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Attorney Licensing in Oklahoma

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The Oklahoma Bar Association (OBA) regulates the practice of law in Oklahoma. Active attorneys are required to join the OBA, which is “an official arm of [the Oklahoma Supreme] Court, when acting for and on behalf of this Court in the performance of its governmental powers and functions.”¹ Common law courts have long held the power to decide who may practice before them, though it has not always been without controversy.² The Oklahoma Supreme Court has extended this traditional power, claiming the authority to regulate every attorney in Oklahoma.³ Whether a lawyer is representing litigants in court or advising businesses on a merger, the Oklahoma Supreme Court declares them, “a part of the judicial system of Oklahoma and officers of its courts.”⁴

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Board

The OBA is led by a seventeen-member Board of Governors.⁵ Three officers, President, Vice President, and President-Elect, are elected at-large. The fourth officer is the Secretary/Treasurer, a role filled by the full-time Executive Director. One member is elected from each of nine geographic districts. Three members are at-large. The final member of the Board of Governors comes from the Young Lawyers Division. The OBA employs approximately 44 staff members.⁶

Licensing and Cost

The road to becoming a licensed lawyer is long. First one must graduate from a law school accredited by the American Bar Association.⁷ Admission to such a law school usually requires a bachelor’s degree, though the field of study is unimportant. Some time between the second year of law school and taking the Bar Exam, prospective attorneys must pass the multiple-choice Multi-state Professional Responsibility Exam. After graduating from law school, prospective attorneys must sit for and pass the Bar Exam. This test consists of 200 multiple-choice questions, several essays, as well as a practical component in which examinees must produce court-ready documents. Finally, once applicants have passed the bar exam, they are subjected to a character and fitness review.

The bulk of the costs of Oklahoma’s attorney licensing scheme comes from the education and testing requirements. In addition to the three-plus years of law school and bar preparation, tuition, and lost income, the OBA charges a \$150 registration fee for students in their second year of law school followed by a \$650 fee for first time examinees who registered or a \$1,150 fee for those who did not commit to pursuing licensure in Oklahoma early enough. Out-of-state attorneys may apply to take the bar exam for \$1,200, while those with five or more years of experience outside the state may apply for Admission on Motion (no exam) for \$2,000. Those who took the Uniform Bar Exam (the same exam Oklahoma now offers) in a different state may apply to have their scores transferred for \$1,250.⁸ Annual licensing dues are \$275.

Out-of-state applicants would seem to require less work for the Board of Bar Examiners, given that there are no tests to administer and score. So the obvious conclusion is that the higher fees are either a ransom that the Bar knows attorneys moving to the state will be willing to pay for the opportunity to forego repeating the Bar exam, or it is meant as a disincentive

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to out-of-state competition poaching clients from existing OBA members.

Penalties

Penalties for the unauthorized practice of law are difficult to find. They are not laid out in the Supreme Court rules establishing the offense. Case law allows one to make inferences, but there is no clear statute spelling out the penalties for a non-lawyer practicing law in Oklahoma. Several cases involve the practice of law by a lawyer whose license was suspended; typical penalties in those cases were additional years of suspension.⁹ Under a now-repealed statute, the Supreme Court did issue an injunction against a corporation that was engaged in the unauthorized practice of law.¹⁰ The court has also speculated on potential instances of members of other professions that might veer into the territory of unauthorized practice of law but it has not specified penalties for such a breach.¹¹

There is a conflict of interest in the prosecution of these crimes. The OBA is charged with seeking a judicial remedy should they learn of anyone practicing law without their permission.¹² Not only are the prosecutors interested parties, but so are any judges.¹³ No one may serve as an Oklahoma judge or justice without being a member of the OBA.¹⁴ No one may serve on the Oklahoma Supreme Court, Court of Criminal Appeals, Court of Civil Appeals, or District and Associate District courts without having been nominated to the position by influential members of the OBA (the Judicial Nominating Convention, or JNC).¹⁵ This means that both prosecutor and judge are members of an exclusive organization whose admitted purpose is, in part “to encourage practices that will advance and improve the honor and dignity of the legal profession.”¹⁶ Additionally, the system lacks accountability since “Neither the Oklahoma Bar Association, the Board of Governors, nor any member thereof, nor any Trial Authority, nor investigator, or informant, or any of them, shall be liable to any member of the Association, or to any other person charged or investigated by the Association, or by its Board of Governors, or any of its committees or such agents, employees and investigators, for any damages incident to such investigation, or any complaint, charge, prosecution, proceeding or trial.”¹⁷

Evaluating Whether to License Lawyers

The 1889 Institute has published Policy Maker’s Guide to Evaluating Proposed and Existing Professional Licensing Laws.¹⁸ It argues that there are two preconditions for licensing an occupation: 1) an occupation’s practices present a real and probable risk of harm to the general public or patrons if practitioners fail to act properly; AND 2) civil-law or market failure makes it difficult for patrons to obtain information, educate themselves, and judge whether an occupation’s practitioners are competent. An occupation should be licensed ONLY if the answer to both questions is yes.

Is there a real and highly probable risk of significant harm to consumers if the occupation’s practitioners do not act properly?

Yes. For only the second time in twenty Oklahoma Licensing Directory entries, the profession analyzed does carry a highly probably risk of significant harm to consumers. Lawyers are charged with protecting life, liberty and property. An incompetent

lawyer in Oklahoma could potentially cost a client their life, if they are on trial for murder. Even lower-stakes criminal trials could end with an innocent client put in prison for decades if an attorney is incompetent. Civil litigators may not hold their client’s life or freedom in their hands, but are often interested with protecting livelihoods and life savings. Even attorneys who never appear in court could cost clients millions of dollars in fines or fees if they give improper legal advice. The risk to consumers if attorneys act improperly is significant.

Is there a civil-law or market failure that makes it nearly impossible for patrons of these services to obtain information, educate themselves, and judge whether an occupation’s practitioners are competent?

No. The world is full of ratings of law firms and lawyers. Reputation is a lawyer’s stock-in-trade. It would be a simple thing for a private independent ratings board to offer consumer guidance on which lawyers were competent. The market would soon be inundated with private certifying agencies competing to offer the best certification for lawyers at various levels of expense and expertise. This would be particularly helpful in establishing expertise in a particular legal field. Membership in the Oklahoma Bar Association allows every member to practice every area of law, even though true generalist attorneys are very rare these days. Consumers would benefit from a private system that tested and certified lawyers in specific practice areas, instead of the one-size-fits-all solution currently employed.

Does licensing mitigate the specific risks associated with the profession?

Attorneys do not pose a special case that necessitates licensing; the competent ones can be readily identified by consumers willing to do a bit of research. Further, lawyers who run the gauntlet of licensure are still disciplined by the Bar every year. It is impossible to compare complaint or discipline rates of licensed vs. unlicensed lawyers, since all 50 states require licensure, but the very existence of a Bar Association with more than 40 people on staff demonstrates that some bad actors must slip through the cracks of the existing system.

The 1889 Institute has outlined a solution to the problem of occupational licensing, including a model bill, in its paper A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing.¹⁹ The proposal would allow the state to register multiple private certification organizations, who then compete for professionals and the attention of consumers. This allows a state to keep the one and only valuable aspect of licensing, the shorthand information consumers get about which practitioners are competent, while discarding the market distortions of monopolized industry. The law keeps certifying agencies honest by allowing additional certifiers to enter the market if those already in place behave badly. Private certifiers are given the protection of criminal fraud laws to lower the cost of defending their credentials. State licenses are not eliminated, instead anyone certified by a qualified certifying agency is exempted from the relevant licensing laws.

Policy Recommendations

We can safely conclude that requiring lawyers to graduate from

college, be admitted to and graduate from an ABA accredited law school, pass the MPRE and Bar Exam, and gain approval from the character and fitness board is not sufficient to weed all bad actors out of the profession. Further, expertise in one area of law is not a guarantee of competence in another (in fact, unless the areas are closely related, expertise in one area is likely to indicate a lack of familiarity with another area of law, given the depth of knowledge required to expertly practice a single area).

Consumers would be better off if attorney licensing was replaced with private certification from a variety of private groups who could certify competency or expertise in specific branches of law. This would reduce the cost of entry to the legal profession,

encourage competition, promote specialization and specialized training, and greatly reduce the cost of entry into the legal field. Consumers would have more detailed information and pay significantly less for legal services.

Oklahoma courts will always have the inherent power to regulate who may practice before them. But the Oklahoma legislature should reassert authority over non-litigation attorneys. The legislature should deregulate the practice of law, and create a system that encourages private companies to provide consumers with more granular information on which lawyers are competent or excellent in which areas of law.

End Notes



- 1 5 O.S. Chapter 1, Appendix 1, ARTICLE I, Section 1, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=100529>.
- 2 Editorial Board, Minn. L. Rev., "The Inherent Power of the Judiciary to Regulate the Practice of Law--A Proposed Delineation," *Minnesota Law Review* (1976): 787, <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=4080&context=mlr>.
- 3 See also Charles W. Wolfram, "Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine," *U. Ark. Little Rock L. Rev.* 12, Iss. 1, (1989), <https://lawrepository.uar.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1858&context=lawreview>.
- 3 Ford v. Board of Tax-Roll Corrections, 1967 OK 90, 431 P.2d 423 (1967), <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=37319>
- 4 5 O.S. Chapter 1, Appendix 1, ARTICLE I, Section 2, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=100530>.
- 5 In Re: Rules Creating and Controlling the Oklahoma Bar Association, 2020 OK 17 __ P.3d __, <https://www.okbar.org/wp-content/uploads/2021/01/SCBD-No-4483-2020-OK-17-FILED-03-23-2020.pdf>.
- 6 "Staff Directory," Oklahoma Bar Association, <https://www.okbar.org/staff>.
- 7 Benjamin M. Lepak, Breaking the ABA's Law School Cartel: A Proposal to Make Oklahoma Top-Ten in Innovative Lawyer Education, 1889 Institute Policy Report, March 2020, <https://1889institute.org/breaking-the-abas-law-school-cartel-a-proposal-to-make-oklahoma-top-ten-in-innovative-lawyer-education-2>.
- 8 "Applications," The Oklahoma Board of Bar Examiners, <http://www.okbbe.com/Applications/default.aspx>.
- 9 See e.g. State ex rel. Oklahoma Bar Assn. v. Nichols, 2021 OK 28, 488 P.3d 734 (2021), <https://www.oscn.net/applications/oscn/deliverdocument.asp?id=488081>; State ex rel. Oklahoma Bar Assn. v. Holden, 1996 OK 88, 925 P.2d 32, (1996), <https://www.oscn.net/applications/oscn/deliverdocument.asp?id=4512>.
- 10 R.J. Edwards, Inc. v. Hert, 1972 OK 151, ¶23, 504 P.2d 407, <https://law.justia.com/cases/oklahoma/supreme-court/1972/42412.html>
- 11 William R. Grimm, "The Unauthorized Practice of Law in Oklahoma," *Oklahoma Bar Journal* 81, no. 33 (December 11, 2010): 2773, <https://www.okbar.org/wp-content/uploads/2018/06/OBJ2010Dec11-sm.pdf>
- 12 5 O.S. Chapter 1, Appendix 1, ARTICLE I, Section 7(c), <https://www.okbar.org/wp-content/uploads/2020/11/RulesCreatingControl-01-Amd-2020-03-23.pdf>.
"It shall be the duty and responsibility of this Association, acting through the Professional Responsibility Commission, to investigate and to seek judicial action to prevent the unauthorized practice of law by any person, and to take appropriate action to enforce any lawful orders issued in such proceedings."
- 13 5 O.S. Chapter 1, Appendix 1-A, Rule 1, Section 1.1, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=479744>.
- 14 Oklahoma Candidate Qualifications District Judge and Associate District Judge, <https://oklahoma.gov/content/dam/ok/en/elections/2022-candidate-filing-archives/2022-candidate-qualifications/2022-district-judge-associate-district-judge-qualifications.pdf>
- 15 "Rules of the Oklahoma Judicial Nominating Commission," Oklahoma State Courts Network, <https://www.oscn.net/jnc/about>.
- 16 *Rules Creating and Controlling the Oklahoma Bar Association*, Oklahoma Supreme Court, <https://www.okbar.org/wp-content/uploads/2020/11/RulesCreatingControl-01-Amd-2020-03-23.pdf>.
- 17 5 O.S. Chapter 1, Appendix 1, Article XII, Section 2, <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=100565>.
- 18 Byron Schlomach and Vance H. Fried, *Policy Maker's Guide to Evaluating Proposed and Existing Professional Licensing Laws*, 1889 Institute Policy Prescription, February 2017, https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d0kmu3ds_137499.pdf.
- 19 Byron Schlomach, Christina Sandefur, and Murray Feldstein, *A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing*, 1889 Institute and Goldwater Institute, November 2018, https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d0kmu3dp_669551.pdf.