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February 10, 2011

SENT VIA FACSIMILE - (310) 827-4293

James R. Gillen, Esq.
JAMES R. GILLEN, P.C.
4300 Promenade Way, Suite 118
Marina del Rey, California 90292-6279

RE: WILLIAM CARL, et al. V. RANCHO SPECIALTY HOSPITAL, et al.
Our File No.: 9031.33636 DKA/WEC

Dear Mr. Gillen:

Sorry, but you exhaust me.

I know of no legal authority which is binding on Medicare's right to claim reimbursement. It's the federal government. What I know is what I learned in law school about the difference between a survival action brought in the name and on behalf of the estate of the decedent, and a wrongful death action brought on behalf of the heirs.

Medical expenses are the obligation of the patient who incurs them. "He," the patient (meaning the estate suing in his name for survival) is therefore entitled to recover them if he was caused to incur them due to the negligence of the defendant. The elder abuse statute expands the right of the estate to recover not only medical expenses incurred during the decedent's illness, but, as a departure from basic California law, the estate may recover some amount (up to \$250,000) for the decedent's own pain and suffering. Therefore, the estate's survival action claim (i.e., the elder abuse cause of action) theoretically includes claims for both medical expenses (from which Medicare might request reimbursement) and general damages.

If you settle the "survival action," i.e., the elder abuse case, you will be receiving some amount of money in the name of the estate. Generally, collateral sources, including in this case Medicare, are entitled to be reimbursed by the estate if the estate recovers monies from a third-party tortfeasor. While you might characterize the monies received as for "general damages" only, and nothing for medical expenses, and then argue to Medicare that as nothing was received by the estate for medical expenses, there is no pot of gold from which Medicare might lay claim--my

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second hand experience is that Medicare does not consider itself bound by such allocations. They will look at the entire amount received by the estate, the rationale for the estate receiving anything, and negotiate the Medicare lien from there. As far as I have heard, if money is paid to the estate in a survival action, then Medicare presumes the entire amount received by the estate is in play, and negotiations begin. That's your job.

Contrast that from a wrongful death action--an action brought by heirs, for their losses. Generally, that does not include any claim for expenses incurred in treating the patient's last illness. As far as I know, collateral sources for payment of medical expenses of the decedent have no cause of action for reimbursement for medical expenses against the heirs' own claims for loss of care, comfort, society or support--collateral sources's claims, if any, are against the estate.

On that basis, and again this is second hand, and your job not mine, my experience has always been that plaintiff's attorneys in these cases dismiss the survival action for waivers of costs, and the estate receives nothing from the settlement. The settlement is paid to the heirs in a good faith settlement of their claims for wrongful death (which does not include payment of any special damages for medical expenses of the decedent--which they are not entitled to recover). The settlement is accurately and appropriately reported to Medicare in this way; and, again, my second hand experience is that Medicare generally accepts this representation--but I'm sure there are exceptions.

The settlement of the wrongful death only is in recognition of the much higher burden of proof that the plaintiff must establish to support an elder abuse claim, and in recognition that insurance coverage for the statutory damages recoverable in an elder abuse case (e.g., attorneys fees and punitive damages) are not covered by insurance, and, that as a matter of law (Ins. Code 533) intentional conduct is not covered either. But the characterization and allocation of the settlement proceeds among the various causes of action is up to you and your client.

As for the cost issue you included in your letter, I simply don't know what you're talking about. We are waiving all costs, for all causes of action. As to those causes of action for which you are allocating settlement proceeds, we are paying the money and waiving costs. As to those causes of action for which you are not allocating settlement proceeds we are only waiving costs. What I said in court was that as there is likely no insurance coverage for the intentional torts, or the statutory violation of the penal code, or for certain aspects of the elder abuse claim (e.g., attys fees and punitive damages), no settlement proceeds may be allocated to those claims--such that for those claims we are only waiving costs.

As for the comment from Dr. Phan--he told us that he had worked with Ms. Schultz and had no criticisms of her clinical skills. If called to testify, and asked, "Did you work with Ms. Schultz?"; he will say, "yes." If asked, "Do you have any criticisms of her clinical skills as a nurse?"; he will answer, "no." I'm not sure that the State Bar will allow "promised testimony at trial" as

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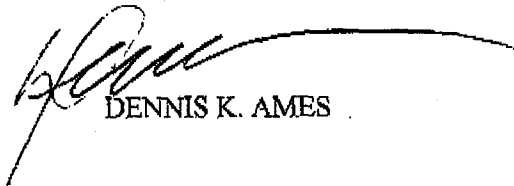
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additional consideration for a settlement--but if you want a very short declaration from him which includes these two statements, I'll get that for you, so you are protected.

Very truly yours,

LA FOLLETTE, JOHNSON, DEHAAS, FESLER & AMES

By:



DENNIS K. AMES

DKA/wmh

cc: James Davis, Esq.

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