ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday February 20, 2020

No. 3 Update and possible action regarding Ethics Opinion drafts:

- EO-19-0004/0005/0007

Staff will present information at the meeting.

ETHICS OPINION DRAFT

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File Nos. EO-19-0004, EO-19-0005, and EO-19-0007

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order No. 2018-110.

Rule 1.15(f) of the Arizona Rules of Professional Conduct ("ER 1.15(f)" or "the Rule") provides an ethical "safe harbor" to lawyers who distribute disputed property—including funds—in the lawyer's possession after providing notice to third persons known to claim an interest in the property. *See* ER 1.15 cmt. 1 (2014 amendment). The questions before the Attorney Ethics Advisory Committee (the "Committee") are: what constitutes sufficient notice under ER 1.15(f) where the lawyer is in possession of property that is the subject of a disputed health care provider lien asserted under A.R.S. §§ 33-931 through 33-936, and what obligations does the lawyer have to respond to requests for information prior to coming into possession of property?

Based upon the language of ER 1.15(f), Comments to the Rule, and lawyers' ethical obligations to their clients, the Committee concludes notice under the Rule, in this context, is sufficient if it includes:

- the client's name;
- the name of the tortfeasor and the tortfeasor's insurance carrier (if known);
- an acknowledgment that disputed property is in the lawyer's possession;
- the mailing address, telephone number, and email address where the third party can provide notice to the lawyer of the commencement of an action by the third party asserting an interest in the property;
- date of the third-party recovery; and
- the proposed distribution of the disputed property (e.g., to the client).

A lawyer does not need to provide information regarding the amount of recovery or other details concerning the recovery in a notice under ER 1.15(f). The notice, however, must be sent promptly after the lawyer receives the disputed property under ER 1.15(d). Moreover, where the lawyer does not have possession of any disputed property, a lawyer is not required by ERs 1.4, 4.4, or 1.15 to respond to requests for information by third parties who may have an interest in any future recovery being sought by the client.

ISSUE PRESENTED:

1. What information is required in a notice served under ER 1.15(f) in the context of a disputed health care provider lien?

2. Must a lawyer who does not have possession of any disputed property respond to requests for information from interested third parties with possible claims against a future recovery?

FACTUAL BACKGROUND:

A lawyer has a client who has been injured by a tortfeasor. The client has either obtained a recovery from the tortfeasor, which is in the lawyer's possession, or the lawyer is seeking to obtain such a recovery for the client.

As a result of the client's injury, healthcare services were provided to the client by a duly licensed healthcare provider. The healthcare provider has asserted and perfected a health care provider lien against the client's third-party recovery under A.R.S. §§ 33-931 – 33-936.

Under this statute, a licensed healthcare provider may file a lien against a third-party recovery to secure amounts owed to the provider for the injury-related health care. *See Blankenbaker v. Jonovich*, 205 Ariz. 383, 387 ¶¶ 17-18, 71 P.3d 910, 914 (2003). The lien is enforceable against the tortfeasor or the tortfeasor's insurance carrier, and the healthcare provider has two years to file suit to enforce such a lien. *See* A.R.S. § 33-934.

The client disputes the validity or enforceability of the health care provider's lien, and the lawyer would like to distribute the recovery to their client without filing an action concerning the dispute. After consultation with the client, the lawyer provides notice pursuant to ER 1.15(f) that, unless the third party commences an action within 90 calendar days of service of the notice, the recovery will be distributed to the client.

There is some controversy over what information must be contained in a notice under the Rule. Some healthcare providers have argued an ER 1.15(f) notice must include the name of the tortfeasor, the name of the tortfeasor's insurer, the amount of any applicable recovery, and date of settlement.

There is also a dispute over whether a lawyer who is seeking a recovery for a client must respond to requests for information from health care providers before any recovery being obtained by the client. Some healthcare providers have filed complaints with the State Bar of Arizona, pursuant to ERs 1.4, 4.4, and 1.15, against lawyers who have not responded to requests for information. The Committee agreed to address these disputes in EO-19-0005 and EO-19-0007.

RELEVANT ETHICAL RULES:

ER 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in ER 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the clientto make informed decisions regarding the representation.

(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary

to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ER 1.15. Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the

consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

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(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement between the client and the third person, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer possesses property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer. The lawyer shall promptly distribute any portions of the property as to which there are no competing claims. Any other property shall be kept separate until one of the following occurs:

(1) the parties reach an agreement on the distribution of the property;
(2) a court order resolves the competing claims; or
(3) distribution is allowed under section (f) below.

(f) Where the competing claims are between a client and a third party, the lawyer may provide written notice to the third party of the lawyer's intent to distribute the property to the client, as follows:

(1) The notice shall be served on the third party in the manner provided under Rules 4.1 or 4.2 of the Arizona Rules of Civil Procedure, and must inform the third party that the lawyer may distribute the property to the client unless the third party initiates legal action and provides the lawyer with written notice of such action within 90 calendar days of the date of service of the lawyer's notice.

(2) If the lawyer does not receive such written notice from the third party within the 90-day period, and provided that the disbursement is not prohibited by law or court order, the lawyer may distribute the funds to the client after consulting with the client regarding the advantages

and disadvantages of disbursement of the disputed funds and obtaining the client's informed consent to the distribution, confirmed in writing.

(3) If the lawyer is notified in writing of an action filed within the 90-day period, the lawyer shall continue to hold the property separate unless and until the parties reach an agreement on distribution of the property, or a court resolves the matter.

(4) Nothing in this rule is intended to alter a third party's substantive rights.

ER 4.4. Respect for Rights of Others

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

OPINION

The Rules of Professional Conduct are rules of reason, not to be hyper-technically construed to their logical extremes. *See* Arizona Rules of Professional Conduct, Preamble, ¶ 14. When interpreting rules, "[u]sually, the plain meaning of the text is the best reflection of intent and [courts] look no further unless the language is ambiguous or the plain meaning would lead to an absurd result. *Ruben M. v. Arizona Dep't of Econ. Sec.*, 230 Ariz. 236, 240, 282 P.3d 437, 441 (App. 2012).

Under ER 1.15(d), a lawyer must promptly notify any third person with interest in the property in the lawyer's possession and deliver the property to that person if their interest is undisputed. Under ER 1.15(e), a lawyer must hold any property to which there are competing claims until the competing claimants agree upon a disposition or a court resolves the claims. ER 1.15(f), however, allows a lawyer to distribute disputed property to the lawyer's client, without being deemed to have violated their ethical obligations to competing claimants, so long as the lawyer gives those claimants notice and an opportunity to take appropriate action to protect their interests.

In other words, ER 1.15(f) creates an ethical safe harbor for a lawyer to disburse property that is subject to a disputed claim with a third party. Subject to the client's approval, ER 1.15(f) provides lawyers the option of serving a written notice upon the third party of the lawyer's intent to distribute the property to the client unless the third party provides the lawyer with written notice that a legal action was initiated within 90 calendar days of the date of service of the lawyer's notice.

Nothing in ER 1.15 itself provides any specific guidance regarding what must be included in the notice. Comments, however, provide additional context to the rules. *See, e.g., Smart Indus. Corp., Mfg. v. Superior Court In & For Cty. of Yuma*, 179 Ariz. 141, 147, 876 P.2d 1176, 1182 (App. 1994); *In re Estate of Fogleman*, 197 Ariz. 252, 257, 3 P.3d 1172, 1177 (App. 2000). The Comment to ER 1.15, states notice must be "sufficient to allow the third person to take appropriate action to protect its [claimed] interests." ER 1.15 cmt. 1 (2014 amendment).

In the context of a health care provider lien asserted under A.R.S. § 33-931 through A.R.S. § 33-936, the identity of the tortfeasor and the tortfeasor's insurance carrier, if any, is needed to file suit to enforce a lien. *See Blankenbaker*, 205 Ariz. 383, 71 P.3d 910. Therefore, the Committee determines that "sufficient" notice under ER 1.15(f) requires the lawyer to provide the identity of the tortfeasor and tortfeasor's insurer, if any.

Clients must, of course, give consent to the lawyer to share confidential information in the notice, but it will typically be in the client's interest to do so as taking advantage of ER 1.15(f) can speed up the process of getting the property disbursed promptly and without additional expense. Also, since ER 1.15 does not alter a third-party's legal rights, *see* ER 1.15(f)(4), clients must also be advised, as required by ER 1.15(f)(2), as to the advantages and disadvantages of receiving the disputed property, and lawyers must obtain the client's informed consent, confirmed in writing, to the disbursement.

The Committee determines, however, that a lawyer does not need to provide information regarding the amount of recovery or other details concerning a recovery in a notice under ER 1.15(f). Not only are such details often subject to confidentiality, but they also are not necessary for the third party to take appropriate action to protect its claimed interest. Providing this information is voluntary and also subject to the client's approval, but not required as part of the notice.

Likewise, the Committee determines that, where a lawyer does not have possession of any disputed property, a lawyer is not required by ERs 1.4, 4.4, or 1.15 to respond to requests for information by third parties who may have an interest in any future recovery being sought by the client.

Nothing in ERs 1.4, 4.4, or 1.15 requires a lawyer to respond to requests for a "status" or "reasonable requests for information" from a third-party claimant. A lawyer's obligation to safeguard property in which a third party claims an interest, and provide the claimant with notice, only arises when the property comes into the lawyer's possession. *See* ER 1.15(d),(e) (specifying that the lawyer must act "[u]pon receiving funds or other property in which a client or third person has an interest."). Prior to a lawyer receiving a recovery, there is no ethical duty owed to the third party. Indeed, sharing information about a lawyer's representation of a client is prohibited by ER 1.6 unless the client has consented.

It should be noted four members of the Committee dissent regarding the required contents of the notice. Based on the language of the comment providing that the notice should generally include at least "a description of the funds or property in the lawyer's possession," the dissenting members believe that an adequate notice should include information regarding the amount of the recovery. This information is necessary to permit the third person to determine what action is necessary and appropriate to protect their claimed interest.

ETHICS OPINION REQUEST
EO-19-0004

January 26, 2017

State Bar of Arizona
Ethics Department
4201 N 24th Street, Suite 100
Phoenix AZ 85016

To Whom It May Concern

I am requesting a formal Ethics Opinion on the following issue Plaintiff is involved in a motor vehicle accident and has a personal injury claim pending against the Defendant The Defendant's insurance is insufficient to cover the Plaintiff's personal injury claim The Defendant has his own unrelated personal injury claim arising from an earlier accident The Defendant settles his own case while the case against him is pending First, may Plaintiff's counsel ethically send a Rule 1 15 letter to Defendant's counsel, claim an interest in those proceeds, and request that the Defendant's settlement money be held pending a resolution of Plaintiff's case against the Defendant Second, whether the Defendant's attorney may ignore the claim because Plaintiff has no cognizable "interest" and distribute the funds upon his client's demand

The issue is whether a Rule 1 15 letter may be sent under such circumstances and what "interest" means under Rule 1.15(c) See Ethics Opinion 11-03 discussing Rule 1 15 2003 Comment 4 ("The type of interest" protected under ER 1 15 is a matured legal or equitable claim "), *Silver v Statewide Griev Comm* , 242 Conn 186 (1997) ("An interest as used in the rules means more than an unsecured claim with respect to a third party An interest in the fund or property requires that the third party have a matured legal or equitable lien) See also 1 G Hazard & W Hodes, *The Law of Lawyering A Handbook on the Model Rules of Professional Conduct* § 1 15 302, p 460 (2d Ed 1996) ("The Comment to rule 1 15 uses the phrases 'just claims' and 'duty under applicable law' to suggest that the third party must have a matured legal or equitable claim in order to qualify for special protection [under the rule]", Alaska Bar Association Ethics Committee, Opinion No 3 (1992) ("In order to trigger an obligation on the part of the attorney to pay a creditor's claim, in contravention of a client's instructions, the creditor's claims must be a valid assignment on its face or statutory lien which has been brought to the attorney's attention "), Colorado Bar Association Ethics Committee, Formal Opinion

Nos 94 and 95 (1994) ("Where the third party does not hold an interest as a result of a statutory lien or a contract or a court order, the property should be promptly distributed to the client "), Connecticut Bar Association Committee on Professional Ethics, Informal Opinion No 20 (1995) ("The mere assertion of a third party claim to property is insufficient to create a duty to deliver to that third party"))

As additional information, the case where this dispute arose has since been resolved, but I expect that others have the same question as to the interpretation of Rule 1 15 under similar circumstances If an "interest" is undefined as is the language in Comment 4 of "a matured legal or equitable claim" then attorneys will remain uncertain as to what claims may be asserted which will impose the obligation under (e) and (f)

AJP bb
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ETHICS OPINION REQUEST
EO-19-0005

Patricia Seguin
State Bar of Arizona
Ethics Advisory Group
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266

Re: Request for Ethics Opinion regarding ER 1.15(f)

Dear Bar Counsel:

I am writing to request the issuance of a formal ethics opinion from the Ethics Advisory Group regarding ER 1.15(f). I understand Rule 42.1 of the Arizona Rules of the Supreme Court is shifting the responsibility for formal ethics opinions to the Attorney Ethics Advisory Committee. As the new Committee is yet unformed, I respectfully request your consideration of this issue to the extent permitted, or that you add it to the future Committee's agenda. The question, as detailed below, is whether the required "notice" must provide the information necessary to enable a third party to protect its rights.

The background is uncomplicated. As every lawyer knows, ER 1.15 prescribes a lawyer's duties with respect to the rights of third parties, particularly the rights of third parties who may have a claim to property in the lawyer's possession. Under Arizona law, a healthcare provider may have a lien on the claims of its patient for services rendered. A.R.S. § 33-931. The holder of a healthcare provider lien is a "third party" who is entitled to the protections of ER 1.15. Over the years there have been numerous ethics opinions regarding the obligations of a lawyer who has possession of settlement funds in which the lienholder has an interest. See Arizona Ethics Opinions 88-02, 88-06, 98-06, 11-03.

In 2014, the Supreme Court adopted an amendment to ER 1.15 relevant here. That rule, ER 1.15(f), authorizes a lawyer to serve a "notice" upon the third party that the lawyer may distribute property to the lawyer's client unless the third party initiates legal action. The Official Comment to ER 1.15(f) specifies the content of the notice:

> Notice under paragraph (f) must be sufficient to allow the third person to take appropriate action to protect its interests. Although there is no one form of notice that will be acceptable, the notice should generally include at least the following: (a) a description of the funds or property in the lawyer's position; (b) the name of the client claiming an interest in the funds and other information reasonably available to the lawyer that would allow the third person to identify the claim or interest . . . .

Our firm routinely represents healthcare providers who wish to protect their lien rights under A.R.S. § 33-931. Under Arizona law, a health care provider lien can only be enforced against the tortfeasor or its liability insurer. A.R.S. § 33-934. That is, the lien is not enforceable against the patient. *Blankenbaker v. Jonovich*, 205 Ariz. 383, 387 ¶ 18 (2003). Thus, to protect its rights under A.R.S. § 33-931, the healthcare provider must know the identity of the tortfeasor and/or its insurance company; and the date and amount of the settlement. The date of the settlement is critical because it starts the statute of limitations under A.R.S. § 33-934.

We routinely receive letters from lawyers of healthcare patients that purport to supply the "notice" discussed under ER 1.15, but fall short. These letters only identify the lawyer's client and demand that the hospital file suit within ninety days. They do not supply the tortfeasor's identity, the tortfeasor's insurance company, or the settlement date or amount. Without this knowledge, the hospital has insufficient information to file suit to protect its rights, but the injured party's lawyer will always have possession of this information after a personal injury case settlement. It is thus "reasonably available to the lawyer" and is necessary to "allow the third person to take appropriate action to protect its interests" within the meaning of the Official Comment to ER 1.15(f). Nonetheless, our clients repeatedly encounter lawyers who refuse to supply any of this information.

A letter that omits this information is inadequate to trigger the safe harbor of ER 1.15(f). This interpretation of ER 1.15 is necessary to effectuate its purpose, which is to require lawyers to respect the rights of third persons. The rule is turned upside-down if lawyers can "respect" the rights of third persons by refusing to provide them with information they need to protect their interest.

I therefore request that the Ethics Advisory Group issue an opinion on the following question:

When a lawyer representing a client in a personal injury case knows the identity of the tortfeasor, the tortfeasor's insurance company, the date on which the settlement was made, and the amount of the settlement, does ER 1.15(f) require the lawyer to supply that

information to a holder of the health care provider lien in order to satisfy the obligations of ER 1.15(f)?

I am happy to supply the Ethics Advisory Group with further background if desired.

Very truly yours,

ETHICS OPINION REQUEST
EO-19-0007

[redacted]

April 10, 2019

EO-19-0007

VIA U.S. MAIL AND EMAIL

Supreme Court of Arizona
Court Clerk's Office
1501 West Washington, Suite #402
Phoenix, AZ 85007-3231
aea@courts.az.gov

Dear Committee Members:

We are writing to request the issuance of a formal ethics opinion from the Attorney Ethics Advisory Committee (the "Committee") concerning whether an attorney who has not received a third-party recovery in connection with a client matter has any ethical obligation to provide "status" or otherwise communicate with a third-party (or their lawyer) who claims to have an interest in a possible future recovery.

This issue has arisen on numerous occasions because attorneys for several large Arizona hospitals have repeatedly sent out form letters to a number of attorneys, like those attached hereto, claiming that "status" and "reasonable requests for information" about a possible injury claim is required by ERs 1.4, 1.15, and 4.4.

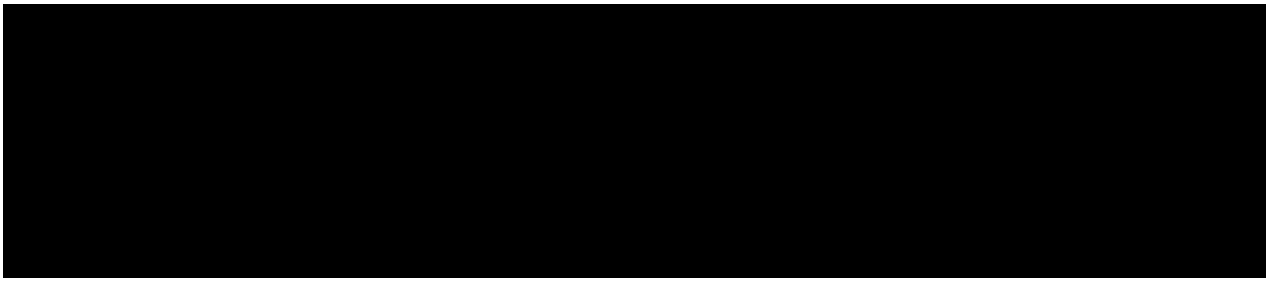
Although we believe there is no obligation to communicate "status" or anything else about a client or former client unless and until a recovery is obtained, and then only as specifically required by ER 1.15, numerous attorneys have been threatened and, in some cases, subjected to complaints with the State Bar of Arizona ("SBA"). While the SBA has not, to our knowledge, opened any disciplinary proceedings to date, we believe that given the statewide importance of this issue and the fact that it is being raised in a form letter sent out to numerous plaintiff's lawyers through the state who have no way of being aware of the SBA's disposition on such matters, the Committee should provide formal guidance to the legal community on this issue.

Thank you for your consideration.

Sincerely,

[redacted]

EXHIBIT A



[redacted]

Re: Our Client: [redacted]
Patient: [redacted]
Account No.: [redacted]
Dates of Service: [redacted]
Unpaid Hospital Charges Owing: [redacted]
Unpaid Physician Business Services Owing: [redacted]

Dear [redacted]

You will recall by letter of [redacted] I asked for status as to the patient referenced above represented by your office. As yet I have had no response to my letter.

The ethical rules obligate you to respond to my reasonable requests for information to clarify my client's legal rights, and your failure to do so is in violation of numerous ethical rules. As explained below, Arizona Supreme Court Rule 42 requires a timely response to requests for information on the status of my client's lien rights.

ER 1.15 requires a lawyer to safeguard property in which third parties have an interest. The official commentary to the 2013 amendments confirms that this rule applies when third parties are asserting a lien on a personal injury recovery. Under ER 1.15(d), a lawyer must "notify" a third-person of the existence of its rights, and upon request a lawyer must "render a full accounting regarding such property." My request for information on the status of the personal injury action is effectively an "accounting" under ER 1.15(d). This is especially so since other ethics rules corroborate a lawyer's duty to respect the rights of third parties. In general, ER 4.4 mandates respect for the rights of others. Moreover, ER 1.4(a)(4) requires a lawyer to "promptly comply with reasonable requests for information."

Simply put, it is unprofessional conduct to ignore my request for information. Such a refusal is a violation of ER 1.15, 1.4, and 4.4.

Please advise me of the status of this matter as soon as possible.

Very truly yours,

[redacted]

[redacted]

EXHIBIT B

[redacted]

[redacted]

Re: Our Client: [redacted]
Patient: [redacted]
Account No.: [redacted]
Dates of Service: [redacted]
Unpaid Hospital Charges Owing: [redacted]
Unpaid Physician Business Services Owing: inquire

Dear [redacted]:

You will recall by letter of [redacted] I asked for status as to the patient referenced above represented by your office. As yet I have had no response to my letter.

The ethical rules obligate you to respond to my reasonable requests for information to clarify my client's legal rights, and your failure to do so is in violation of numerous ethical rules. As explained below, Arizona Supreme Court Rule 42 requires a timely response to requests for information on the status of my client's lien rights.

ER 1.15 requires a lawyer to safeguard property in which third parties have an interest. The official commentary to the 2013 amendments confirms that this rule applies when third parties are asserting a lien on a personal injury recovery. Under ER 1.15(d), a lawyer must "notify" a third-person of the existence of its rights, and upon request a lawyer must "render a full accounting regarding such property." My request for information on the status of the personal injury action is effectively an "accounting" under ER 1.15(d). This is especially so since other ethics rules corroborate a lawyer's duty to respect the rights of third parties. In general, ER 4.4 mandates respect for the rights of others. Moreover, ER 1.4(a)(4) requires a lawyer to "promptly comply with reasonable requests for information."

Simply put, it is unprofessional conduct to ignore my request for information. Such a refusal is a violation of ER 1.15, 1.4, and 4.4.

Please advise me of the status of this matter as soon as possible.

[redacted]

[redacted]

[redacted]

EXHIBIT C

[redacted]

[redacted]

Re: [redacted]
Patient:
Account No.:
Date of Service:
Lien Total:
Payment(s) Rec'd:

Lien Balance:
Offer of Compromise:

Dear [redacted]

I am in receipt of your letter regarding the lien balance on the above-referenced patient account. [redacted] respectfully rejects your proposal and disagrees with your position.

A hospital's right to lien is statutory, not contractual. Specifically, "[t]he lien shall be for the claimant's customary charges for the care and treatment or transportation of an injured person." A.R.S. § 33-931(A). Customary charges are not contracted charges, but rather, are charges that hospitals file with the Arizona Department of Health Services (DHS), and you may obtain this information on the DHS website, www.azdhs.gov. Health insurance payment does not preclude or invalidate hospital lien rights. In *Andrews v. Samaritan Health System*, the Arizona Appeals Court held that, "[h]ospitals could assert their statutory medical liens for the difference between their customary charges and actual payments from insurance providers against tort recoveries by patients, where provider contracts reserved right to recapture difference in payment, medical liens were automatically granted by statute upon care and treatment of each patient, and lien created non-recourse debt that limited hospitals' means of recovery." *Andrews v. Samaritan Health System*, 201 Ariz. 379, 36 P.3d 57 (App. 2001).

In *Andrews v. Samaritan Health System*, the Arizona Appeals Court held that, "[h]ospitals could assert their statutory medical liens for the difference between their customary charges and actual payments from insurance providers against tort recoveries by patients, where provider contracts reserved right to recapture difference in payment, medical liens were automatically granted by statute upon care and treatment of each patient, and lien created non-recourse debt that limited hospitals' means of recovery." (Emphasis added.) *Andrews v.*

[redacted]

Samaritan Health System, 201 Ariz. 379, 36 P.3d 57 (App. 2001). Indeed, the Court agreed with the hospital that "the balance of the customary charges, after payment by the insurers, constitutes the 'debt' supporting the medical liens." This finding further supports that the charges incurred for service are "customary" since the balance, or 'debt' is recoverable "after payment by the insurers." (Emphasis added.) A non-recourse debt is created by the "difference" between the insurance payment and the customary charges. In each case, the insurance payment is a specific dollar amount. That "difference" can be calculated only if the charge is also a specific dollar amount, namely, the amount charged by the hospital for the service. Finally, if the insurance payment is supposed to represent customary charges, as you allege, then why would the Court in *Andrews* draw the distinction? The reason is clear – they are not the same.

As to customary charges, the term "charges," by any definition, refers to what is *charged* for the medical service provided. The specific charge for each line item of medical service provided to any [redacted] patient is referenced on their itemized statement, and reflects the same rate for that service item as referenced on [redacted] charge description master as submitted to the Arizona Department of Health Services, pursuant to A.R.S. §§ 36-436 to 36-436.02. The cumulative total charged for medical services and billed to a patient, guarantor, or managed care provider, is the same.

[redacted] is not attempting to collect from the patient. As evidenced by A.R.S. § 33-934(D), [redacted] lien attaches to the claim; it is recovery from the tortfeasor or the tortfeasor's insurer. Frankly, I appreciate you referring to the purpose of the lien statute, which is "designed to lessen the burden on hospitals … imposed by non-paying accident cases." We could not agree with you more. It is [redacted] position that the burden on the hospital is not merely from one specific case, but a burden that is created by all of the accident and injury patients that present to our emergency rooms, for whom medical care (often life-saving medical care) is provided, where no health insurance exists or third-party is responsible. The fact that [redacted] provides millions of dollars of medical care every year, and receives no payment at all, is precisely the burden this statute was meant to lessen.

As to your statements that [redacted] is prohibited by A.R.S. § 20-1072 from asserting its lien right against the settlement, [redacted] respectfully disagrees. [redacted] is not "balance billing," or billing the insurance company, recovering the contracted payment, and then billing the patient. Again, the court in *Andrews* agrees:

> [U]nder A.R.S. § 20-1072(D), health care providers are prohibited from maintaining a legal action against or otherwise collecting from enrollees except for copayments, the cost of uncovered services, and the cost of services rendered after termination of the provider contract. A.R.S. § 20-1072(D). **No mention is made of medical liens.** Plaintiffs assert that these recapture liens violate A.R.S. § 20-1072 as to [redacted] enrollees. We disagree.
>
> The medical lien statute, A.R.S. § 33-931 is written broadly enough to allow the hospitals to file medical liens **against insured patients** as well as non-insured patients… Plaintiffs ask us to impose an exclusion on the medical lien statute for [redacted] enrollees that the legislature did not include….

> Just as a medical lien is not a personal debt, **lien enforcement is not the same as billing or collecting from the enrollee.** The hospitals are not billing or bringing legal action against the [redacted] enrollees, as prohibited by A.R.S. § 20-1072, by asserting recapture liens; they are asserting a statutory lien against the enrollee's tort claim. **These are two different actions.**
>
> Under this holding, medical liens are allowed under A.R.S. § 33-931 and [redacted] enrollees are still protected from personal liability for covered services owed by the insurer. Our interpretation gives full effect to both statutes without harming either. To hold otherwise would result in the nonsensical result that [redacted] enrollees are subject to a different application of the medical lien statute than are . . . PPO/MCO members.
>
> **We hold that A.R.S. § 20-1072 does not preclude the hospitals' medical liens against [redacted] enrollees.**

Andrews v. Samaritan Health System, 201 Ariz. 379, 36 P.3d 57 (App. 2001). [Emphasis added.] In addition, we are aware of a potential class action lawsuit related to this statute, and your client has options with regard to that.

Despite the fact that the trial attorneys' lien seminar suggested making an issue of the reference in A.R.S. § 33-932(B), your statement of deficiency of the lien's language about continuing care, is irrelevant. Were the lien recorded by a surgeon, a chiropractor, or some other treating medical provider, the determination of continuing care would be clear and definitive. Obviously, a Level One trauma center cannot know whether a discharged patient will return for injury-related complications or follow-up at some subsequent date.

In addition, your statement that [redacted] does not have a matured legal or equitable claim is specious. The Arizona State Bar has already identified recorded and perfected medical liens as "matured legal or equitable claims."

The comment to the 2014 amendment to E.R. 1.15 clarifies that attorneys may have legal obligations related to third-party funds that are unaffected by E.R. 1.15.

> Apart from their ethical obligations, lawyers may have legal obligations to safeguard third-party funds under applicable case and statutory law. The notice provisions of paragraph (f) do not alter a lawyer's legal obligations and duties to third persons with respect to funds or property in the lawyer's possession. A lawyer who proposes to distribute funds under this paragraph should carefully evaluate the underlying law governing the lawyer's obligations to safeguard funds in which third persons claim an interest, which may expose the lawyer to a risk of civil or other liability even if the notice provisions of paragraph (f) are satisfied.

If you disburse the settlement funds without first settling the lien, the hospital can and will file suit against the tortfeasor and the liability carrier under A.R.S. § 33-934. **The statute gives the hospital two years from the date of the settlement to file that action, in which the carrier would essentially face automatic liability for the full amount of the lien.** The provisions of E.R. 1.15 do not purport to affect (and obviously cannot affect) the hospital's substantive

rights. E.R. 1.15(f)(4) confirms as much by stating that, "nothing in this rule is intended to alter a third party's substantive rights."

While we are not privy to the settlement agreement entered into by your client and the tortfeasor/their liability carrier, if there is an indemnification provision or other agreement to satisfy this hospital lien with the settlement proceeds, you and your client could be facing an indemnification action by the tortfeasor/their liability carrier for the full amount of the hospital lien. Therefore, it would be wise to ensure the safekeeping of [redacted] entire lien balance.

As I'm sure you are aware, the comment to E.R. 1.15 acknowledges that there are circumstances where an attorney could be subject to civil liability despite compliance with E.R. 1.15 and emphasizes the importance of fully informing the client of any potential liability prior to disbursing funds.

> A lawyer who proposes to distribute funds under this paragraph should carefully evaluate the underlying law governing the lawyer's obligations to safeguard funds in which third persons claim an interest, which may expose the lawyer to a risk of civil or other liability even if the notice provisions of paragraph (f) are satisfied. Before making any distribution of funds or property pursuant to paragraph (f), a lawyer should explain to the client that the client may remain responsible to satisfy valid claims of third persons, and that the third person's failure to commence an action within the 90-day period of paragraph (f) will not by itself operate to waive, reduce or extinguish the third person's claim, if any, against the client or the funds or property received by the client. Before making any distribution under paragraph (f), the lawyer must obtain the client's informed consent, confirmed in writing, to the distribution.

E.R. 1.15, 2014 comment.

Further, your 90-day notice under E.R. 1.15 is required to include "a description of the funds or property in the lawyer's possession" and "the name of the client claiming an interest in the funds and other information reasonably available to the lawyer that would allow the third person to identify the claim or interest." As a result, in addition to the other concerns in this letter, your 90-day notice is deficient in that it does not identify the tortfeasor and tortfeasor's insurance company. A description of the funds or property in your possession should include that information. At a minimum, such information is clearly "reasonably available" and is information that would allow the hospital to identify its claim or interest.

Finally, please provide the date of the settlement and the name of the tortfeasor and their insurer.

[redacted] would prefer not to have to file a Petition with the Maricopa County Superior Court to take your deposition to obtain the identity of the tortfeasor and insurer, as authorized by Rule 27, ARCP. E.R. 1.15 requires that you provide this information to us. Failure to do so violates this Ethical Rule. We anticipate your cooperation.

It seems the best course for all involved is to continue good faith negotiations to settle the hospital's lien from the settlement proceeds you are currently holding in trust for your client.

We have agreed to reduce by 45%, or the percentage of your fees and costs. Greater reductions are based on information. Please provide the following information, with specificity, for consideration:

1. Total amount of settlement; **(provided)**
2. Other valid lien balances, agreed-to reductions, and unpaid co-pays;
3. Any available UIM/Med Pay (we understand our lien does not attach, however, other medical providers may be paid from these proceeds);
4. If health insurance seeks reimbursement pursuant to ERISA ("Plan"), please provide a copy of the Plan page(s) indicating such; the amount they are seeking and any agreed-to reduction;
5. Attorneys' fees and costs; **(provided)**
6. Date of the settlement;
7. Tortfeasor's insurance company;
8. Other relevant information regarding the patient; and
9. Attorney's proposal for reduction and distribution.

If you are willing to work with us, we are willing to work with you. Pending receipt of additional information, this letter confirms that [redacted] is willing to accept the above-referenced amount in settlement of the lien balance on this account. This constitutes an accord and satisfaction, and release of all claims regarding the validity of the hospital's lien or the manner of its assertion.

Acceptance of this settlement will terminate any rights you may have as a class member or potential class member in litigation styled as *Banuelos, et al. v. Scottsdale Healthcare, et al.*, Superior Court of Maricopa County, Case No. CV2018-012029. That litigation asserts challenges to a hospital's lien rights on managed care accounts and has been filed as a purported class action, although no class action has been certified at this time. Plaintiffs' counsel in that litigation is Geoffrey Trachtenberg, Levenbaum Trachtenberg, 362 North Third Avenue, Phoenix, Arizona 85003; telephone (602) 271-0183.

Please remit payment to [redacted] Please reference the account number on the check so that the account is properly credited. [redacted] tax identification number is [redacted] Upon receipt of the check, [redacted] will release the lien.

Sincerely,

[redacted]