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Introduction

This quarter, we received guidance from courts regarding how lawyer's responsibilities may be impacted when they sign off on settlement agreements, situations in which disqualifications may arise (or not) due to lawyer mobility, duties that lawyers may have when handling trusts, and how reasonableness of fees should be determined by courts. Additionally, new ethics opinions have been issued from the ABA, the State Bar, and the Los Angeles County Bar Association. And, perhaps most notably, the State Bar's Task Force on Access Through Innovation of Legal Services released a comprehensive report and 16 concepts that could be developed to increase access.

We welcome your comments and suggestions about recent decisions, authority or issues we might address in future editions. For immediate questions, the Legal Ethics Committee maintains a hotline that SDCBA members can call at any hour (619) 231-0781 x4145. Just follow the instructions and a Committee member will get back to you with ethics authority you might consider.

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In litigation, what are a lawyer's ethical obligations when offered evidence retained by a former employee of the opposing party who reveals that relevant documents have been concealed from production?

COMMENTARY

In July, the ATILS Task Force released a report identifying 16 concept options for possible regulatory changes and requested public comment by September 23, 2019. These concepts included the following:

19.3.1 *Monster Energy v. Schechter* (2019) 7 Cal.5th 781 – Supreme Court of California (July 11, 2019)

Issue:
Can a lawyer's signature on a settlement agreement under the notation that the lawyer approved the written agreement as to form and content evidence the lawyer's intent to be bound by the agreement's confidentiality provisions that extended to both the parties and their lawyers?

Analysis:
Yes. The Court held that a notation stating an agreement was "approved as to form and content," does not preclude, as a matter of law, a factual finding that the lawyer both recommended the client sign the document and intended to be bound by its provisions that extended to the lawyers.

Monster Energy settled a products liability/wrongful death action with a confidential settlement agreement that provided it was made:

on the behalf of the settling Parties, individually, as well as on the behalf of their, without limitation, respective beneficiaries, trustees, principals, attorneys, officers, directors, shareholders, employers, employees, parent company(ies), affiliated company(ies), subcontractors, insurers, predecessors, successors-in-interest, and assigns.

The agreement had a confidentiality clause that included the provision:

Plaintiffs and their counsel agree that they will keep completely confidential all of the terms and contents of this Settlement Agreement, and the negotiations leading thereto and will not publicize or disclose the amounts, conditions, terms or contents of this Settlement Agreement in any manner .... [¶] specifically, and without limitation, Plaintiffs and their counsel of record, individually and on behalf of themselves and their principals, partners, agents, attorneys, servants, representatives, parents, spouse, dependents, issue, heirs, insurer, predecessors, successors-in-interest and assigns agree and covenant, absolutely and without limitation, to not publicly disclose to any person or entity, including, but not limited to, newspapers, magazines, television, fliers, documentaries, brochures, Lawyers & Settlements, VerdictSearch (or the like), billboards, radio, newsletters, and/or the Internet [certain facts related to the settlement.]

The agreement further provided that "the Parties and their attorneys and each of them hereby agree" not to make any statement other than: "This matter has been resolved." The parties signed the agreement; the parties' lawyers, including Schechter, signed under the preprinted notation: "APPROVED AS TO FORM AND CONTENT."

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Shortly after the settlement, an article entitled "'Substantial Dollars' for Family in Monster Energy Drink Wrongful Death Suit" appeared on the internet. The article attributed several quotes to Schechter, including his statements that he believed Monster energy products were unsafe.

Monster Energy sued Schechter and his firm. The trial court denied his anti-SLAPP motion to the breach of contract cause of action, finding that the settlement clearly contemplated counsel being subject to the agreement and rejected Schechter's argument that he was not a party because he approved it as to form and content only as "beyond reason." The court of appeal reversed, and the Supreme Court granted review.

Because a settlement agreement is a contract, it requires mutual consent. So, the Court focused on whether by objective criteria—what the outward manifestations of consent would lead a reasonable person to believe—the parties' acts evidenced mutual consent.

First, the court agreed with an earlier appellate decision's characterization of language providing an agreement was "approved as to form and content" as affirming that the lawyer has read the document, that it embodies the parties' agreement, and that the lawyer perceives no impediment to the client signing it.

But, the issue for the Court was whether a lawyer's signature approving an agreement as to form and content for a client's signature precludes, as a matter of law, a finding that the lawyer also intended to be bound by the agreement. The Court reasoned that, if the agreement has no provision purporting to bind the lawyer, the lawyer's signature approving the agreement as to form and content could only mean the lawyer approved it for the client's signature.

But a lawyer's signature on an agreement with substantive provisions imposing duties on the lawyer may reflect the lawyer's intent to be bound even though the lawyer also approved the document for a client's signature.

The Court concluded that a factfinder considering all the circumstances could reasonably conclude Schechter agreed to be bound by confidentiality provisions that were not only extensive, but repeatedly referred both to the parties and their lawyers. Here, the agreement barred the parties and their lawyers from making any statements other than, "The matter has been resolved." The Court rejected, among others, Schechter's argument that his statement to a reporter that he could not reveal the amount of the settlement because "Monster wants the amount to be sealed" was merely a manifestation of his ethical obligation to maintain client confidences under Business & Professions Code section 6068, subdivision (e), and not an acknowledgment he was obligated by the confidentiality provisions.

19.3.2 *The National Grange of the Order of Patrons of Husbandry v. California Guild* (2019) 38 Cal.App.5th 706 - Court of Appeal of California, Third Appellate District (July 23, 2019)

Issue:
Is a lawyer and his new firm subject to disqualification, notwithstanding the fact that the lawyer has been ethically screened since the date of hire, when the lawyer formerly represented a party in litigation and then joined a law firm representing an adverse party?

Analysis:
Yes. Applying former Rule of Professional Conduct 3-310 (E), which prohibited lawyers from representing a new client whose interests are adverse to those of a former client on a matter in which the lawyer has obtained confidential information, the Court of Appeal upheld the disqualification of a lawyer and his new firm because he had previously been at another firm, and worked on a matter, in which a client of his new firm had interests adverse to his former client.

The court applied the presumption that, because the matters were substantially related, the lawyer possessed confidential information of his former client adverse to the former client, requiring disqualification. Further, the court applied the general rule that, where a lawyer is disqualified, the entire law firm was vicariously disqualified, especially when the lawyer's disqualification was due to his former representation of the opposing party in the same matter.

The court further said that the fact the lawyer worked for the firm representing the adverse party in the same litigation presented the same concerns as if the lawyer represented the adverse party himself. That he was not the attorney of record or listed on documents or other communications at his new firm to avoid disqualification "would allow for an exception that would swallow the rule."

The court rejected the ethical screen argument because the lawyer had possession of his former client's confidential information from having worked on the matter. The court distinguished this from the circumstance where a lawyer could establish the lawyer had no confidential information because the lawyer had never worked on the matter at issue, creating a rebuttable presumption with the burden on the challenged law firm to establish that screening has been effective.

With respect to a second, substantially related lawsuit in which both the lawyer and his firm were also disqualified, the court upheld disqualification for all the same reasons. In addition, it treated as a suspect a memorandum regarding the screen that attempted to memorialize an ethical screen that had purportedly been in place since the lawyer began work at the firm, even though the memorandum was created later.

19.3.3 *In the Matter of Bradshaw* (2019) 5 Cal. State Bar Ct. Rptr. _, Case No. 16-O-15558 - Review Department of the State Bar Court (Filed July 30, 2019) [Not for Publication]

Issue:
Is a lawyer trustee of a client's trust culpable of breaching his fiduciary duties to his client and the trust beneficiaries, misappropriation of trust funds, and misrepresentation related to his handling of the trust and his involvement with a construction company that repaired the client's home.

Analysis:
No. Bradshaw's frim prepared an estate plan, including a trust that provided for the care of the trustor while still living, facilitation of property management, and transferring the trust property after the trustor's death. After the trustor became incapacitated, Bradshaw became her conservator and was appointed as a successor trustee. Bradshaw engaged various construction professionals to work on the trustor's residence, which was in disrepair, and paid for them and the trustor's monthly expenses with reverse mortgages.

Bradshaw was charged with making misrepresentations that the trustor had been removed from her home by APS (to support his appointment as conservator), and that there was no relationship between Bradshaw and any agent he hired. In After 21 days of trial, the Hearing Department judge found Bradshaw, successor trustee on a client's Trust, culpable of engaging in a scheme to defraud the trust by hiding the fact that he was in the process of forming a construction company with one of the vendors, breaching his fiduciary duties and making misrepresentations to the probate court; the court recommended disbarment.

The Review Department, upon independent review, did not find clear and convincing evidence to support culpability for any charged misconduct since Bradshaw was not an owner of the construction company (and the trust would have permitted him to have an ownership interest). Further, the Review Department determined that Bradshaw's conduct was consistent with the objective of the Trust: to provide for the settlor to remain in her home as long as possible; it found that his evidence demonstrated the expenditures from the Trust were permissible.

So, it reversed all culpability findings, dismissed the case with prejudice, ordered Bradshaw's inactive enrollment from September 2, 2018 vacated and found Bradshaw entitled to reimbursement of costs.

19.3.4 *Wu v. O'Gara Coach Co., LLC* (2019) 38 Cal.App.5th 1069 - Court of Appeal of California, Second Appellate District, Division Seven (August 21, 2019)

Issue:
Should the court disqualify a lawyer and the lawyer's firm based on the lawyer's previous engagement as an adversary's executive and playbook knowledge.

Analysis:
Unless the lawyer had confidential information material to the engagement, no. O'Gara Coach employed Richie as general manager for a location, director of sales operations for the company, and then president and chief operating officer. In the latter role, Richie was involved with various human resource issues and was the primary contact person with outside counsel. When he left the company, Richie signed a contract in which he promised not to sue O'Gara Coach or to assist others in bringing claims against it.

The following year, a lawyer at Richie Litigation filed a suit against O'Gara Coach and several of its senior management employees for discrimination, wrongful termination, defamation, harassment, and related claims. O'Gara Coach answered the complaint and then moved to disqualify the firm, arguing that Richie is a key percipient witness whose testimony would be adverse to the interests of his client and because he had been privy to confidential and privileged documents and information during his employment at O'Gara Coach that were directly related to the issues in the lawsuit.

Richie had never acted as a lawyer for O'Gara Coach. So, the regular conflict analysis for successive representation did not apply. So, the court considered cases in which disqualification had been based on the acquisition of an adversary's privileged communication by means other than a prior attorney-client relationship.

Richie possessed presumptively privileged information regarding O'Gara Coach's development, implementation, and enforcement of its workplace polices, as well as knowledge of other confidential information regarding the company, its operations and its general litigation strategies. But no evidence suggested that Richie was involved in any way in investigating these particular complaints of a hostile work environment or had any discussions with O'Gara Coach's outside counsel regarding these claims. In short, the confidential information upon which disqualification was sought was simply "playbook" information. Confidential information protected by the substantial relationship test does not include playbook information. So, disqualification was not proper.

Additionally, although it was likely that Richie would be called as a percipient witness at trial, disqualification was not required because the client provided informed written consent, thereby precluding any potential conflict. And O'Gara Coach had no standing to object since it was not a former client.

19.3.5 *In the Matter of Lingwood* (2019) 2019 Calif. Op. LEXIS 21 - Review Department of the State Bar Court (August 27, 2019)

Issue:
Must a lawyer acting as a trustee comply with former Rule 3-300 even when the trust instrument permits the trustee to borrow funds from the trust?

Analysis:
Yes. Lingwood prepared a trust agreement for a couple. After the wife's death, with the husband diagnosed with Alzheimer's disease, Lingwood became the sole trustee of a trust intended to fund the husband's care, with two children as beneficiaries. Lingwood, believing some trust investments were losing money and that she could legally do so, borrowed $60,000 from the trust, with the loan secured by a recorded deed of trust on her real property and a guaranteed rate of return of five percent to the trust.

Lingwood made periodic principal and interest payments to the trust. She used the $60,000 for personal expenditures. When one of the beneficiaries complained, she refinanced her real property and repaid the trust within a year of the loan having been made.

The Office of Chief Trial Counsel charged that a $60,000 loan was an improper business transaction with a client, in violation of former rule 3-300 (which is analogue to current rule 1.8.1), and a misappropriation of trust funds in violation of Business and Professions Code section 6106. It also charged Lingwood with failing to comply with the Probate Code and making misrepresentations about the transaction.

The Hearing Department judge found that Longwood both misappropriated the $60,000 and improperly entered into a loan transaction for it. The judge also found misrepresentations about the loan, but dismissed the Probate Code charge as duplicative of the improper loan charge. Nonetheless, the judge recommended disbarment.

The Review Department, upon independent review, held that a lawyer acting as a trustee must conform all of the services performed to the Rules of Professional Conduct, which impose independent requirements on trustees when they are lawyers. Thus, even if a trust instrument would permit a non-lawyer trustee to borrow funds from the trust, a lawyer acting as a trustee must also comply with rules governing business transactions with a client (former rule 3-300, current rule 1.8.1).

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Although trust beneficiaries are not "clients" of a lawyer trustee, the lawyer trustee may nonetheless be disciplined as if they were the lawyer trustee's clients because of the lawyer's fiduciary relationship with the beneficiaries. With the husband unable to consent because of his Alzheimer's disease, Lingwood owed a fiduciary duty to the beneficiaries and she had to treat them as her "clients" under former rule 3-300.

Lingwood violated the former rule because she did not disclose the terms of the transaction to her beneficiary "clients" in writing and did not advise them in writing that they may seek the advice of an independent lawyer of their choice—before entering into the loan transaction.

The Review Department further found that, even though the Trust permitted self-dealing, Probate Code section 16004 applies to the fiduciary relationship between a lawyer and client and is a "statutory complement to rule 3-300." Section 16004, subdivision (c), provides a rebuttable presumption that a trustee violates fiduciary duties when a transaction occurs between the trustee and a beneficiary and the trustee obtains an advantage from the beneficiary. Since Lingwood obtained an advantage in the $60,000 loan, but failed to comply with former rule 3-300, she also violated her fiduciary duties under the Probate Code. The Review Department reversed dismissal of this violation as duplicative, but did not consider it for imposition of discipline.

The Review Department rejected the hearing judge's finding of misappropriation and violation of section 6106. Lingwood thought she had the authority to make the loan, and in fact she could, and the review court found no facts to show that she misappropriated the money in a way to violate section 6106 as well as the misrepresentation findings. Instead of disbarment, the Review Department recommended a 60-day actual suspension.

19.3.6 *Roberts v. City and County of Honolulu* (9th Cir. 2019) 2019 U.S. App. LEXIS 27491, __ F.3d __ , 2019 WL 4308874 - United States Court of Appeals for the Ninth Circuit (September 12, 2019)

Issue:
When assessing reasonableness of attorney fees, may a court properly look exclusively at previous fee awards in determining the prevailing market rate?

Analysis:
No. Reasonableness of fees must necessarily also include an analysis of whether the work done was reasonably necessary.

For purposes of establishing the lodestar figure in an attorney's fees case, courts must first determine a reasonable hourly rate, which is adduced by examining rates for comparable work performed by attorneys in the relevant community with similar skill, experience, and reputation. So, the court must first determine what is the prevailing hourly rate in the relevant community. Additionally, a court must determine whether the work performed, especially once settlements are reached in principle was reasonably undertaken. It is potentially reasonable given that, even in such instances, some settlements fall through.

19.3.7 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 488 - Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure (September 5, 2019)

Issue:
Under what circumstances must judges disqualify themselves or make disclosures based on personal relationships?

Analysis:
Model Code of Judicial Conduct Rule 2.11 identifies situations where judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned, including cases implicating some family and personal relationships. But it is silent regarding obligations imposed by other relationships. Judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. What must be done when a party or lawyer is a friend or shares a close personal relationship with the judge depends on the circumstances, largely involving the closeness of the friendship and the affinity of the judge to the party or lawyer. Whether a friendship between a judge and a lawyer or party is so close that it requires the judge's disqualification in the proceeding is essentially a question of degree. A judge should disclose to the other lawyers and parties in the proceeding information about a friendship with a lawyer or party "that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." If, after disclosure, a party objects to the judge's participation in the proceeding, the judge may either continue to preside over the proceeding or disqualify himself or herself. The judge should put the reasons for the judge's decision to remain on the case or to disqualify himself or herself on the record. A judge must disqualify himself or herself when the judge has a romantic relationship with a lawyer or party in the proceeding, or desires or is pursuing such a relationship. Of course, disqualification may be waived in accordance and compliance with Rule 2.11(C) of the Model Code.

19.3.8 State Bar of California Standing Committee on Professional Responsibility and Conduct Opinion No. 2019-197

Issue:
What ethical obligations arise when lawyers in a law firm consult with outside counsel concerning matters related to the firm's representation of a current client, such as the lawyer's ethical compliance or a possible error by the law firm, and do those ethical obligations change if the lawyer consulted is a member of the same law firm as the consulting lawyer and serves as law firm in-house counsel?

Analysis:
Lawyers at times may seek legal advice concerning their ethical and other obligations to clients, advice that may be provided by, among others, outside counsel or a lawyer within the law firm serving as law firm in-house counsel. The act of seeking legal advice concerning ethical obligations owed to a client by itself does not create a conflict with the client.

Once a lawyer becomes aware that he or she has committed an error that could prejudice the client, the lawyer ethically may seek legal advice concerning obligations to the client and options available, but must comply with the rules governing disclosure to clients and conflicts. The lawyer's ethical obligations in that situation do not vary whether he or she seeks legal advice from a lawyer outside the firm or law firm in-house counsel.

19.3.9 State Bar of California Standing Committee on Professional Responsibility and Conduct Opinion No. COPRAC 2019-198

Issue:
May a lawyer who is required to withdraw from representing a client because the client's claim lacks merit, ethically settle the action before withdrawing from the representation?

Analysis
A lawyer who has concluded that a client's claim lacks merit and cannot be pursued without violating the Rules of Professional Conduct or the State Bar Act is required to withdraw from the representation. Before withdrawing, the lawyer must take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. Such reasonable steps may include settling the claim if the lawyer can do so consistent with the attorney's duty of truthfulness. Lawyers may not make any affirmative material misstatements, conceal information material to the negotiations in violation of a duty to disclose, or negotiate based on past misinformation or concealment.

19.3.10 Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 531 (July 24, 2019)

Issue:
In litigation, what are a lawyer's ethical obligations when offered evidence retained by a former employee of the opposing party who reveals that relevant documents have been concealed from production?

Analysis: When a lawyer is offered access, by a witness who is an unrepresented former employee of the opposing party, to potential documentary evidence and is informed that it will show the adverse party's failure to comply with discovery obligations, the lawyer is faced with competing public policy considerations and difficult ethical and legal issues. The first question the lawyer must address is whether witness is lawfully in possession of the data. To do so, the lawyer must determine not only whether possession of the data is proper, but also whether the lawyer may lawfully and ethically review it. If the lawyer concludes that the witness's acquisition or possession of the evidence was a crime and the lawyer has taken possession of it, then the lawyer may be ethically required to turn the evidence over to the court or the appropriate authorities.

The second question the lawyer must address is whether the data includes writings the lawyer knows or reasonably should know are privileged or subject to a claim of work product. The lawyer is prohibited from accessing the content of privileged communications between the adverse party and opposing counsel.

Because the witness is an unrepresented person and not a current employee of the adverse party, the lawyer is not prohibited from communicating with the witness, but may not state or imply that the lawyer is disinterested. The lawyer also may not seek to obtain privileged or other confidential information from the witness that the lawyer knows or reasonably should know the witness is not entitled to reveal without violating a duty to another, or which the lawyer is not otherwise entitled to receive.

COMMENTARY

On July 20, 2018, the State Bar of California directed the formation of a Task Force on Access Through Innovation of Legal Services ("ATILS"), which was charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including artificial intelligence and online legal service delivery models. Notably, the 23-member committee has only 10 attorney members. The Task Force was charged with submitting recommendations to the Board of Trustees no later than December 31, 2019.

In July, the ATILS Task Force released a report identifying 16 concept options for possible regulatory changes and requested public comment by September 23, 2019. These concepts included the following:

1.0 - The Task Force does not recommend defining the practice of law.

1.1 - The models being proposed would include individuals and entities working for profit and would not be limited to not for profits.

1.2 - Lawyers in traditional practice and law firms may perform legal and law-related services under the current regulatory framework but should strive to expand access to justice through innovation with the use of technology and modifications in relationships with nonlawyers.

1.3 - The implementation body shall: (1) identify, develop, and/or commission objective and diverse methods, metrics, and empirical data sources to assess the impact of the ATILS reforms on the delivery of legal services, including access to justice; and (2) establish reporting requirements for ongoing monitoring and analysis.

2.0 - Nonlawyers will be authorized to provide specified legal advice and services as an exemption to UPL with appropriate regulation.

2.1 - Entities that provide legal or law-related services can be composed of lawyers, nonlawyers or a combination of the two, however, regulation would be required and may differ depending on the structure of the entity.

2.2 - Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.

2.3 - State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of "artificial intelligence." Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.

2.4 - The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.

2.5 - Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality.

2.6 - The regulatory process contemplated by Recommendation 2.2 should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

3.0 - Adoption of a new Comment [1] to rule 1.1 "Competence" stating that the duty of competence includes a duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

3.1 - Adoption of a proposed amended rule 5.4 [Alternative 1] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. The Alternative 1 amendments would: (1) expand the existing exception for fee sharing with a nonlawyer that allows a lawyer to pay a court awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer in the matter; and (2) add a new exception that a lawyer may be a part of a firm in which a nonlawyer holds a financial interest, provided that the lawyer or law firm complies with certain requirements including among other requirements, that: the firm's sole purpose is providing legal services to clients; the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients; and the nonlawyers have no power to direct or control the professional judgment of a lawyer.

3.2 - Adoption of a proposed amended rule 5.4 [Alternative 2] "Financial and Similar Arrangements with Nonlawyers" which imposes a general prohibition against forming a partnership with, or sharing a legal fee with, a nonlawyer. Unlike the narrower Recommendation 3.1, the Alternative 2 approach would largely eliminate the longstanding general prohibition and substitute a permissive rule broadly permitting fee sharing with a nonlawyer provided that the lawyer or law firm complies with requirements intended to ensure that a client provides informed written consent to the lawyer's fee

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sharing arrangement with a nonlawyer.

3.3 - Adoption of a version of ABA Model Rule 5.7 that fosters investment in, and development of, technology-driven delivery systems including associations with nonlawyers and nonlawyer entities.

3.4 - Adoption of revised California Rules of Professional Conduct 7.1–7.5 to improve communication regarding availability of legal services using technology in consideration of: (1) the versions of Model Rules 7.1–7.3 adopted by the ABA in 2018; (2) the 2015 and 2016 Association of Professional Responsibility Lawyers reports on advertising rules; and (3) advertising rules adopted in other jurisdictions.

Of note, many of these concepts are adopted or are being discussed in other jurisdictions, in several cases due to similar access to justice concerns. Regardless of what measures are ultimately adopted, the report raised significant issues regarding access, including the report that in 75% of civil cases statewide, at least one party is not represented.