

Inside Oregon Ethics:

Does the Bar Discriminate Against Small-Firm Lawyers and Solo Practitioners?

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Many lawyers are certain that the answer to this question is "yes." I submit, however, that the answer depends on how one defines and what one accepts as proof of "discrimination."

Small-firm lawyers (however defined) and solo practitioners do indeed account for more than their proportionate share of the total number of letters of admonition, public reprimands, suspensions, disbarments and Form B resignations issued annually. This is so even though no one should contend that small-firm lawyers and solo practitioners are inherently less "ethical." To me, however, this is not sufficient proof that the Bar "discriminates."

We know from the Bar's annual reports that certain types of practice (e.g., family law) result in high numbers of complaints. At least some of these high-complaint practice areas tend to be concentrated in small firms or solo practitioners. Or, to put it another way, the types of work that lawyers in medium-size and large firms do is, on average, less likely to result in complaints. Before one can say that the Bar "discriminates," one would have to adjust for such differences. One might ask, for example, how the percentage of complaints against small-firm lawyers and solo practitioners compares to the percentage of letters of admonition, public reprimands, suspensions, disbarments and Form B resignations incurred by small-firm lawyers and solo practitioners. I have seen no such data for Oregon.

Other nondiscriminatory factors may also be at work. For example, large and even medium-size firms increasingly have in-house ethics expertise that many small firms and solo practitioners do not. To the extent that these in-house ethics personnel or other safeguards are able to avoid potential problems "up front," this too could cause differences that would not result from discrimination.

On the other hand, it is also possible that the Bar could discriminate in other ways—by, for example, slapping large-firm lawyers on the wrist for violations that result in suspensions when committed by small-firm lawyers. Once again, however, I have seen no actual data on this issue for Oregon.

Does the disciplinary system affect all lawyers in the same way? No. For example, solo practitioners who are suspended for several months are pretty much out of business, while lawyers in medium-size or large firms suspended for the same period may be able to have their practices held together by their firms. One can argue, however, that the sanction for wrongdoing "should" be a function of the wrongdoing and not of the number of lawyers with whom an accused lawyer practices.

This does not mean that there is nothing that should be changed to make the Oregon disciplinary system more fair. There is much that should be changed. I will address some of the needed changes in future columns.

For a summary of a recent California study of the small-firm bias issue see  
<http://www.calbar.org/2rel/nw01/biassolo01.htm>

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If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

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