

The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation - Summary*

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

– The Federalist Papers, No. 47 (J. Madison).

Oklahoma has endured a silent constitutional fissure for nearly 80 years relating to the licensing and regulation of attorneys and the practice of law. With the stroke of a pen in 1939, the Oklahoma Supreme Court usurped from the legislative and executive branches the power to regulate attorneys and the practice of law. In response to this invasion into their reserved constitutional spheres, the other two branches fell silent.

The Court then used its newly discovered power to impose a form of licensing on attorneys more onerous than that of any other occupation in the state. Attorneys are both comprehensively regulated and compelled to join and pay dues to a private trade association, the Oklahoma Bar Association. The Court compelled lawyers in Oklahoma to join this private trade association in violation of their first amendment rights to freedom of speech and association. The Court deputized this trade association to write legislation regulating lawyers and to punish lawyers who run afoul of these regulations. The Oklahoma Bar Association and the Court have swept within their regulatory reach activities that could be performed by non-lawyers, and historically were, enlarging the scope of the attorney monopoly.

To make matters worse, the Oklahoma Bar Association substantially controls who is chosen to sit on the Supreme Court, resulting in a situation of the tail wagging the dog. This has resulted in a Supreme Court that too often weights the perspective of the Bar more heavily than the rule of law.

The Oklahoma Supreme Court's Control of Attorney Regulation

The Oklahoma Supreme Court's exclusive and extensive regulation of attorneys undermines the separation of powers because it concentrates the powers of rulemaking, enforcement, and adjudication all in one branch. Separation of powers is foundational to American government, and was incorporated in virtually every state constitution, including Oklahoma's. The doctrine is fundamentally intended as a guarantor of individual liberty. It is concerned with the threat of tyranny that results when two or more of the basic powers of government are consolidated in a single branch.

Early in Oklahoma's history, the Supreme Court deferred to the Legislature on matters of occupational licensure, including with respect to attorneys, while reserving the common-law right of determining who could practice before the courts. This changed in 1939 following the repeal of a controversial 1929 attorney licensing law that included mandatory membership in the Oklahoma Bar Association.

The Court, in its 1939 decision, *In re Integration of the State Bar of Oklahoma*, first discovered its own inherent power to regulate the practice of law. The decision consists of more assertion than legal reasoning, with heavy reliance on a virtually identical case decided by the Nebraska Supreme Court, the first instance of a state high court creating a mandatory bar purely by judicial decree.

Having swept aside the traditional legislative power, the Court then adopted "rules creating, controlling, regulating, and integrating the State Bar of Oklahoma." In these rules, the Court placed itself in charge of the Bar, set the amount of mandatory dues lawyers would be required to pay, and provided for expenditure of those funds. In one all-encompassing declaration, the Court completely removed the legislative branch from the

question of regulating an entire occupation. In essence, *the Court unilaterally enacted a piece of legislation.*

Contrary to all separation of powers principles, the Court found for itself the power to **(1)** enact legislation comprehensively regulating a major industry in the state, **(2)** compel attorneys to join a hitherto private organization against their will, **(3)** accomplish both of these objectives in direct contradiction to the will of the people as expressed through the legislature, **(4)** assess a tax on lawyers, and **(5)** spend that tax revenue without legislative appropriation. It is difficult to overstate the audacity of this maneuver by the Court.

What the Court Wrought

The current Oklahoma licensing regime violates attorneys' first amendment freedoms, deputizes a conflicted private organization to enforce its provisions, and creates a monopoly in the provision of services by taking a very expansive view of the services it is authorized to regulate.

Under a mandatory bar, an attorney is required by law to join the bar association and subsidize its speech in order to make a living practicing law. Because this requirement necessarily burdens lawyers' first amendment rights, the Supreme Court held in *Keller v. State Bar of California* that mandatory bar associations must provide attorneys with safeguards that are carefully tailored to protect their rights. The Oklahoma Bar Association openly violates its obligations under *Keller*.

The Oklahoma Bar Association is a trade association for lawyers. By definition, trade associations do not represent the public, they represent their members. For this reason, a trade association should have no role in deciding who enters an occupation or in adjudicating conflicts between its own members and the public. When the Supreme Court deputized the Oklahoma Bar Association, it effectively farmed out protection of the public interest to a group that is primarily concerned about its members' interests, not the public's.

Recommendations for Reform

The Oklahoma Supreme Court should reverse *Integration* and its progeny, and return regulation of attorneys and the practice of law (or at least the regulation of attorneys who do not appear in court, i.e., office lawyers) to the Legislature. At a minimum, the Court should make membership in the Oklahoma Bar Association voluntary in order to move the system to firmer ground under the first amendment. If the Court fails to act on its own in this regard, it is increasingly likely this decision will be made for it by the United States Supreme Court.

The Oklahoma Legislature should enact legislation implementing a private certification system for lawyers who do not appear in court. This approach would create a distinction akin to that found in the British system of solicitors (office lawyers) and barristers (court lawyers), with only the latter being required to possess a state-issued license. If the legislature does desire to require a license for office lawyers, it should take a "light touch" approach, keeping requirements minimal. In any event, such legislation should make clear that the judiciary's authority over attorneys does not extend beyond the courthouse steps. That is, the Supreme Court may determine who is permitted to appear in courts in Oklahoma, but has no authority to regulate the rest of the occupation.

If the Court insists on maintaining complete control of the practice of law by striking down the reform legislation, the Legislature should use its constitutional powers to check the Court. Such powers include the power of the purse and the legislative power of investigation and oversight. The Legislature also has the power to legislate regarding the jurisdiction of the courts, so long as it does so consistent with the jurisdictional provisions contained in the Oklahoma Constitution.

Finally, the legislature should propose a constitutional amendment settling this matter definitively by a vote of the people. The amendment would clarify that the regulation of all occupations, including attorneys, resides with the legislature and not the Supreme Court.