA	Certified Public Accountant
ELS	Elder Law Section of The Florida Bar
ELS Brief	Answer Brief of Petitioner, Elder Law Section of The Florida Bar
IB at ___	Citations to the Initial Brief of William D. Burns
PAO	Proposed Advisory Opinion – Medicaid Planning Activities by Nonlawyers, here at issue
Responsive Briefs	Use with both the ELS and the UPL Briefs are referenced
Standing Committee	The Standing Committee on the Unlicensed Practice of Law of The Florida Bar
UPL	Unlicensed Practice of Law
UPL Brief	Answer Brief of the Standing Committee on the Unlicensed Practice of Law of The Florida Bar

I. STATEMENT OF CASE

William D. Burns, an interested person, having been granted leave by this Court to submit an initial brief in this matter, pursuant to R. Regulating Fla. Bar 10—9.1, replies to the Responsive Briefs of the Elder Law Section of The Florida Bar and the Standing Committee on the Unlicensed Practice of Law of The Florida Bar.

II. SUMMARY OF ARGUMENT

1. Neither the ELS Brief nor the UPL Brief provide any meaningful response to Burns' contention that no material facts or evidence presented to the Standing Committee support either the need for the PAO or the conclusions offered in the PAO
2. Both the ELS Brief and the UPL Brief misstate Burns' arguments. Burns did not argue that his professional licenses authorize him to practice law. The issue of his licensures was tendered for two reasons. First, to counter the PAO's incorrect assumption that nonlawyers who render assistance to Medicaid applicants are totally unregulated. Second, to demonstrate that licensed nonlawyer professionals must comply with the regulatory requirements of such licenses and that the PAO fails to consider that regulatory oversight.

3. In response to Burns' contention that the PAO brings confusion rather than additional clarity to the determination of what constitutes the UPL, especially for nonlawyer licensed professionals, the Responsive Briefs either cited existing case law or offer unsupported, conclusory declarations that the PAO does clarify the situation. Neither brief provides a reference to any aspect of the PAO that provides such clarity.

III. ARGUMENT

A. THE RESPONSIVE BRIEFS FAIL TO ADDRESS BURNS' ANALYSIS OF A LACK OF FACTUAL SUPPORT FOR THE PAO

This Court has emphasized that the public interest is the paramount consideration in the determination of what is the unauthorized practice of law. *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). The analysis of any effect on the public interest must rest upon factual findings that are indicative of a need for action. In this instance, the Standing Committee was presented with the uncontroverted fact that there are very few complaints about nonlawyer Medicaid planning activities. (TAB D, p. 12, ll. 22 – 24) That startling lack of evidence in support of taking action was then the subject of speculation. It was argued that those who are harmed by nonlawyer activity are either unable or afraid to tender complaints. (TAB D, p. 11, l. 22 – p. 12 l. 8) Both the ELS and UPL Briefs argue, in the place of actual complaints from victims of such harm, that "Elder Law Section members are retained to attempt to correct the deficiencies of those non-

lawyer Medicaid planners" established a credible factual foundation for identifying the problem and devising a solution to that problem. (ELS Brief at 3 – 4; UPL Brief at 10 -11; PAO at 18). If, as represented, there are many instances of such need for lawyers to correct the activity by nonlawyers, why have those lawyers not assisted their clients in preparing and filing complaints about these alleged rampant violations? Why was the Standing Committee not provided testimony from even one applicant, applicant's family member, or legal representative who failed to file a complaint due to fear?

Likewise, Burns' contention that the limited factual record is devoid of discussion of harm related to legal advice given by nonlawyers is not addressed in the Responsive Briefs. Contrary to the misrepresentation of Burns' arguments in both briefs, Burns argued that the existing law regarding the drafting of legal documents is clear. He did not, and does not, contend that a nonlawyer may draft a qualified income trust, personal services contract, or other such legal document. He challenged the PAO for its lack of factual basis indicating a need to address the issue of what constitutes legal advice in Medicaid planning. As Burns argued in his Initial Brief, there are functions that any number of nonlawyer licensed professionals can and may serve in assisting persons in need of Medicaid planning. However, the factual record is devoid of testimony or written evidence concerning the role other licensed professionals serve in this area. Further, the PAO summarily

rejects the value of other professions in this area of assistance to the public. Thus, there was no factual basis to illuminate any meaningful understanding of how the various nonlawyer professionals may serve Medicaid applicants without running afoul of the UPL laws. This court has noted the "thorny questions" often inherent in resolving these questions. "The unauthorized practice of law and the practice of law by non-lawyers are not synonymous." *Moses* at 417. This lack of a factual basis is a glaring omission.

At this juncture it must be noted that the general characterization of nonlawyer Medicaid planners in both briefs and in the PAO does a disservice to reasoned and civil discourse. The explicit suggestion that "a disbarred Florida lawyer, an individual who lost his securities license for fraudulent practice, and a life insurance agent who was convicted of two felonies and lost his insurance license" are the norm for nonlawyer Medicaid planners is unseemly at best. (PAO at 18). Dismissing securities brokers and insurance agents as mere sales persons is both factually inaccurate and an intentionally demeaning of those practitioners. UPL Brief at 7, ELS Brief at 7 – 10, PAO at 9. The repeated dismissal of nonlawyers planners as "unregulated" ignores the fact that lawyers are not licensed to engage in this specific work, thus they are also unregulated under that use of the term. Admission to The Bar does not require any knowledge of securities, insurance, or general competence in financial matters. As this Court well knows,

being a lawyer is not a guarantee of moral purity, honesty or competence. One would hope, in pursuing the protection of the public, that cooperation among the relevant professions would be the goal. The use of these gross generalizations and inaccurate characterizations does not serve this Court or the public.

The PAO seeks to remedy a problem that is not demonstrated by any credible information. The PAO simply presents rules that have been very thoroughly addressed in prior decisions of this Court and the May 13, 2009 letter of the Standing Committee. *E.g.*, *Sperry v. Florida ex rel Florida Bar*, 363 U.S. 379 (1963); *In re: The Joint Petition of The Florida Bar and Raymond James and Associates, Inc.*, 215 So. 2d 613 (Fla. 1968); *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980); *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 Living Trusts*, 613 So. 2d 426 (Fla. 1993); *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997). The aspect of the PAO about which Burns expressed greatest concern was the determination of what constitutes legal advice in these circumstances. There was no meaningful investigation on this subject. The UPL Brief, in response to this concern, simply recites the number of pages or exhibits in the record, with no attempt to provide discussion of why any testimony or record is supportive of the action requested.

The ELS brief simply restates the testimony of ELS lawyers, ignoring the issue raised by Burns.

B. The Responsive Briefs Misstates Burns' Arguments.

Notably, both the ELS Brief and the UPL Brief respond to an argument that was neither offered nor suggested by Burns. He did not claim a right to practice law based upon his professional licenses. There is some harmony in these approaches. Both briefs and the PAO seek to remedy a problem in the absence of any relevant complaints made by alleged victims. The PAO and Responsive Briefs respond to an argument that was never made by Burns.

In responding to this phantom argument, the Responsive Briefs fail to address Burns' real concerns and further misrepresent aspects of his argument. For instance, the PAO rejects the relevance of *Raymond James, supra,* and *Living Trusts*, *supra*, as applicable to Medicaid planning. (PAO at p. 8). The rejection is apparently based upon the erroneous conclusion that nonlawyer Medicaid planners are "essentially unregulated." Since the Standing Committee failed to investigate what other regulated professions provide assistance in Medicaid planning, Burns provided that information regarding his licensures and the nature of regulation pursuant to those licenses. Clearly he did not argue that as a securities broker and insurance agent that he is entitled to provide legal advice. Rather, it was rebuttal to a factually inaccurate conclusion.

Second, in wrongfully rejecting the reality of the participation of nonlawyer, licensed professionals in this field, the PAO failed to grapple with the role of other professionals and failed to provide meaningful guidance in this multidisciplinary field. This approach is a stark departure from that used in *Pension Plans, supra*, wherein this Court noted that "[i]t is apparent that pension plan preparation and administration is a field of practice that requires the knowledge and expertise of lawyers, CPAs, actuaries, and life insurance professionals." *Id.* at 433. The same could be said for Medicaid planning, as a broader investigation would have revealed.

Just as was the case with pension plan preparation, the federal government has authorized nonlawyers to provide assistance. Even without such federal authorization, in the best of all worlds, people in need of such planning would have at their disposal CPAs, insurance professionals, stock brokers, lawyers and others. The reality is that people often realize they may need Medicaid planning as a result of interdisciplinary activity. When one of these nonlawyer professionals provides assistance, they must meet the regulatory requirements of their professional regulatory structure. That was the point and also the concern raised by Burns in his brief. Further, in light of 42 CFR § 435.908(b), it is the policy of the federal government that an individual "of the applicant or beneficiary's choice" be allowed to provide assistance "in the application process or during a renewal of eligibility."

Burns clearly expressed his concern that the PAO ignores this Court's opinions dealing with similar circumstances. Rather than discuss the application of the relevant decisions, including *Raymond James*, *Living Trusts*, *Sperry*, *Pension Plans*, *Moses* and other decisions that analyze the overlap among the relevant professions, both Responsive Briefs mischaracterize Burns position by claiming he seeks to practice law.

Burns position, as stated in his initial brief, was clear. As a professional who must comply with the regulations that govern his licenses, the PAO not only fails to provide guidance for his circumstances, it raises serious concerns regarding its application to his licenses. For instance, at page 10 of the PAO it is stated that a nonlawyer Medicaid planner has no legitimate reason "to gather information about customer's assets." Under both his licenses, Burns not only has a reason, he has a duty to gather such information. Burns also argued that the PAO seeks to create a very narrow definition of what information may be elicited from the client. For instance, the PAO misstates the holding in *Raymond James*, stating it "did not allow for the gathering of information [by securities brokers], it allowed for the gathering of facts about a customer's assets . . . ." PAO at 9. Aside from offering the semantic challenge of distinguishing the gathering of information versus facts, the PAO then limits such facts to the assets of the customer. That is not what *Raymond James* holds and such a limitation would require Burns to violate his

duty to his customers under both his licenses. As a securities broker, Burns must gather not only information about assets, but about tax status, planning goals and objectives, and other information relevant to providing the customer with suitable financial advice. Thus, *Raymond James* provided a list of activities that would constitute the UPL and those that would not. Those are lists, along with the guidance offered in *Living Trusts* and *Sperry*, which have long guided Burns in his practice. Burns' primary concern, completely misrepresented by the Responsive Briefs, is that the PAO's rejection of those cases as "not applicable here" throws the law relevant to the participation of nonlawyer professionals in Medicaid planning into a state of confusion and creates a monopolistic market for lawyers to the detriment of a public needing interdisciplinary services. Clearly 42 C.F.R. § 435.908(b) mandates the assistance by such nonlawyers in the Medicaid application process be permitted.

The Responsive briefs, in their mischaracterization of Burns' arguments, fail to respond to his contention that 42 C.F.R. § 435.908(b) mandates more than the mere assistance in filling blanks of an application and the appearance at an agency hearing. In attempting to narrow the scope of assistance pursuant to that regulation, the PAO and the Responsive Briefs avoid discussion of those cases most germane to the issue of authorization by the regulation. The UPL Brief quotes extensively from *The Florida Bar v. Turner*, 355 So. 2d 766 (Fla. 1978), but fails to provide

any discussion of the opinion in *Pension Plans*, *supra*, an opinion that revisited the nonlawyer activity addressed in *Turner* in the context of the relevant federal regulation. In *Pension Plans*, this Court noted that *Turner* "was based solely on a stipulated record and upon facts which occurred prior to the federal government's entry into the field of pension planning." *Pension Plans* at 433.

The ELS Brief avoids discussion of the role of federal regulatory authorization of nonlawyer participation, and of Burns' citation to other relevant cases on this subject, with the dismissive comment that "apart from the Federal regulation allowing anyone to assist in filling out a Medicaid 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." ELS Brief at 12. This sentence suffers from several infirmities. First, Burns does not seek authorization for any conduct. He requests this PAO be rejected because it brings confusion to the determination of what is the unauthorized practice of law in Medicaid planning. Second, the phrase "apart from the Federal regulation allowing anyone to assist in filling out a Medicaid application" materially misrepresents the relevant language. The regulation provides that "[t]he agency must allow individual(s) of the applicant or beneficiary's choice to assist in the application process or during a renewal of eligibility." The United States Supreme Court, held in *Sperry v Florida ex rel. The Florida Bar*, 373 U.S. 379, 404 (1964), "the order

must be vacated since it prohibits him from performing task which are incident to the preparation and prosecution of patent applications before the Patent Office." The PAO, in acknowledging the federal regulation, then applies the erroneous limitation to "preparation of the Medicaid application," rather than the actual term used in the regulation, "application process." PAO at 10, fn. 4. Further, the PAO cites *State ex rel. The Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963) twice, but it fails to consider the modification of that opinion by the United States Supreme Court. PAO at 6 and 13.Therefore, the PAO is devoid of discussion of what the phrase "application process" means in Medicaid planning. It fails to consider what is "incident" to the "application process." Without such an analysis, there can be no suggestion the PAO offers any clarification to the issue at hand.

In both the Responsive Briefs, the characterizations of Burns' objections to the PAO were more than misstated. They had no relevance to his arguments. He does not seek to draft legal instruments, whether qualified income trusts, personal service contracts or other such documents. In fact, he clearly stated that position at pages 12 and 13 of his Initial Brief, citing the relevant cases governing such activity. He stated that he is aware of and abides by the rules concerning the relationship between nonlawyer and a lawyer in providing relevant services. IB at 13. Burns' does object to the failure of the Standing Committee to elicit any

competent testimony or evidence of complaints regarding nonlawyer Medicaid planners. He objects to the failure of the PAO to discuss or demonstrate any causal link between any alleged problem and the proposed solutions to the alleged problem. Finally, he objects to the failure of the PAO to bring any clarity to the determination of what is the UPL with regard to Medicaid planning. He contended in his Initial Brief that the PAO injects confusion and ambiguity into such determinations. These were the arguments that the Responsive Briefs failed to address in any meaningful way.

C. The Responsive Briefs Fail to Explain How the PAO Brings Clarity Rather than Confusion to the Determination of the UPL in Medicaid Planning.

The juxtaposition of UPL Brief and the ELS Brief provides a rather compelling, if unintended, reply to Burns concern about the failure of the PAO to bring clarity to the determination of the UPL in Medicaid planning. The UPL Brief asserts that the PAO is necessary because "there is no existing case law or opinion that specifically addresses the Medicaid planning activities at issue," claiming that the May 13, 2009 letter has no binding authority. While there is no case that specifically states it is the UPL for a nonlawyer to draft a qualified income trust or a personal services contract in the context of Medicaid planning, that activity is clearly defined as the practice of law. The May 13, 2009 letter may not have

binding legal authority, but the Opinions of this Court upon which that letter rests certainly have binding effect.

The ELS Brief does not explicitly respond to Burns' concerns about lack of clarification. Rather the response to Burns' brief begins with the misstatement that Burns believes his licenses "authorize him to give legal advice to his customers" and then invites consideration of "[a] unbroken line or precedent over the past sixty years . . . ." ELS Brief at 6. Notably, after establishing this phantom argument, the ELS Brief fails to point to a single sentence in the PAO that would clarify the current state of the law. At page 11 of the ELS Brief, Burns is told he "would be well advised to reread the *Raymond James* opinion." There is no little irony in the fact that *Raymond James*, as well as *Living Trust,* is rejected in the PAO as inapplicable. See PAO at 8 and 9. Further, the PAO's mandate that gathering of information by nonlawyers must be limited to the customer's assets is contrary to the holdings in those cases. *See* PAO at 9. To add to the confusion, the PAO misstates the application *American Senior Citizens Alliance, supra,* to this argument. At page 10 of the PAO, it is contended that the respondents in that case sought to justify their unseemly sales tactics as authorized by language in the *Living Trust* case. The PAO argues that the Court rejected this contention as "an unreasonable interpretation of the phrase 'gathering information," thus implying that those cases support a limitation on the information a nonlawyer may gather.

That was not the holding in *American Senior Citizens Alliance*. This Court found that the activity was "far more than the mere gathering of the necessary information for a living trust.'" After discussing what activities of the respondent constituted the UPL, this Court restated its holding in *Living Trust*. "Nevertheless, we found that because the 'gathering of necessary information for a living trust' did not constitute the unlicensed practice of law, nonlawyers may properly perform this activity." *Id.* at 259.

If either the ELS or the Standing Committee believe that the PAO brings needed clarity to this subject, the failure in their briefs to direct the Court's attention to a single sentence that achieves that purpose is telling. The factually unsupported statement in the UPL Brief that "[b]ecause there is no case law and because there is public harm and the potential for harm . . . ." the Court should adopt the PAO is unresponsive to the question. If there is a need for filling a gap in the case law, the Responsive Briefs have failed to identify what aspect of the PAO would fill that gap. Clearly, when faced with the most immediate opportunity to demonstrate how the gap would be filled – directing Burns to the specific language of the PAO that would so instruct him – the ELS Brief pointedly directs Burns to long standing opinions of this Court.

Burns believes that the opinions of this Court have provided clear and comprehensive guidance for nonlawyers seeking to avoid running afoul of the UPL

laws. The PAO questions the applicability of those opinions to the subject of Medicaid planning and it misstates the holdings in those cases, especially the *Raymond James*, *Living Trusts* and *Sperry* decisions, and it rejects and/or avoids discussion of the role of licensed, regulated nonlawyers in Medicaid planning as authorized by federal regulation.

CONCLUSION

The Petition should be denied. The need for action by this Court is not demonstrated by competent factual findings. The Proposed Advisory Opinion does not present remedies to any problems that were allegedly identified by the information supplied to the Standing Committee. Finally, the Proposed Advisory Opinion injects ambiguity and confusion, rather than clarity, into the determination of what constitutes the unauthorized practice of law in the context of Medicaid planning.

CERTIFICATE OF SERVICE

I certify that a copy of this Brief in Opposition was sent by Email to the following this 28th 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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