

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](#) and [2019-168](#).

DISSENT

Members of the Committee dissent, in part, regarding the required contents of the notice, specifically the proposed requirement to disclose “the amount of the funds if any.”¹ These members submit that the amount of a tort victim’s recovery is not information necessary “to allow the third person to take appropriate action to protect its interests.” *See* Rule 42, ER 1.15, Comment [2014 Amendment].

ER 1.15(f) is a culmination of Petition Nos. 11-0024 and 12-0032, and was ultimately adopted by the Court, as amended, effective January 1, 2014. The petitions garnered over 100 public comments in support of the Court’s adopting a rule that would no longer give third-party claimants—hospitals in particular—special dispensation by unreasonably tying up tort recoveries with liens asserted under the Health Care Provider Lien Statute, A.R.S. §§ 33-931 through -936. The Petitions pointed out that, without a mechanism like ER 1.15(f) that appropriately puts the burden on the claimant to prosecute their alleged claim, the ethical rule had the effect of creating a non-judicial prejudgment attachment against clients’ property, even where the assertion of a health care provider lien was unlawful. This is important because the unlawful assertion of health care provider liens by hospitals is an ongoing problem in Arizona. *See, e.g., Ansley v. Banner Health Network*, 248 Ariz. 143, 459 P.3d 55 (2020) (upholding an injunction against hospitals unlawfully asserting health care provider liens against AHCCCS patients); *Wigand v. Scottsdale Healthcare Hospitals*, No. CV2016-017027, Maricopa County Superior Court (Mar. 3, 2017) and (May 23, 2017) (entering consent judgments against hospitals enjoining them from unlawfully asserting health care provider liens upon billing or receiving payment from a FEHBA Plan); *Aycock v. Scottsdale Healthcare Corp.*, No. 2:14-CV-01483-DLR (D. Ariz. Jun. 30, 2014) (Doc. 33) and (Doc. 48) (entering consent judgments against hospitals enjoining them from unlawfully asserting health care provider liens upon billing or receiving payment from a Medicare Advantage Organization).

¹ The dissenting members are Paul McMurdie (Chair), Geoffrey M. Trachtenberg, Maria F. Hubbard and Michael Aaron.

Now, the same Arizona hospitals are requesting this Committee modify ER 1.15 and graft a new requirement—not found in ER 1.15 itself or any Comment—mandating tort victims to disclose the amount of their recoveries to access their funds promptly. Setting aside the myriad of privacy and confidentiality issues, this once again gives special dispensation to third-party claimants and is more information about a potential recovery than the tort victims *themselves* are entitled to receive before deciding whether to pursue their tort claims or file suit. Indeed, even after filing suit, ordinary tort plaintiffs are not entitled to discovery on a defendant’s assets until they obtain a judgment. The hospitals, however, assert they should be allowed to “skip the line” by having access to the amount of the recovery to determine whether it’s “worth it” to pursue their alleged claims. As helpful as it might be to know in advance whether it’s “worth it” to pursue a lien claim, that puts the cart before the horse and bestows upon hospitals a new and extrajudicial right to access information that no other claimant enjoys.

The dissenting members submit health care provider lien claimants do not need, and are not entitled to, information about the amount of a tort recovery to “allow [them] to take appropriate action to protect its interests.” *See* Rule 42, ER 1.15, Comment [2014 Amendment]. Information about the amount of a recovery could be provided, with the client’s voluntary approval, but the disclosure should not be required for a tort victim to access their funds promptly without unreasonable interference.