

LAW OFFICE OF
LAWRENCE K. LYNDE
4506 N. 12TH STREET
PHOENIX, ARIZONA 85014
(602) 944-5710
FAX (602) 944-1136

November 19, 2012

Arizona Supreme Court
1501 West Washington Street, Room 402
Phoenix, Arizona 85007

Lawrence K. Lynde, Esq.
4506 N. 12th Street
Phoenix, Arizona 85014
602-944-5710
602-944-1136
Larry@lyndelaw.com
Attorney Bar No.: 011156

Re: Proposed changes to ER 1.15

Dear Justices:

I have read the proposed changes to ER 1.15 submitted by the Arizona Association for Justice ("AAJ"). I am writing to communicate my support for those proposed changes as contained in what I understand to be petition R-12-0032.

The Petition itself outlines the numerous points and arguments in support of the proposed change to ER 1.15 very well. In support of the Petition, I would like to share an experience that I recently had involving ER 1.15 which, in my opinion, vividly illustrates the need for the proposed changes.

I recently represented a woman in a personal injury claim arising out of a car wreck. The woman received approximately four (4) months of chiropractic treatment following the car wreck. The chiropractor did not record a healthcare provider ("HCP") lien under A.R.S. § 33-931 et seq. until after the patient/my client had been released from chiropractic care. A.R.S. § 33-932 states that to perfect a healthcare provider, the HCP must record its lien within 30 days after the patient has received any services relating to injuries. In this particular case, the HCP lien recited that the patient had started receiving care in February, and the lien was not recorded until four (4) months later in June. Accordingly, the HCP lien was, on its face, invalid and unenforceable.

My client later settled her third party claim against the responsible driver for far less than the value of her claim because the responsible driver carried only the minimum \$15,000.00 liability insurance limits required by Arizona law. The chiropractor attempted to assert a balance bill claim under A.R.S. § 33-931. I informed the chiropractor that his HCP lien was not timely recorded, was not perfected and was therefore invalid. I dispersed funds to my client and considered the matter concluded.

The chiropractor thereafter complained to the State Bar of Arizona. The Bar contacted me and I recited the same information outlined above. I further indicated to the Bar that I had no doubt whatsoever that the HCP lien was invalid and unenforceable. It was my position that there was therefore no good faith doubt (in fact, I had no doubt whatsoever) that the lien was invalid. I also cited the Bar to the case of Employer's Reinsurance Corp. v. GMAC Ins. 308 Fed. Supp. 2d 1010 (D. Ariz. 2004) which holds that ER 1.15 is not violated where the lawyer actually has a reasonable, good faith belief that the third party's lien claim is without substantial merit. I also cited the Bar to A.R.S. § 20-1072 which provides that it is unlawful for a healthcare provider to attempt to charge a patient more than the contracted amount which the healthcare provider agreed to accept from the patient's health insurer.

Notwithstanding the foregoing, the State Bar concluded that my disbursement of funds under the circumstances was violative of the current version of ER 1.15. The Bar's position was based upon Ethics Opinion 98-06 which interprets the current version of ER 1.15. The position taken by the Bar was that a recorded HCP lien which was and is invalid on its face was nevertheless somehow a matured claim under ER 1.15. Citing to Ethics Opinion 98-06, the Bar concluded that because HCP lien had been recorded, this apparently imputed a good faith doubt as to whether the HCP was entitled to be paid based upon its invalid lien. The Bar therefore concluded that I was obligated to withhold my client's funds which were the subject of the invalid HCP lien and to negotiate, arbitrate or interplead those disputed funds.

- I explained to the Bar that the practical effect of its position was:
 1. To impose a conflict of interest as between my client and myself by placing me in the position of having to recognize an invalid lien to my client's detriment;
 2. To impose a provisional remedy allowing the healthcare provider claimant to force withholding of my client's funds in the absence of due process or the requirements of A.R.S. § 12-2401 et seq.
 3. To impose a financial duty upon my client to file suit against the healthcare provider and to incur the \$301.00 filing fee, service of process fees and further

11/19/2012

Page 3

litigation fees in order to prove a facially invalid lien was indeed invalid.

As a personal injury attorney, I am regularly called upon to make determinations as to the validity of HCP liens, ERISA liens, government liens and other claims against my client's recovery. In the case outlined above, I had no doubt whatsoever that the HCP lien was invalid. Nevertheless, according to the Bar, under the current version of ER 1.15 and Ethics Opinion 98-06, I was obligated to withhold my client's money and to either negotiate, arbitrate or interplead the disputed funds.

I could not possibly, in good conscious, negotiate away a portion of my client's recovery for a lien which was invalid as a matter of law. The only alternative left was for my client to be put through the expense of filing suit against the healthcare provider and interpleading funds which clearly belonged to my client. I submit that this is an inequitable, unfounded result which is not supported by existing law or common sense.

The current version of ER 1.15 results in HCP lien claimants having far greater rights than recognized for any other creditor under Arizona law. The current version of ER 1.15 places attorneys for injuries parties in the position of having to recognize facially invalid liens and to act contrary to the interests of their clients in withholding monies based upon unenforceable HCP. In addition, it forces injured victims, who typically are financially distressed as a result of medical bills and loss of income, to incur additional attorney fees and costs and to wait even longer to be compensated or made whole as a result of having been injured.

The proposed changes to ER 1.15 strike a reasonable balance for the rights of HCP lien claimants and their patients. The proposed change will result in the burden of proof as to the validity of a HCP lien being placed where it belongs: on the creditor asserting the lien. The proposed change further impose any duty to commence litigation upon the party asserting the lien claim. This is also consistent with Arizona law for any other creditor. Finally, the proposed change allows for a 90 day period in which the HCP lien claimant can act to enforce his/her purported lien following service of process of written notice.

For the foregoing reasons, I ask that the proposed changes to ER 1.15 be adopted. I thank you for your time and consideration.

Most Sincerely,



Lawrence K. Lynde
Attorney at Law