

Patricia Seguin
State Bar of Arizona
Ethics Advisory Group
4201 N. 24th Street, Suite 100
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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:

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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

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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,