Picking on the Little Guy

Perception Lingers That Discipline Falls Hardest on Solos, Small Firms

MARK HANSEN

ILLUSTRATION BY JONATHAN BARKAT

KEITH W. WATTERS KEEPS A COPY OF AN obscenity-laced recording in his office. The tape holds the voice of an irate former client who was screaming over the telephone at another plaintiff in the suit that Watters, a Washington, D.C., lawyer, had handled for them.

The former client also filed a complaint against Watters with the Attorney Grievance Commission of Maryland, and Watters keeps the tape as an example of the kinds of things he has to face as an attorney in his three-lawyer firm.

Watters says he's had at least 10 disciplinary complaints filed against him in his 20 years of practice, the majority of which were determined to be frivolous and dismissed in the preliminary stage of investigation. And he says that's not unusual for a solo or small-firm practitioner, who can count on having a disciplinary complaint filed against him or her about once every year or two.

"It's a routine hazard of practice" for solo and small-firm lawyers,

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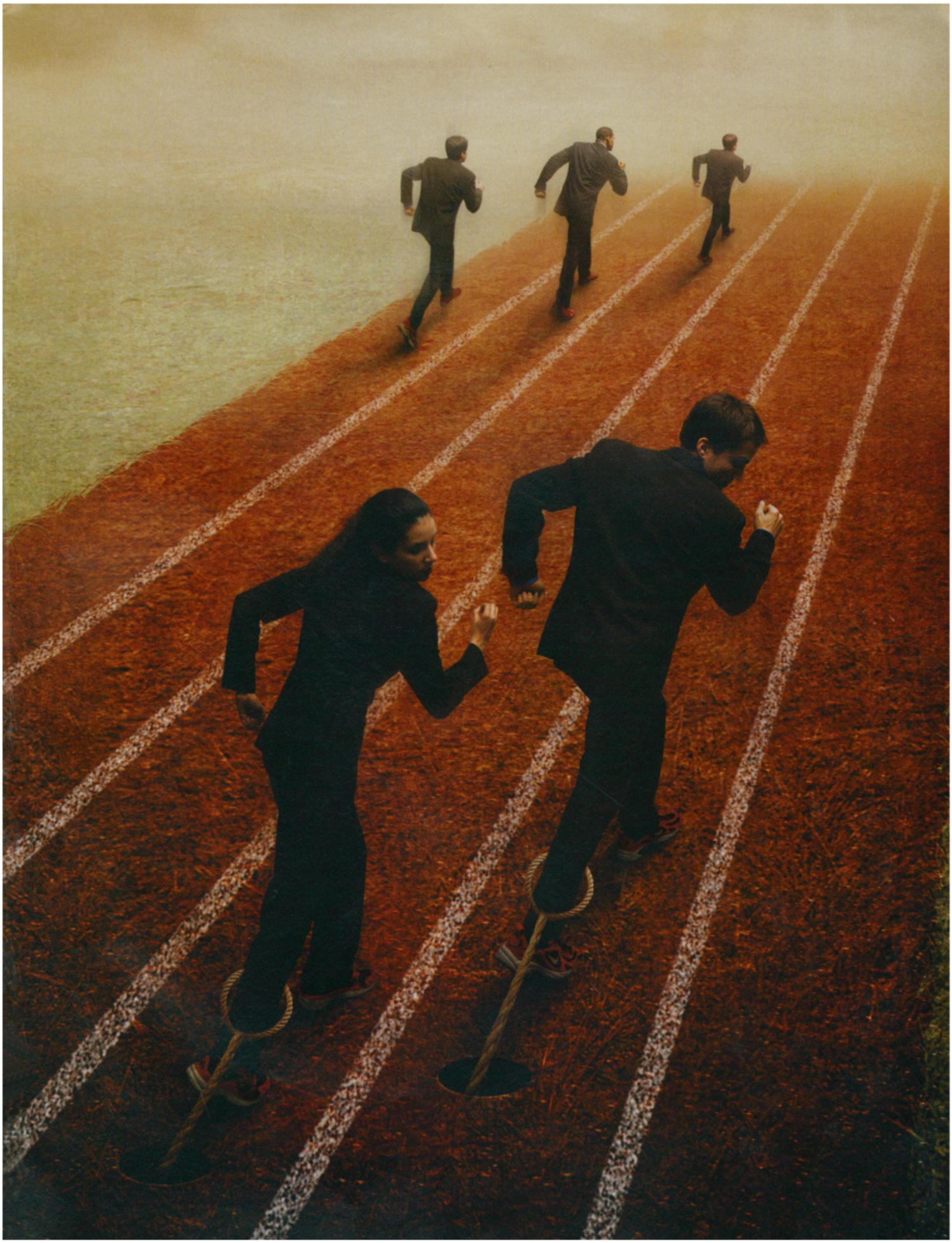


he says. "It happens to everybody. If you represent 300 people a year, as I do, you're going to get complaints."

But solo and small-firm practitioners don't just get more complaints against them than big-firm lawyers do, Watters says. They also get disciplined more often. And when solo and small-firm lawyers get disciplined, the consequences can be a lot worse for them than they would be for a big-firm lawyer, he says.

Watters is convinced the disciplinary system has an inherent bias against solo and small-firm lawyers and minority attorneys. He is a past president of the Bar Association of the District of Columbia and the National Bar Association, and a former member of the ABA's Standing Committee on Lawyer Discipline. He also has served on a variety of lawyer disciplinary review committees, and Watters says he has seen bias against minorities and solo attorneys with his own eyes. And as a black lawyer in a small firm who deals with the public on a daily basis, he says he has experienced such bias firsthand.

Bar officials have always maintained that the attorney disciplinary process isn't biased against minority lawyers or solo and small-firm practitioners. They admit that the "little guys" are disciplined at a disproportionately higher rate than lawyers in bigger firms are. But solo and small firms just happen to have clients who complain more than big-firm clients do, bar officials say. And most minority lawyers happen to practice solo or in small firms.

Perceptions of bias in the disciplinary process have been the subject of at least two organized bar meetings in the past year alone. A panel discussion on the topic among bar disciplinary counsel was held in conjunction with the 28th National Conference on Professional Responsibility last May in Vancouver, B.C. And the National Organization of Bar Counsel sponsored a similar program at its annual meeting last August in Washington, D.C.

After looking at the limited studies available, which find several logical reasons behind the disparities in disciplinary action, panel members, participants and others in the profession are left to discuss the vexing questions that remain: what to do about the perception of bias, and how to deal with the root causes of that disparity.

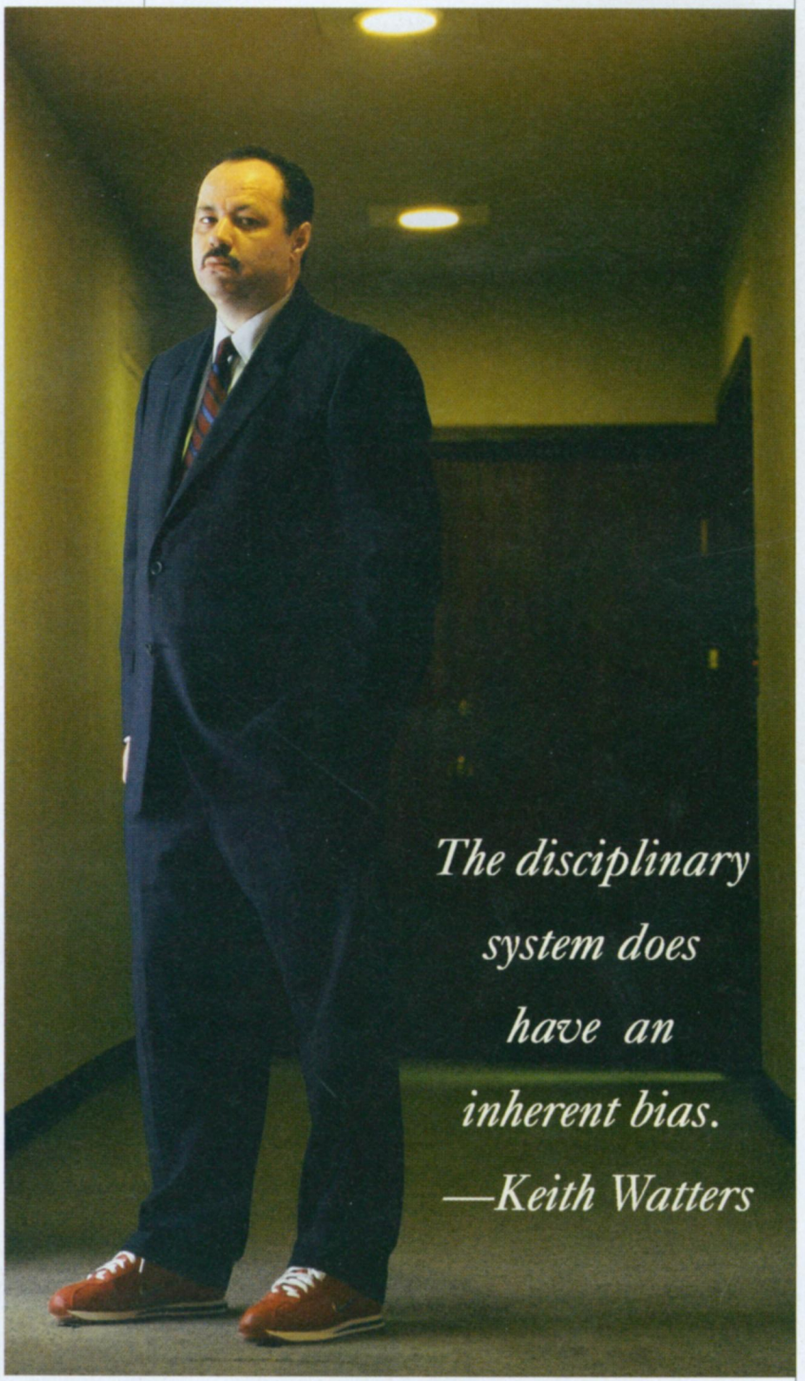
A LACK OF PROOF

THE PROBLEM IN TACKLING DISCIPLINARY disparity has always been a lack of empirical evidence that would either support or rebut claims of bias in the system. Attempts to collect such information have raised objections, sometimes from the people the studies are supposed to help.

At one time, the State Bar of Georgia routinely collected data on the race of applicants for bar admission, according to deputy general counsel Paula J. Frederick. But that practice was discontinued in the 1970s, she says, after some minority lawyers threatened to sue the bar for allegedly using the information to manipulate bar exam scores of minority applicants.

At the Vancouver conference, studies by three state bars were discussed, and they suggest that solo and minority bias is nonexistent.

A 2001 study by the State Bar of California found no evidence of bias in the disciplinary process against solo and small-firm practitioners. The report looked at disci-



ABA/MIKE MORGAN

plinary investigations opened against solo and small-firm practitioners between April 1, 2000, and March 31, 2001. It concluded that, though the number of small-firm investigations was out of proportion to their percentage of the lawyer population, the rate at which those lawyers were disciplined was commensurate with the number of investigations opened.

Solo and small-firm lawyers, who the study defined as those in firms of 10 or fewer lawyers, accounted for nearly 95 percent of all lawyers for whom disciplinary investigations were opened. And they represented nearly 98 percent of all lawyers who were disciplined, the study showed.

While the bar keeps no records as to the percentage of lawyers who work in various-sized firms, the authors located a 1994 survey done on behalf of the bar showing that 56 percent of all lawyers in private practice were working in firms of 10 or fewer lawyers.

One reason for the "slightly higher" percentage of disciplinary prosecutions against solo and small-firm lawyers, according to the study, could be the "significantly higher number" of lawyers in those two categories who do not cooperate with the bar in the initial stage of its investigation.

"It is the state bar's estimate that in approximately 25 percent to 30 percent of all disciplinary prosecutions, the accused attorney fails to participate, and that the vast majority of those defaulting attorneys are solo practitioners," the study says.

The study found several other factors that place solo and small-firm practitioners at greater risk of disciplinary action, including:

- They often find themselves so overworked they miss deadlines or fail to communicate with clients.
- They sometimes experience money worries and "borrow" from clients' trust accounts.
- They often have no documentation to defend themselves against complaints of misconduct.

A bar study on the status of minority attorneys in New Mexico in 1999 found that Hispanic lawyers received about 26 percent of all serious disciplinary sanctions issued between 1988 and 1997, although they accounted for only 14 percent to 17 percent of the state's lawyer population at the time. But the study concluded the most apparent reason for that disparity wasn't ethnicity, but the fact that a large percentage of minority lawyers (79 percent in 1988) were practicing solo or in firms of five or fewer lawyers.

In the study, Virginia L. Ferrara, New Mexico's chief disciplinary counsel, offered several possible explanations for the high incidence of disciplinary sanctions against solo and small-firm lawyers. She cites a lack of mentors, an absence of training in accounting and law office management procedures, and the increasing competition for new clients.

Moreover, lawyers who practice solo or in small firms often feel compelled, primarily for financial reasons, to accept almost every conceivable case that comes their way—whether they're qualified or not, the authors found. And that increases the risk that the lawyer will face disciplinary action should the case turn sour and the client become disgruntled.

A third study, on the consistency of decision-making within the Virginia State Bar's disciplinary system in 2000, found no statistical correlation between the outcome of a disciplinary proceeding and a lawyer's race, age or gender. But the study found a high correlation between case resolution and firm size, and between case resolution and the number of pending complaints.

MORE LAWYERS, FEWER SANCTIONS

ACCORDING TO THE STUDY, AS THE NUMBER OF LAWYERS in a firm increased, the odds of being disciplined declined. As the number of concurrent complaints against a lawyer increased, the chances of being disciplined rose.

Both findings were expected, according to the authors of the study. In a small practice, they say, a lawyer deals with a wider range of practice and client management responsibilities than a lawyer in a larger practice. It only stands to reason that he or she would be more vulnerable to circumstances that affect the flow of his or her caseloads and practice requirements.

That may also explain why lawyers who have more complaints against them have a greater chance of being disciplined, the authors say. If a lawyer is the subject of a number of complaints, it may indicate that he or she has had significant business, professional or personal problems that have affected his or her standards of practice.

The Oregon State Bar has also compiled statistics on the correlation between disciplinary sanctions and firm size, according to Martha Hicks, the state bar's assistant disciplinary counsel. Those statistics show that solos, who account for 50 percent to 60 percent of the state's lawyer population, garner 58 percent of all complaints to disciplinary officials, but receive 80 percent of all the disciplinary sanctions imposed, she says.

So it's fair to say the process does have a disparate impact on solos, Hicks says. "But it doesn't have anything to do with bias," she says.

Interestingly enough, Hicks says, the statistics also show that lawyers with more than 20 years' experience receive 30 percent of all the disciplinary sanctions imposed. Lawyers with six to 10 years' experience receive 26 percent of all the disciplinary sanctions imposed. Both statistics suggest experience doesn't necessarily translate into lower disciplinary rates.

And, Watters argues, these facts don't account for the unequal effects the disciplinary system has on "little guy" firms. He points to his most recent experience with the system, which took place last year, as a good example of the kind of thing solo and small-firm practitioners are up against. It involved the former client whose taped message he keeps.

The former client was a plaintiff in a personal injury lawsuit that was settled for a total of $25,000. She filed a complaint saying Watters billed her twice for his fees. In reality, Watters says, it was a two-part settlement from which he only took his agreed-upon one-third share of each part.

That should have been obvious to anyone who looked at the financial documents the former client attached to her complaint, Watters says. But the disciplinary commission still opened an investigation into the woman's claim, which meant he had to spend several hours preparing a response.

A few weeks later, Watters says, the former client was arrested after leaving on an answering machine the allegedly threatening message, in which she attacked a relative who was another plaintiff in the same case.

BIASED WITHOUT INTENT?

SOME DISCIPLINARY DEFENSE LAWYERS AGREE WITH WATters about bias in the system.

Los Angeles lawyer Diane Karpman, who makes a living defending her colleagues in disciplinary proceedings, says the California bar's study proves the system is biased against solo and small-firm practitioners.

"It may not be intentional," she says, "but that doesn't mean it's not biased."

She says the figures only confirm what most lawyers already know. "Everybody knows they don't go after big-firm lawyers. They can't. They don't have the resources," she says. "They go after the little guys because they're such easy targets."

But other disciplinary defense lawyers defend the system. Donald Hubert, a black Chicago lawyer who has represented hundreds of his colleagues, black and white, in disciplinary proceedings over the past 15 years, says race has never been a factor in terms of who gets disciplined or how severely.

But even he says the system is too dependent on client complaints, the overwhelming majority of which come from the clients of solo and small-firm practitioners. "That has got to change," Hubert says.

Malcolm S. Robinson, president of the 22,000-member, historically black National Bar Association, says he knows of no evidence to suggest the system is biased against minority lawyers.

But he also says he finds it hard to believe that disciplinary officials don't keep track of the race of lawyers who are disciplined. And if they don't, he says, it's only because they don't want to know what those statistics might reveal.

Robinson, a founding partner at a four-lawyer Dallas firm, thinks that disciplinary officials could be a lot more sensitive to the demands of practicing solo or in a small firm.

"Solo and small-firm lawyers have to do everything for themselves, which makes them a lot more vulnerable to complaints," he says. "All big-firm lawyers have to do is practice law."

Robinson says he also thinks the system should take into account the size of a lawyer's practice when it issues a disciplinary sanction. As it stands now, disciplinary officials aren't allowed to consider firm size when a lawyer is disciplined.

"When a big-firm lawyer gets suspended, it's no big deal for the firm," he says. "But when a solo practitioner gets suspended, he's out of business until that suspension is over."

William I. Weston, who chairs the professionalism and professional responsibility committee of the ABA's General Practice, Solo and Small Firm Section, says the disciplinary process is clearly skewed against solo and small-firm lawyers. But he says he wouldn't call it biased.

"I think of bias as prejudice," says Weston, associate dean of Concord University, the country's only totally online law school. "And I know a lot of bar counsel. But I've never known one yet who has gotten up in the morning and said, 'I'm going go out and get me a solo practitioner today.' "

But even if the system isn't biased against minorities, solos or small firms, bar officials agree that the perception is a serious problem the bar must do more to address. Many state bars and the ABA's general practice section already sponsor a variety of programs designed to assist solo and small-firm lawyers, including "Bridging the Gap" programs for newly admitted lawyers and "Solo Day" programs for solo practitioners. Some are advocating for even more to be done.

But Weston, a law school professor for 30 years, says what's needed most is a concerted effort in law school to prepare students for the possibility of a solo practice. These days, he says, it's possible to graduate without having received any exposure to any practical skills.

"That's like a doctor graduating from medical school without having ever picked up a scalpel," he says. ■

HELP IS OUT THERE

Bar counsel and other lawyers have discussed ways to deal with the disparity in the number and effects of disciplinary actions on lawyers in solo or small-firm practice. Some suggestions include:

- Developing new educational programs to help newly admitted lawyers become practicing attorneys. One example is the "Solo Day" programs put on by the ABA's General Practice, Solo and Small Firm Section, which are designed to address a variety of firm-management issues.
- Creating more informal alternatives to the disciplinary process for minor infractions or technical violations that are unintentional and cause no client harm. Many state bar associations offer diversionary programs for such cases.
- Providing more low-cost, self-study MCLE courses for lawyers with little time for or limited access to live continuing education programs. The ABA Center for Continuing Legal Education posts a list on its Web site.
- Establishing more ethics hotlines providing free legal advice on ethical situations and the responsibilities of maintaining a practice. The ABA Center for Professional Responsibility and many state bars have such hotlines.
- Developing programs to provide independent assistance from defense counsel to lawyers accused of misconduct. Under the State Bar of Arizona's program, defense lawyers volunteer their time to help other lawyers facing disciplinary charges.
- Providing a handbook for lawyers facing disciplinary proceedings.
- Requiring an apprenticeship or internship program for lawyers before they can go into solo practice. The program would be similar to internships for doctors, accountants, teachers and other professions.

—Mark Hansen