IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

RE: ADVISORY OPINION
MEDICAID PLANNING ACTIVIES
BY NONLAWYERS

CASE NO. SC 14-211

PETITION OF WILLIAM D. BURNS FOR REHEARING AND/OR CLARIFICATION

COMES NOW Petitioner WILIAM D. BURNS, by and through undersigned counsel, pursuant to Rule 10-9.1(g)(4) of the Rules Regulating The Florida Bar and Rule 9.330, Florida Rules of Appellate Procedure, and petitions this Court for leave to request that the Court rehear and/or clarify the Order of this Court rendered January 15, 2015, and says:

Preliminary Statement: The Amended Proposed Advisory Opinion, as approved by this Court, will be referenced herein as "AO." Nonlawyer Medicaid Planners will be referenced herein as "NMPs."

1. Introduction: Petitioner is licensed under Florida law as a stockbroker and insurance agent. Petitioner respectfully contends that the Court overlooked or misapprehended both the role of licensed, regulated non-lawyer professionals (hereafter "NMPs") in Medicaid planning and the impact the approval of the Amended Proposed Advisory Opinion[1] has upon long

standing opinions of this Court that have guided nonlawyer, regulated professionals, such as stock brokers, insurance agents, and CPAs. The Advisory Opinion, ("AO") in some instances, misstates holdings of earlier opinions of this Court or conflicts with such opinions. The AO cannot be reconciled with long standing rulings of this Court. The AO is in conflict with federal policy regarding who may assist Medicaid applicants. The AO suffers from internal inconsistencies and ambiguities that render compliance with the opinion difficult, if not impossible. The AO, based upon a very few anecdotes, characterizes the entire Medicaid planning industry in a disturbing manner. Finally, far from providing consumer protection, the AO will restrict the services available to Medicaid applicants and their families and access insurance and financial tools that would help such consumers achieve their goals of protecting assets..

2. Federal Policy. At page 5 of the AO, 42 C.F.R. § 435.908 is cited in footnote 1 as authority for the statement that "preparation of the application for Medicaid benefits was not considered as federal law authorizes nonlawyer assistance in the application process." (Emphasis supplied). No further discussion of this regulation is found in the AO[2]. The characterization of this regulation as "authorizing nonlawyer assistance" is a misstatement of this

[1] The Amended Proposed Advisory Opinion will be referenced herein as "AO>"
[2] At page 14, fn. 2 this mischaracterization is repeated.

federal policy. The regulation provides, "The agency must allow individual(s) of the applicant or beneficiary's choice to assist in the application process or during a renewal of eligibility." (Emphasis supplied). The Court's characterization incorrectly places the focus of the federal provision on the individuals assisting the applicant, as though the provision were designed to address the type of person or professional *authorized* to provide such assistance. The federal provision, however, focuses not on those providing assistance, but on the unfettered right of applicants *to choose* whomever they wish to assist in the application process.[3] The language of the AO belies the public policy clearly underlying the federal regulation, which is to afford consumers the broadest access to Medicaid coverage and guaranteeing consumers the right to choose any person to assist them in the application process.

Moreover, by insisting that any person of the applicant's choosing "must [be] allow[ed] to assist in the *application process*," the regulation evinces a federal intent to afford applicants a wider range of assistance than

[3] The Florida Department of Children and Families, the agency that administers this federal program, maintains a website that seeks to fulfill the goal of accessibility. http://www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/medicaid That website provides specific guidance regarding income and asset limits and other information, in including a qualified income trust fact sheet. This begs the question, is a nonlawyer Medicaid planner practicing law when he or she directs an applicant to this state website?

simply filling in the blanks on an application. In authorizing assistance with the "application process" the drafters obviously intended to permit the applicant to receive assistance in the broad spectrum of tasks relevant to obtaining these federal benefits. The AO's determination that those tasks do not extend to gathering documents and financial information necessary to complete the application is inconsistent with the federal directive's plain language. We respectfully submit the Court misapprehended the import of the federal provision by failing to analyze or even discuss the meaning of "application process" and by failing to address the need to balance the federal policy expressed in 42 C.F.R. § 435.908 with concerns regarding UPL.

3. Damage to the Consumer. While the stated goal of the AO is to protect the consumer, this AO has had an immediate and startling impact upon the choices available to those persons seeking Medicaid planning services. As previously stated, the federal policy mandates that the applicant be permitted to select an individual of the applicant's choice to assist in the application process. This Court has stated policy reasons for the UPL rules.

> The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the

> judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.

The Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978)[4]. Both *Brumbaugh* and of 42 C.F.R. § 435.908, reflect the policy that consumer is served best when the professional possessing the relevant expertise is available to the applicant. Just as *Brumbaugh* was concerned about nonlawyers who had not been examined and qualified to give legal advice, that policy is applicable to the other disciplines relevant to Medicaid planning. State and federal authorities have enacted laws to assure that only those who have been examined and found qualified to render financial and insurance advice may doing so. Nobody, including this Petitioner, came forward during the proceedings leading up to the approval of the AO to contend that the drafting of legal documents such as personal service contracts or the preparation and execution of qualified income trusts was not the practice of law. Nobody argued that non lawyers are authorized to give advice concerning such documents. In fact, there was agreement regarding those issues, which had long been settled under *Raymond James* and *Living Trusts*. But the AO brings confusion to that long standing body of law. The

[4] *Brumbaugh* involved the sale of do-it-yourself kits and a typing service, but it was found that she exceeded merely typing, but provided advice and assistance that constituted the practice of law.

gathering of information necessary for a living trust was not the practice of law under *Brumbaugh*, but is under the AO. *See* AO at pages 11 and 14. The effect of the AO is to limit consumer access to those persons trained to provide specific services such as insurance, securities, and financial planning. Further, the immediate response of the insurance industry has been dramatic. The week following the opinion, several annuity companies notified agents they were withdrawing their Medicaid planning annuities from the Florida market. See Exhibit A, attached hereto. One company has chosen to remain in the market, but will only provide that product through a very limited number of lawyers who also have an active insurance license. This Petitioner respectfully contends that the limitation of consumer choice was overlooked or misapprehended.

4. Factual Misstatements. This Court in *In re: The Joint Petition of The Florida Bar and Raymond, James and Assoc., Inc., 215 So. 2d 613 (Fla. 1968)* and *The Florida Bar re: Advisory Opinion – Nonlawyer Preparation of Living Trusts*, 613 So. 2d 426 (Fla. 1992) established guidelines that have long served not only Medicaid planners, but all regulated nonlawyer professionals that were the object of those opinions. The holdings in these cases are dismissed in the AO as "not applicable here." (AO at 11). While the AO seems to recognize that licensed nonlawyer professionals may gather the

"information" necessary "to conduct the business for which they are licensed and regulated", the AO's repeated declaration that *Raymond James* and *Living Trust* are inapplicable to Medicaid planning injects confusion and chaos into the practices of NMPs and all professionals who have looked to those cases for guidance. Significantly, in arriving at this conclusion, the AO does not present any analysis of the nonlawyer Medicaid industry. There is no discussion of whether the industry consists primarily of regulated nonlawyer professionals or others who have significant qualifications to provide the assistance that federal policy mandates an applicant be free to obtain. Rather than analyze this critical subject, the entire industry is dismissed in an alarming manner.

> As noted earlier, the testimony revealed that nonlawyer Medicaid planners are *essentially* unregulated, as there are no licensing, education, or advertising requirements. Because of this lack of regulation, nonlawyer Medicaid planners include 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.

(AO at 21, emphasis supplied). It is significant that each of these undocumented anecdotes references a regulated professional, including members of The Florida Bar. This characterization of an entire industry, especially in light of the complete failure to investigate the nature of the industry, would never have been admitted as evidence before a trial court.

However, in this instance it has attained the force of law. This begs the question: Did this Court intend to adopt and approve language that characterizes an entire industry in this manner? The Petitioner believes this was a serious oversight.

The factually unsupported characterization of NMPs in the AO continues with the use of a citation to *The Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997) to support the limitation of the "gathering of information" by NMPs. At issue in *American Senior Citizens Alliance* was the use of high pressure sales tactics targeting the elderly. There is nothing in this record to suggest that such tactics are being used by NMPs. If that is discovered to be a problem, *American Senior Citizens Alliance* is the governing law. Nothing in the AO enhances the prohibition of such unsavory practices. The citation to that opinion in support of a rule to limit the legitimate gathering of information to assist Medicaid applicants is inappropriate. It is another instance in this AO that implies improper conduct by the industry as a whole in the absence of any factual support for such serious accusations.

5. Inadequate Investigation. This Petitioner concedes that the technical requirements of notice under the Rule Regulating The Florida Bar 10-9.1 were met. Notably, the testimony at the public hearing was almost

exclusively obtained from members of the Elder Law Section of The Florida Bar. The members of that section have a clear self-interest. To the extent that NMPs are discouraged or eliminated from providing these services, lawyers benefit financially. There is no indication in the AO, or in the record of the hearing, that any consideration was given to the anti-competitive impact this proposal would have upon the consumers of these services. While the requisite notices were published, the lack of participation by any association or relevant industry representatives is a glaring omission. *Raymond James* has served the public well for forty-five years because it was a collaborative effort of the affected parties. That process should have served as the model for addressing any problems that could be identified in Medicaid planning. There is no suggestion that any attempt was made to solicit the input of securities, insurance or financial planning professionals. There is no indication in the record, or in the AO, that consideration was given to the roles such professionals serve in Medicaid planning. Rather, the AO offers the repeated conclusion that NMPs are unregulated and unlicensed. (AO at pages 13 and 21). The record is clear that complaints about NMPs are very rare. That fact is not mentioned in the AO, though it is undisputed. (TAB D, p. 11, ll. 19 – 21of the PAO). This fact is met with speculation by the Elder Law Section representative, as suggested in their assertion that Medicaid

applicants do not have the capacity to lodge complaints. (TAB D, p. 11, l. 22 – p. 12, l. 8) The only witness to comment on that speculation was Jeff Brown, who confirmed it is extremely rare that a Medicaid applicant acts alone. Most often it is the family that primarily interacts with the Medicaid planner, whether lawyer or nonlawyer. (TAB D, pp. 86 – 99). The AO fails to mention that Medicaid planning is carried out to protect the assets of the estate. If the Medicaid planner does not perform properly, it is the family that suffers the loss as much as or more than the applicant. The failure to conduct a reasonable investigation of the subject, including any fact based analysis of either the nature of NMPs or the existence of any pattern of abuse is a significant and troubling omission in the AO. Ironically, of the few anecdotal examples of Medicaid planning abuse identified by the AO, two were abuses *by lawyers*. Yet the AO does not consider whether there is a pattern of abuse by lawyers in this area of practice. Such misconduct was certainly a significant percentage of the cases mentioned in the testimony. If the problem was not properly identified and analyzed, how can any solution be devised to solve the problem? Thus, the Petitioner respectfully contends this omission has undermined the basis for approving the AO.

6. Age of the Internet. The AO presents the startling conclusion that unlike the circumstances in 1978, when this Court observed "that our citizens will

generally use [legal information disseminated in print] for what they are worth . . . and further assume that most persons will not rely upon these materials . . . .” that assumption does not hold true in the age of the Internet. AO at 19. No support for such an assertion is offered. Rather, the AO goes on to declare that “nonlawyer companies are placing themselves in a position where the customer will not only rely on their information and expertise, but will also trust that the information and services they are receiving are true and correct.” Once again, no factual support for this conclusion is present in the record. However, common sense suggests this contention is contrary to reality. In an age when “Google” has become a verb of common usage. At a time when every doctor, lawyer, accountant, insurance agent, stockbroker, and auto mechanic is tested against the unlimited information instantly available to anyone with access to a computer, tablet or smart phone, this AO seeks to support the need for action on this subject by claiming that citizens are more dependent upon what a person tells them than they were in 1978.[5] There is simply no logical basis for the notion expressed in the AO that although far more information and resources are available to the public today than in 1978, the modern public is

[5] This startling assertion is presented in a section addressing the use of legal kits and forms. The use of legal kits and forms was not the object of any evidence and apparently not a factor in the several anecdotes of abuse offered by the Elder Law Section members.

less able to vet planners and more apt to be taken in by their marketing. (See footnote 3, herein). Does the public need this Court to protect it from too much readily available information? There is no support in logic or the record evidence for the AO's contention that citizens who have such information literally at their fingertips are more vulnerable than were the citizens of 1978?

7. Lawyers Practicing As Unlicensed Securities and/or Insurance Professionals. Perhaps the most critical language of the AO is found at the top of page 17. Listed in one sentence are virtually all the elements that constitute Medicaid planning. Included in this list is the process of "*assessing the facts relevant to the client's situation*, applying those facts to the laws governing Medicaid, *developing a plan to structure or spend the client's assets in compliance with those laws*, and drafting legal documents to execute the plans . . ." AO at 17 (Emphasis added). This list seems to have been carefully crafted to indicate that nobody other than a lawyer can gather facts, apply those facts to the needs of the client or develop a financial plan to "structure or spend the client's assets." However, that sort of activity is exactly what was considered in *Raymond James* and *Living Trust*. The underlying premise of this language is that the primary concern in Medicaid planning is legal, not financial. Petitioner contends, and common sense dictates, that this is a

multi-disciplinary process. However, if a lawyer engages in some of the activity this list implies, the lawyer is acting as a non-licensed securities broker, insurance agent, and/or financial planner. The AO provides no guidance regarding when the lawyer oversteps the limits of his or her license and becomes guilty of the unauthorized practice of these regulated professions. The consumer is not served by any limitation on access to the relevant specialists. However, Medicaid planning is not procedurally or conceptually different than estate or tax planning. Is the Petitioner practicing law when he complies with the security industry's "know your customer rule"? FINRA Rule 2090; *See* page 9 of Burns' Initial Brief. Is the Petitioner practicing law when he counsels his clients regarding the insurance and financial products that will meet their needs? Is an insurance agent guilty of UPL when insurance contracts are discussed with the client? Are CPAs guilty of UPL when they provide their client tax planning services? Conversely, this list demonstrated the dilemma presented by this AO. In this society, law is an integral part of many aspects of life. The AO devotes much of its content to matters that were not in controversy and fails clarify the harder question of what is "incidental" or what is "the application process." If this AO is read literally, a reading that is mandated by its status as having the force and effect of an order of this Court, every insurance

agent, securities broker, financial planner, and CPA is in constant jeopardy of prosecution for UPL.

The AO omitted any discussion of the overlap between the practice of law and the practice of other regulated professions. In failing to address that critical issue, this AO invites lawyers to engage in the unauthorized practice of securities, insurance and financial planning. The Investment Advisers Act of 1940, codified at 15 U.S.C. § 80b-1 through 15 U.S.C. § 80b-21, provides for regulation of anyone who, for a fee, advises people, pension funds, and institutions on investment matters. In SEC Release No. IA-1092, the SEC staff has interpreted the Act to limit the investment advice a lawyer may give to that which is incidental to the practice of law.[6] The planning and execution of spend down strategies often involve dealing with the applicant's investment portfolio and advising the client on the recharacterization of the applicant's investment portfolio. Life insurance and annuity policies also require financial analysis to determine if recharacterization is appropriate.[7] The language at page 17 of the AO invites

[6] Section 202(a)(11) of the Act provides that the definition of investment adviser does not include:
(B) any lawyer, accountant, engineer or teacher whose performance of such [advisory] services is solely incidental to the practice of his profession

[7] These licensed, regulated professionals must regularly obtain training regarding the needs of the elderly. For instance, the National Association of Insurance Commissioners (NAIC) has mandated such training in Section 9 of the NAIC Model 640, Long-Term Insurance Model Act. It calls for "no less than 8-

lawyers to engage in securities transactions and provide investment and insurance advice, not as an activity incidental to the practice, but as a critical element of the Medicaid application process. Such activity cannot be reconciled with section 517.1611 and Chapter 69W-100 through 69W-1000, of the Florida Administrative Code. Annuities and other insurance products that may serve as elements of Medicaid planning field are subject to regulation under chapter 626, Florida Statutes. Advice about and sale of annuities and other insurance products by a person who has not obtained a license is prohibited under that chapter.[8] Contrary to these laws, the language at page 17 of the AO strongly implies that only lawyers may gather the information and devise the plan to deal with an applicant's assets. Thus the failure to consider either the role these licensed, regulated professional serve or the statutory framework in which they provide insurance and financial services, is a significant omission. The effect of that omission is to invite lawyers to violate the laws governing the unauthorized practice of securities, insurance and financial planning.

WHEREFORE, Petitioner William D. Burns, respectfully moves this Court to grant his motion for rehearing and order The Florida Bar's Standing Committee

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hours" for initial training and "no less than 4 hours" for on-going training every 24 months regarding the sale, solicitation or negotiation of long-term care insurance.

[8] See section 626.7845

on the Unlicensed Practice of Law to address the matters identified herein as overlooked or misapprehended. Alternatively, Petitioner moves that the Advisory Opinion be clarified to define how the UPL regulations and the mandate in 42 C.F.R. § 435.908 are to be balanced, to define the use of the term "application process," and to provide specific guidelines for those Medicaid planners who possess various professional licenses.

Respectfully submitted this 30th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that a copy of this Motion for Rehearing and/or Clarification was sent by Email to the following this 30th day of January, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that this Motion 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.

By: /s/ Stephen M. Masterson

Stephen M. Masterson