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FROM THE CHAIR

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As my year as Chair of the NLD draws to a close I thought it would be best to reflect on some of the amazing experiences we have had together this year, and discuss some of the highlights of our upcoming Chicago Convention. Being Chair of the NLD has been a whirlwind tour, and it has been so much fun. The year has gone by so fast, and I want to thank all of you for your support and hard work.



Jackie Olinger

We started this bar year with an eye toward keeping up with the NLD legacy of growing members and having fun while doing it. We did not disappoint in this regard. We have once again helped AAJ sustain, grow, and build membership. This is the NLD's most important task as a member group.

We had at least one membership drive every month this year, and that is no small feat. Our AAJ staffers organized these events all over the country, and took great care to see that it was a rewarding experience. Thanks guys—you're the best! Kudos to those of you who attended a drive or recruited even one member this year, because it is really hard work and is so appreciated by AAJ. The NLD was successful this year in part because of you.

We have completed so much important work this year, and one of the biggest things we did was raise money. We raised money for the AAJ Political Action Committee (PAC) during two PAC drives. They were very successful. Without a strong PAC, our interests and the interests of our clients' are severely crippled. Thank you to our PAC committee for organizing these drives; you are appreciated. Thanks to those of you who were able to attend the drives, and special thanks to those of you who gave to the PAC this year. It is so important to unify under our AAJ umbrella to support pro-civil justice candidates. As one very smart past chair of the NLD so eloquently put it, supporting the PAC is our career insurance. Please support the PAC.

THE SIDEBAR

The New
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MEDICARE SET-ASIDE DOLDRUMS

M I L E S T O N E

Moving forward

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Hot air balloons, ships under sail and trial attorneys looking for closure want to avoid the slow moving air mass phenomenon. When it comes to settling cases, involving a “Medicare Beneficiary” may require the assistance of a Medicare Set-Aside Consultant. Due to ever-evolving regulations and lesser-known settlement options, Milestone Consulting, LLC (“Milestone”) has long played an imperative role as advocate for your client. As with all positions in litigation, each party over-values their position. Do not let defendants determine how a case is settled as it pertains to your client’s benefits. This includes the defendant, assuming control over the plaintiff’s implantation of a Medicare Set Aside (“MSA”).

Preserving your client’s ongoing Medicare entitlement must be addressed by a plaintiff expert. Controlling the outcome of your settlement allows you to mitigate issues that are commonly dealt with in settlement negotiations relating to MSAs. Potential key issues are legal necessity, compliance, funding, and allocation. Milestone has designed the following suggestions to highlight MSA challenges, and to suggest how together we can collaborate to ensure MSAs are only created when necessary, and are established and maintained properly.

MAINTAIN ONGOING COMPLIANCE

Provide the clarity of hindsight

Problem: Some plaintiffs choose to “self-administer” their MSA. Despite your client’s best efforts to comply with Centers for Medicare and Medicaid Services (“CMS”) guidelines, this course can lead to accounting errors and the misuse of funds, resulting in Medicare denials and eventual financial duress to your client.

Solution: Offer your client information to multiple professional administration MSA companies. This allows your client to consider the scope of services and costs associated with professional administration, and to understand the many benefits of that shared responsibility.

How this helps the client: The burden of responsibility is lifted from your client. The professional monitoring of funds ensures accounting is done properly, and that funds are not misused. Most professional management companies guarantee that your client will remain in compliance with Medicare.

How this helps you: You have offered multiple solutions to allow your client to make an independent decision. In the event your client chooses to forgo professional

administration, you are removed from liability in the event Medicare is denied down the road.

Practice Tip: The cost of professional administration has never been more affordable. While management appears to be an added expense, rather it is a preventative measure that can save your client from greater expense when coverage is denied due to non-compliance. Costs for professional management are trending down “as low as \$450 per year.”

PROVIDE CHOICES IN FUNDING

The options are many; but many may not be options

Problem: Plaintiffs are often forced, or are even unaware their MSA is funded through a structured settlement annuity provided by the defense as their only option. The use of a structured annuity, for this purpose can complicate care when your client reaches “temporary monetary exhaustion”. Temporary monetary exhaustion occurs when a Medicare beneficiary depletes a MSA prior to the next annuity-funding installment, limiting any flexibility for unexpected medical expenses. The MSA accounting and demonstration that MSA funds were spent on injury related care, Medicare approved, and properly coded, becomes your client’s burden. A look at *Spencer v. Hartford* highlights the inherent risk of not involving a client consultant.

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MEDICARE SET-ASIDE DOLDRUMS *continued*

Solution: Unless avoidable, MSAs should be funded with annuities that are developed by your expert, that take into account taxation, deductibility and liquidity needs. Documenting the process ensures that the client understands all available options for funding the MSA, including the use of a Single Premium Immediate Annuity (“SPIA”). In contrast to the structured settlement annuity, a SPIA offers living commutation (the ability to commute all or a portion of the annuity’s present value during their lifetime), offering flexibility and liquidity when necessary. If a structured settlement annuity is the best option for your client, your expert can co-broker the annuity purchase with the defendant to ensure the MSA is funded properly. How this helps your client: An expert for your client ensures that annuity pricing, product selection, and document process is performed in the interest of your client. On average, a SPIA is less expensive than a structured settlement annuity. When the living commutation feature is available, a SPIA offers flexibility for the future. While the growth on the SPIA is not tax-excludable, as with a structured settlement annuity, many clients establishing MSA arrangements have little to no tax liability due to low income or high medical deductions, even after applying Revenue Ruling 75-232. Additionally, if any guidelines for MSAs change, your client will not be locked into an immutable structured settlement annuity contract.

How this helps you: Providing choices for your client provides you with insulation.

Practice Tip: The use of an annuity results in a lower cost to the funding party and/or consumes less of your client’s total settlement offer, while still satisfying the funding requirements of the CMS. Note that in some states, such as Virginia, a client cannot own the annuity that funds the MSA. Because Milestone is licensed in all 50 states, we are confident in our recommendations with respect to individual guidelines and circumstances.

EXPAND THE ALLOCATION

Read between the lines; then commission a few of your own

Problem: Defendants commonly commission the preparation of allocation reports that offer no more than what is required in order to receive a stamp of approval. These bare-bone reports are void of an adequate plan for your client’s future medical expenses. The most common post-settlement complaint occurs when clients realize

their MSA will not cover many of the medical treatments recommended for their injuries as previously assumed, particularly off-label pain medicine prescriptions. Many plaintiff attorneys cannot practically commission their own allocation reports to counter the reports provided by defendants.

Solution: Commission an expert to review the MSA, taking care to include non-covered injury-related medical expenses. This supplement will insure both you and your client that the allocation report thoroughly compensates future injury-related medical expenses, both covered and non-covered by Medicare. Even when a complete and separate report may not be required or possible, the benefits of having the allocation reviewed far outweigh the future costs to a client as a result of inadequate reporting.

How this helps the client: Your client will be assured a complete future medical care plan.

How this helps you: Assuring the inclusion of non-covered medicals that are injury-related builds case value, and potentially leads to a higher settlement recovery.

Practice Tip: Your client will likely have medical expenses that fall outside of what is covered by Medicare. Your preferred selection of a MSA allocator should be determined by the company’s treatment of all covered and non-covered medical expenses, as well as their record of accomplishment of obtaining CMS approval. When required, prompt CMS approval of the allocation will prevent the extended waiting period associated with revisions and renegotiations. During negotiations, you have the right to review the allocation report and to obtain a second opinion when the MSA appears insufficient. The report should then be reviewed by a trusted allocator with a complete understanding of your client’s medical requirements, both covered and non-covered.

CLOSING

Plan for today; provide for the future

Milestone www.milestoneseventh.com is a comprehensive settlement management firm specializing in the complex issues that arise in the resolution of litigation and complex claims. Milestone is licensed to provide professional services in all 50 states. John T. Bair, Founder/Member, 716.883.1833, jbair@milestoneseventh.com. ■