

BY MARTIN COLE

The Myth of Solo & Small-Firm Bias

There exists a long-held belief that lawyer-discipline systems are biased against solo practitioners and lawyers in small-firm practices. This belief is sufficiently strong that states have conducted extensive studies of this claim as part of their periodic reviews of the disciplinary system.¹ The issue regained steam in the past year when it was a topic at a joint presentation of the Association of Professional Responsibility Lawyers (APRL), the National Organization of Bar Counsel (NOBC), and the ABA Center for Professional Responsibility.² The presentation took it as an uncontroverted fact that solo and small-firm lawyers are complained against and disciplined in greater proportion than their numbers in the bar as a whole.

The Director's Office does not specifically keep statistics based upon the size or nature of an attorney's practice. Nevertheless, it is indeed likely true that a disproportionate number of the complaints received by the Director's Office are against lawyers in solo or small-firm settings. That solo and small-firm lawyers are more often *complained about* intuitively seems valid, but are they *disciplined* more often? Unfortunately, this may be accurate as well. And even when limiting the discussion to attorneys who are *seriously disciplined*, as in disbarred, the evidence indicates that the same may be true. Do these facts establish that

any actual bias exists, at least if not animus then perhaps an unintentional bias? Or is this actually an enduring myth that finally should be laid to rest?

Who Ya' Gonna' Call?

A lawyer-discipline office is reactive. Our office investigates complaints that are filed with us—we are not out there seeking com-

plaints from unwilling clients, judges or opposing lawyers.

There are several factors working to the collective disadvantage of solo and small-firm attorneys when it comes to being the target of a complaint. One is that clients of lawyers in larger firms have options: as a young associate in private practice, a call to my senior partner complaining about my work or threatening to take the client's business elsewhere would have been a much greater potential threat to my continued employment than any ethics complaint. Solo and small-firm lawyers usually lack a supervisor similarly able to pacify an unhappy client before a complaint is filed.

A second factor is that solo and small-firm lawyers are more likely to have people as clients. This statement usually generates a few snickers when made at CLE presentations or in talking with law students. But think about it. Divorce, custody, criminal defense, immigration, personal injury or workers compensation matters are the regular stuff of many solo and small-firm practices. They are also highly emotionally charged situations for the clients involved. Any frustration on their part, no matter how minor, especially if compounded by even one or two phone calls not returned promptly, can turn into a complaint. From a disciplinary perspective, solo practitioners who have people for clients are undoubtedly in a high-risk occupation!

A third factor in ascertaining why solo and small-firm lawyers seem to generate a disproportionate number of complaints is that they may lack the support of a mentor or other lawyers to consult before engaging in conduct that may lead to a complaint. They also may lack a supervisor to whom they are regularly answerable, such that procrastination issues are not dealt with internally. And finally, as to discipline, when a complaint is received, solo and small-firm lawyers may be less likely to hire

experienced counsel to assist them at an early stage in the disciplinary process, when small issues can expand, particularly due to noncooperation.

One of the harsh facts of life is that allegations that solo and small-firm lawyers engage more frequently in certain types of misconduct may have some validity. Failure to return phone calls is beyond doubt the most prevalent allegation against attorneys the Director's Office receives. Busy solo practitioners, especially those without any support staff help, simply may find it hard to return all calls promptly,

There are several factors working to the collective disadvantage of solo and small-firm attorneys when it comes to being the target of a complaint.

even when their intentions are good. From an unhappy client's perspective, well-intentioned isn't good enough. Good office procedures thus are a must for solo and small-firm lawyers. There are many courses and bar association sections devoted to helping solo and small-firm lawyers in this regard; such lawyers should take advantage of these resources. Less-experienced lawyers in solo or small-firm settings especially should work to establish solid procedures early in their careers.³

There are also likely explanations for solo and small-firm lawyers' disproportionate involvement in the most serious disciplinary matters, such as those that result in public discipline, including disbarments. While high-profile criminal misappropriation cases involving dishonest large-firm lawyers have occurred (James O'Hagan or David Moskall, for example), far more frequently it is a solo or small-firm practitioner who dips into client funds. The lack of institutional oversight, such as may exist within a larger firm, may explain this discrepancy in part. Unintentional misappropriation also



MARTIN COLE
is director of the
Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 21 years.

can occur in small practices more easily due to poor recordkeeping procedures.

Frequent Flyers

The "frequent flyers" of the disciplinary world—attorneys who regularly receive complaints for a whole host of offenses, some involving dishonesty and others involving competence and client service—overwhelmingly are solo practitioners. This should come as no surprise since few attorneys are willing to risk employing the "frequent flyers" or even want to associate with them. It usually doesn't take long for such attorneys to depart any law firm and end up on their own, if only by default rather than choice.

None of the above discussion is in any way intended to disparage solo and small-firm lawyers in the least. These categories include countless outstanding lawyers about whom complaints are never received and likely won't be. The Lawyers Board has been blessed to have several such lawyers serving as its members; many more volunteer to be district ethics committee investigators.

Even critics of lawyer-discipline offices are hard-pressed to show that any actual bias or prejudice against solo or small-firm lawyers exists. The statistical basis for the myth of such a bias can be explained. Still, for some people perception will always be their reality and vigilance certainly remains necessary to prevent this myth from ever becoming reality. For now, however, it is indeed time to put to rest the myth of any actual bias in the lawyer-discipline system against solo practitioners and small firms. ▲

Notes

For example, California conducted such a study in 2001, as did Oregon in 2002. Neither found any evidence of institutional bias. These organizations were also featured in last month's column concerning their listservs.

See, e.g., Jorgensen, "Inexperienced and Solo," 62 *Bench & Bar of Minnesota* 5 (May/June 2005), pp. 12-15.

MSBA ADR SECTION



Snow White and the Wicked Queen submit the fairness question to binding arbitration.

The MSBA ADR Section is celebrating 10 years as a section. Join now and enjoy the benefits.

The best CLE deal going — \$25 yearly membership includes:

- 9 free educational programs per year — most qualify for CLE credit — including ethics and elimination of bias credits. Members can participate by telephone for credit. 2006-2007 programs included: Mediation, No-Fault, International, Commercial Arbitration, Cross-Cultural, Community.
- Opportunity to network with hundreds of members statewide.
 - Section website — Members can post their ADR bio, download podcasts of prior meetings, and view ADR links and upcoming events.
 - Membership in "adr-talk," the Section listserv that has ADR opportunities, job postings, current cases, discussions, etc...

Join the Section today by calling (612) 333-1183 or visit the Section website at www.mnbar.org/adr

SOCIAL SECURITY DISABILITY CLAIMS

Paul Livgard

**Livgard & Rabuse, PLLP
2520 University Avenue SE, Suite 202
Minneapolis, MN 55414
Phone: 612-825-7777**

Successfully Representing Disability Claimants Since 1993