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IN THE SUPREME COURT OF FLORIDA

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

CASE NO.: SC14-211

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

COMES NOW, The Florida Bar's Standing Committee on the Unlicensed Practice of Law (Standing Committee), by and through its undersigned counsel, and provides its response to the Petition of William D. Burns for Rehearing and/or Clarification (Burns Petition), pursuant to Fla. R. App. P. 9.330(a), and responds to the numbered paragraphs of the Burns Petition as follows:

2. The revised proposed advisory opinion (opinion), which is set forth in the appendix to this Court's January 15, 2015 opinion, does not misstate federal policy regarding who may assist a Medicaid applicant in the application process. In three places, the opinion makes clear that any nonlawyer may assist an applicant in the application process. On page 5, the opinion states "The preparation of the application for Medicaid benefits was not considered as federal law authorizes nonlawyer assistance in the application process" citing to 42 C.F.R. § 435.908. At footnote 2 on page 14, the opinion states "The preparation of the Medicaid application is not the unlicensed practice of law as it is authorized by federal law." And on page 22, the opinion states "It is the position of the Standing Committee

that a nonlawyer's preparation of the Medicaid application itself would not constitute the unlicensed practice of law as it is authorized by federal law." Nowhere in the opinion is there an attempt to limit the type of person or professional who may assist in the application process as suggested by Burns.

Burns also misstates what the opinion says when he suggests that the opinion determines that the application process does not include the gathering of documents and financial information necessary to complete the application. (Burns Petition at p. 4). To the contrary, the opinion specifically allows nonlawyers to gather information as part of assisting someone in preparing an application for Medicaid benefits. In footnote 2 on page 14, the opinion states "The preparation of the Medicaid application is not the unlicensed practice of law as it is authorized by federal law. Therefore, the preparation of the application was not part of the question presented to the Standing Committee. **To the extent that it is necessary for a nonlawyer to gather information about an individual's assets to complete the application, that activity would also be authorized**." (Emphasis added).

3. Burns claims that "[t]he effect of the [opinion] is to limit consumer access to those persons trained to provide specific services such as insurance, securities, and financial planning."(Burns Petition at p. 6). Nothing in the opinion limits the ability of other regulated professionals to provide insurance, securities,

and financial planning advice during Medicaid planning. This point was fully addressed in the Standing Committee's Answer Brief at pages 7-9.

The inclusion of Exhibit A to the Burns Petition is an attempt to paint a picture of gloom and doom for the State of Florida by implying that certain annuities will no longer be sold in Florida. As more fully discussed in the response of the Elder Law Section, this is not the case.

4. Burns contends that Medicaid planners, who have long relied on *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) for guidance, will now be confused by the opinion. To the contrary, the opinion will now provide needed clarification in this area. Neither *Raymond James* nor *Living Trusts* dealt with the Medicaid planning activities that are the subject of the opinion. Now, Medicaid planners have an opinion on point to provide appropriate guidance.

5. Burns claims that the "the lack of participation by any association or relevant industry representatives is a glaring omission." (Burns Petition at p. 9). As Burns concedes, the requisite notices required by R. Regulating Fla. Bar 10-9.1 were published. Additionally, at least two individuals, attorney Jeff Brown and Sonja Kobrin, spoke on behalf of nonlawyer Medicaid planners (Public Hearing Transcript pages 85-99, at TAB D of the proposed advisory opinion). Further,

word was out in the industry regarding the public hearing and the request for advisory opinion. See Sonja Kobrin's Urgent email sent to Medicaid planning professionals (exhibit A of the 1/31/13 written testimony of Twyla Sketchley, at TAB N of the proposed advisory opinion). The fact that few in the industry chose to participate is beyond the control of the Standing Committee. As the old adage goes, "you can lead a horse to water, but you can't make him drink."

6. In Burns's discussion of the Internet, he poses the rhetorical question "Does the public need this Court to protect it from too much readily available information?" (Burns Petition at p. 12). The availability of information is not the issue. It is the way the nonlawyer Medicaid planning companies are holding themselves out to the public that is the issue. As demonstrated by the website screen shots from numerous nonlawyer Medicaid planning companies that were included in the written testimony, the companies hold themselves out as "experts" or "specialists" and place themselves in a position where the customer will rely on their information and expertise, and will also trust that the information and services they are receiving are true and correct. This is what the public needs to be protected from. Nonlawyers placing themselves in a position where the customer relies on them for the proper handling of their legal matter is what this Court found to be the unlicensed practice of law in *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1193-4 (Fla. 1978)("Although Marilyn Brumbaugh never held herself out as

an attorney, it is clear that her clients placed some reliance upon her to properly prepare the necessary legal forms for their dissolution proceedings. To this extent we believe that Ms. Brumbaugh overstepped proper bounds and engaged in the unlicensed practice of law.")

7. Burns claims that the effect of the opinion "is to invite lawyers to violate the laws governing the unauthorized practice of securities, insurance and financial planning." (Burns Petition at p. 15). Why an opinion dealing with certain Medicaid planning activities by nonlawyers is going to lead lawyers to engage in unauthorized activity in the securities, insurance, and financial planning areas is unclear and wildly speculative at best. Burns also claims "the [opinion] 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." (Burns Petition at p. 13). Providing guidance to lawyers is beyond the scope of an advisory opinion on whether certain activities by nonlawyers constitute the unlicensed practice of law.

As an alternative to rehearing, Burns moves that the opinion be clarified to define how the UPL regulations and 42 C.F.R. § 435.908 are to be balanced, to define the term "application process," and to provide specific guidelines for Medicaid planners who possess professional licenses. This requested clarification

is not necessary as the opinion is either clear on these points or the points are beyond the scope of the request for opinion.

As noted earlier, there is no conflict between what the opinion allows in the application process and what the federal regulation allows. Consequently, there is nothing to be balanced or clarified.

The application process is also defined in the opinion's delineation of activities that are considered the unlicensed practice of law and those that are not. The request from the Florida Bar Elder Law Section's Unlicensed Practice of Law Subcommittee asked about three specific Medicaid planning activities leading up to the application, which were addressed in the opinion. The application process would not involve those activities. In other words, to the extent a nonlawyer is engaging in the activities this Court determined to be the unlicensed practice of law, the nonlawyer would be providing services outside of the application process. As the scope of authorized activities is set forth in the opinion, this point does not need to be clarified.

Nor is it necessary to clarify the opinion to provide specific guidelines for Medicaid planners who possess professional licenses. The role of nonlawyer Medicaid planners who possess professional licenses, although beyond the request for advisory opinion, was fully addressed in the Standing Committee's Answer Brief at pages 7-9. The opinion clearly sets forth what activities constitute the

unlicensed practice of law. An individual holding a professional license may work within the scope of that license while avoiding the unlicensed practice of law. Clarification from this Court is not necessary.

For the reasons stated above, The Florida Bar's Standing Committee on the Unlicensed Practice of Law respectfully requests that the Petition of William D. Burns for Rehearing and/or Clarification be denied and that the Court's January 15, 2015 opinion approving the revised proposed advisory opinion be allowed to become final and have the force and effect of an order of this Court and be published accordingly.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response to Petition of William D. Burns for Rehearing and/or Clarification was sent by email to the Elder Law Section of The Florida Bar, Ms. Jana McConnaughhay, Chair, Waldoch & McConnaughhay P.A., 1709 Hermitage Blvd., Ste. 102, Tallahassee, Florida

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