

IN THE SUPREME COURT OF FLORIDA

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

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CASE NO.: SC14-211

**RESPONSE OF ELDER LAW SECTION OF THE FLORIDA BAR TO  
BURNS PETITION FOR HEARING AND/OR CLARIFICATION**

William D. Burns, a stockbroker and insurance agent, filed a petition for rehearing and/or clarification (the “Burns Petition”) of this Court’s January 15, 2015 Order approving the revised proposed advisory opinion on Medicaid planning activities by non-lawyers, and ordering that the revised advisory opinion shall have the force and effect of an order of this Court. For the reasons set forth below, the Elder Law Section requests that the Court deny the Burns Petition.

1. The Burns Petition is a rehash of arguments made at great length by Mr. Burns in his March 4, 2014 twenty-seven page brief in opposition to the proposed advisory opinion, and his March 28, 2014 sixteen page reply brief. The Burns Petition does not “state with particularity the points of law or fact that, in opinion of the movant, the Court has overlooked or misapprehended in its decision,” Rule 9.330(a), Rules of Appellate Procedure, nor does it “state with particularity points of law or fact in the Court’s decision that, in the opinion of the movant, are in need of clarification.” Id. Rather, the Burns Petition merely reiterates his disagreement with the advisory opinion, which he expressed at length in his earlier submissions to this

Court.

2. The only “new” materials in the Burns Petition are two undated and only partially identified documents attached to the Burns Petition, which the petition claims indicates that “several annuity companies...were withdrawing their Medicaid planning annuities from the Florida market.” (Burns Petition at 6 and Exhibit A attached thereto.) Generally this sort of remote hearsay is unreliable and should not be relied upon or considered by this Court.<sup>1</sup> Moreover, nothing in the advisory opinion says or implies that licensed insurance agents cannot sell annuities in Florida. Nothing in the advisory opinion interferes with the business of selling insurance. What the advisory opinion (and a long line of prior opinions of this Court) states is that insurance agents, like other non-lawyers, are not authorized to perform legal analysis for clients and give legal advice to clients as to the legal affect of purchasing an annuity on their eligibility for Medicaid. As the advisory opinion explains, applying the facts of a particular client’s situation to the complex and voluminous Federal and state laws, and advising a client of the impact of those laws on a client’s eligibility for Medicaid, is the practice of law.

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<sup>1</sup>The Elder Law Section has heard that Mr. Burns has attempted to solicit similar letters without success.

3. As to the particular product alluded to in the Burns Petition, referred to in the industry as a “Medicaid annuity,” the Deficit Reduction Act of 2005 severely limits the utility of such annuities for purposes of qualifying for Medicaid benefits. As a result of that Federal legislation, in order to utilize an annuity for Medicaid planning, it would have to pay out in equal increments of principal and interest over no more than the applicant’s life expectancy, and the state of Florida would have to be named as the primary beneficiary after the applicant’s death, to the extent Medicaid benefits are paid. 42 U.S.C. §§1396p(c)(1)(f),(g); 42 U.S.C. §1396p(e); FAC 65A-1.712(3)(b), (4)(e). Additionally, to be considered exempt, the annuity must be irrevocable and non-assignable. FAC 65A-1.1712(3)(b) 2. Thus, these annuities should be considered only under narrow circumstances and after careful analysis. On occasion, they may be properly used by married couples who are not eligible for Medicaid due to excess assets, where these products are purchased by the spouse to shelter assets, locking away those assets sometimes for decades to create a minimal income stream with those assets to insure that the spouse in the nursing home qualifies for Medicaid.

4. A Google search performed last week revealed that single premium Medicaid qualifying annuities are currently offered by at least ten nationwide

insurance companies. While the Elder Law Section believes that very few such products have been sold since the enactment of the Deficit Reduction Act of 2005, those annuities remain readily available in Florida in those few instances where they would both make economic sense and assist in the qualification for Medicaid benefits.

5. Thus, the documents attached to the Burns Petition do not prove any point helpful to Mr. Burns. Rather, they seem only to reflect that one non-lawyer insurance agent and an insurance company are properly sensitive to issues of the unlicensed practice of law, and seek to conform their activities to the terms of the advisory opinion, which will leave the selling of insurance to licensed insurance salesmen, and the practice of law to those licensed to do so.

### Conclusion

For all of the foregoing reasons, the Petition for Rehearing and/or Clarification should be denied.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was furnished by email to the following individuals on this 10<sup>th</sup> day of February, 2015.

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