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)

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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,

[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.

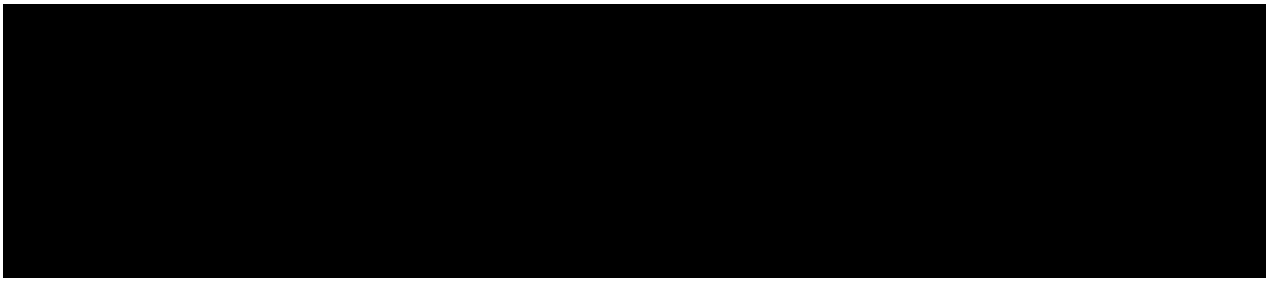
Although we believe there is no obligation to communicate "status" or anything else about a client or former client unless and until a recovery is obtained, and then only as specifically required by ER 1.15, numerous attorneys have been threatened and, in some cases, subjected to complaints with the 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.

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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]