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.

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 before coming into possession of the 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:

- a description of the property, including the amount of funds if any;
- 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).

The notice must be sent promptly after the lawyer receives the disputed property under ER 1.15(d). However, 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 client to 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 right.

Comment [2014 Amendment]

[1] New paragraph (f) allows a lawyer to distribute funds or property in the lawyer's possession after providing notice to third persons known to claim an interest. 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 possession; (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; (c) a mailing address, telephone number, and email address where the third party can provide notice to the lawyer of the commencement of an action asserting an interest in the fund or property; and (d) the proposed distribution of the funds or property. . . .

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.

Also, the Committee determines that an adequate notice should include information regarding the amount of the recovery. Without information about the amount of the recovery, the third person lacks sufficient information to enable them to determine what action may be necessary and appropriate to protect their claimed interest. For example, the amount of the recovery is likely to be material to the decision whether it is worthwhile to commence an action to assert an interest in that recovery, and a notice that does not contain this information leaves the third party without adequate information to make an informed decision regarding whether and how to proceed. This interpretation of the rule is supported by 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" that is "sufficient to allow the third person to take appropriate action to protect its interests." ER 1.15, cmt. 1 (2014 Amendment).

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.

However, 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.

Likewise, 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.