

Legal Ethics: Analysis of Twenty-Five Years of Ethics Complaints against Oklahoma Attorneys (1986-2010)

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Abstract

This paper examines formal and informal complaints against attorneys during the most recent twenty-five year period (1986-2010). The data suggested that the growth of attorneys in Oklahoma has exceeded population growth. However, the per capita amount of complaints has been declining, at least in the short term. Examination of the complaints revealed that the most common complaint was neglect. Second, family law and criminal law drew the most complaints. Finally, more experienced attorneys received far more complaints than their younger counterparts. The paper concludes with policy implications and areas for further research in this area.

Newsflash: some people don't love lawyers. This should not be a shock to anyone in the legal profession. Public opinion of lawyers in general has plummeted.² The negative view of legal profession is widespread.³ Numerous surveys confirm this fact. An ABA national survey showed the public views attorneys as unethical and greedy.⁴ A Gallup poll showed only 18% of the public regarded attorneys as having high ethics.⁵ Recently, the biggest ethics complaint in history was filed, involving 500 attorneys using a referral website.⁶

Why does the public dislike lawyers? The public sees the legal system as a corrupt lottery of fictitious claims which enrich lawyers.⁷ Lawyers have been described as vultures descending on airplane accidents.⁸ The image of the legal profession continues to be horrid. Lawyers are considered to be in the lowest rung of society in America, in same rung as used car dealers and politicians.⁹

Parents do not want their children to enter the legal profession. In 1986, 12% of the Americans wanted their children to become lawyers.¹⁰ Considering only 1% of the public are lawyers, this is positive support for the profession. However, the tarnished opinion has had its effect. By 2000, only 5% of Americans wanted their children to become lawyers.¹¹ One doubts that the image has improved in the last decade.

This poor image is nothing new. From Shakespeare's pronouncement over 400 years ago to Sir Thomas More who viewed Utopia as a place without attorneys, lawyers have always had a difficult time being appreciated.¹²

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² Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AMERICAN U.L.R. 1337, 1340. See also Joseph W. Bellacosa, *A Millennial Renewal of the "Spirit of the Bar,"* 100 DICK. L.REV. 505, 507 (1996); Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79 A.B.A.J. 60, 62 (Sept. 1993); and Cardinal Joseph Bernardin, *The Dark Side of the Legal Profession*, 14 HUM. RTS. Q. 20, 21 (1987).

³ Steven T. Taylor, *Oregon Attorney and State Bar Reach Out to Polish the Profession's Public Perception*, 26.2 OF COUNSEL 3 (Feb. 2007).

⁴ Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79 A.B.A.J. 60, 62 (Sept. 1993).

⁵ Jeffrey M. Jones, *Nurses Remain Atop Honesty and Ethics List*, Gallup.com, December 5, 2005.

⁶ William G. Hyland Jr., *Attorney Advertising and the Decline of the Legal Profession*, 35.2 J. OF THE LEGAL PROFESSION 339, 342.

⁷ James Podgers, *Image Problem: Burned by a Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising*, 80 A.B.A.J. 66, 68 (Feb. 1994).

⁸ Dolores K. Sloviter, *Commentary: Perceptions of the Legal Profession*, 10 WESTERN NEW ENGLAND L.R. 175, 178 (1988).

⁹ Lawrence Savell, *Why are They Picking on Us?* A.B.A.J. 72 (Nov. 1992).

¹⁰ Dolores K. Sloviter, *Commentary: Perceptions of the Legal Profession*, 10 WESTERN NEW ENGLAND L.R. 175 (1988).

¹¹ Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 49 (2000).

¹² Lawrence Savell, *Why are They Picking on Us?* A.B.A.J. 72 (Nov. 1992).

The irony is that the public hates lawyers but they like and trust their own lawyer.¹³ The public has respect for our Presidents, as long as no one mentions that twenty-five presidents were lawyers.¹⁴ A lack of trust leads to complaints and dissatisfied customers. Attorneys have gotten their fair share of complaints. This paper is an analysis of the complaints against attorneys made in the past twenty-five years in Oklahoma.

In this paper, I will first examine the disciplinary system for Oklahoma lawyers. Next, I will examine the problem of attorney population growth. Finally, I will examine the past twenty-five years of complaints and explore those findings. I will conclude for policy implications for legal practitioners.

Disciplinary Procedure

Before reporting on the complaints against Oklahoma attorneys, a brief summary of the attorney complaint procedure is warranted. Oklahoma adopted the rules of professional conduct used by the American Bar Association in 1983.¹⁵ For example, conviction of a crime demonstrating moral unfitness are grounds for discipline.¹⁶ But discipline is not limited to criminal behavior of attorneys. In fact, being disciplined in another jurisdiction and not reporting it to the state bar is grounds for discipline.¹⁷ Any action, whether done in a professional capacity or otherwise which harms the legal profession can be subject to discipline.¹⁸ The grounds for discipline are meant to be broad, and not all-inclusive.¹⁹

After a complaint is filed, the General Counsel makes an investigation. Next, the matter is referred to the Professional Responsibility Commission, who decides whether formal proceedings are needed.²⁰ If so, a formal allegation is made and forwarded to the respondent attorney. The respondent lawyer must respond to the allegations. Deliberate misrepresentation in the response is grounds for discipline,²¹ as is failing to respond within twenty days.²² If the attorney does not agree with the complaint, the hearings are handled by the Professional Responsibility Tribunal.²³ If the respondent attorney is found to have violated the professional rules, he/she faces discipline, which can consist of a private reprimand, a public censure, suspension, or disbarment.²⁴

Costs of the investigation and hearing(s) are surcharged against the disciplined lawyer with rare exception.²⁵ Failure to pay the costs is also grounds for discipline, resulting in automatic suspension until payment is made.²⁶ Data on complaints against Oklahoma attorneys is kept by the General Counsel of the Oklahoma Bar Association. The data is accumulated and reported annually in Oklahoma Bar Journal.²⁷

Attorney Population Growth

Before examining attorney complaints, we must consider the effect of the rapid growth in the number of practicing attorneys. The number of attorneys in Oklahoma continues to grow faster than the population. To make the comparisons accurate, I will use the census years, 1990, 2000, and 2010. In the two decades from 1990 to 2010, Oklahoma's population has increased 19.25%.²⁸ During that same twenty year period, the population of practicing attorneys in Oklahoma increased from 9,230²⁹ to 11,711.³⁰

¹³ Kimberly M. Cahill, *Image*, MICHIGAN B.J. 16 (Nov. 2006).

¹⁴ William G. Hyland Jr., *Attorney Advertising and the Decline of the Legal Profession*, 35.2 J. OF THE LEGAL PROFESSION 339, 341.

¹⁵ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 1.5.

¹⁶ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 7.1.

¹⁷ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rules 7.7.

¹⁸ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 1.3.

¹⁹ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 1.2.

²⁰ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 6.1.

²¹ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 5.2.

²² *id.*

²³ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 4.5.

²⁴ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 1.7.

²⁵ Title 5 O.S. 1991. Ch. 1. App. 1-A, Rule 6.16.

²⁶ *id.*

²⁷ The reports cover calendar years, not fiscal years. The Annual Reports are available online at www.okbar.org.

²⁸ Oklahoma's population in 1990 was 3,145,585. Population in 2010 was 3,751,351. Taken from quickfacts.census.gov/qfd/states/40000.html.

²⁹ ABA Market Research Department (online) at www.aba.org.

This represents a 26.88% increase in attorney population in Oklahoma. In other words, the population of attorneys is growing significantly faster than the population. While the growth of attorneys increased 8% faster than the general population, this actually understates the problem. First, these figures exclude over 4,000 licensed attorneys who are licensed in Oklahoma but not currently Oklahoma residents. Further, these figures do not include many graduates of Oklahoma's three law schools who relocate after graduation.³¹ Finally, Oklahoma lost 800 practicing attorneys in 2008-2009, which coincides with the economic downturn.³² These attorneys could easily return to practice in Oklahoma should the economy rebound. If those 800 attorneys were added back into the figures, the growth of attorneys was 35.55%, nearly double the population growth rate!

The numbers are surging and the problem is not unique to Oklahoma. Texas has seen the per capita lawyer population double since 1970.³³ Specifically, Texas has experienced attorney population growth, from 27,855 in 1976 to 61,638 in 1996, a 121% increase over two decades.³⁴

The problem is national. The number of practicing attorneys in America increased from 169,489 in 1948³⁵, to 542,205 in 1980,³⁶ to 1,225,452 in 2011.³⁷ How have these numbers surged? Law schools have increased in size. In addition, the number of ABA accredited law schools has grown, from 183 in 2000 to 199 in 2009.³⁸ By adding sixteen new law schools in the last decade, the growth rate will only increase. The growth rate of lawyers is more than double the rate of any other profession.³⁹ As an extreme example, New York lawyers have grown at 26 times the rate of growth of the population.⁴⁰ If current trends continue, by the year 2188 lawyers will outnumber non-lawyers in America.⁴¹ The explosive growth of lawyers has caused one columnist to comment "America's lawyer population is breeding like maggots."⁴²

While the number of attorneys has increased, the job prospects have worsened. In the past three years, 15,000 jobs have disappeared at large law firms.⁴³ The job market has deteriorated so much that some schools are even being sued by their graduates over inflated job prospects given to incoming students.⁴⁴

Complaints against Attorneys

Despite the attorney population increase, the amount of grievances (uninvestigated consumer complaints) has been fairly constant, about 1500 per year. Many complaints do not result in discipline. Many simply lack merit. Most (98%) of the complaints are dismissed without imposing any kind of discipline.⁴⁵

³⁰ *Id.*

³¹ The three ABA accredited law schools in Oklahoma are the University of Oklahoma College of Law, Oklahoma City University College of Law, and the University of Tulsa College of Law. There are no unaccredited law schools in Oklahoma.

³² ABA Market Research Department (online) at www.aba.org.

³³ Marc Galanter, *The Turn against Law: the Recoil Against Expanding Accountability*, 81 TEXAS L.R. 285 (Nov. 2002 at 287).

³⁴ *Bar Flies: State Lawyer Population has Doubled over Last Twenty Years*, WALL STREET JOURNAL (July 16, 1997, p. T4).

³⁵ *Study Breaks Down U.S. Lawyer Population by State, Type of Work, Age*, JOURNAL OF ACCOUNTANCY (Jan. 1951 page 20).

³⁶ *The Lawyer Explosion*, 81 ABA JOURNAL (Issue 3 p.37, March, 1995).

³⁷ ABA MARKET RESEARCH DEPARTMENT'S NATIONAL LAWYER POPULATION SURVEY (2011); also Melvin Hirshman, *Gallimaufry II*, 36 MARYLAND BAR J., 50 at 51 (Jan./Feb. 2003).

³⁸ Anna Stolley Persky, *Are There Too Many Law Schools? The Role of Accreditation*, 39.7 STUDENT LAWYER (2011) 26-29

³⁹ Ralph D. Cook, *Reflections on Ethical Issues*, 64 ALABAMA LAWYER 226 (July, 2003). See also Lisa L. Granite, *Too Many Lawyers*, 23 PENN. LAWYER 36 (Jan./Feb. 2001).

⁴⁰ *Are Lawyers Promoting Litigation*, 71 N.Y. ST. BAR J. 49 at 56 (April, 1999).

⁴¹ The short article used figures of annual growth of 0.6% for population and 3.64% for lawyers. See *Ask Mr. Statistics*, FORTUNE (June 15, 1992, page 159).

⁴² *Litigious Society in and out of Court*, WASHINGTON TIMES (Oct. 10, 1996, page A18).

⁴³ Anna Stolley Persky, *Are There Too Many Law Schools? The Role of Accreditation*, 39.7 STUDENT LAWYER (2011) 26-29.

⁴⁴ Anna Stolley Persky, *Are There Too Many Law Schools? The Role of Accreditation*, 39.7 STUDENT LAWYER (2011) 26-29.

⁴⁵ During the 25 year period, a total of 37,070 grievances were filed. However, during the same time only 468 incidents of discipline were imposed. This means only 1.26% of grievances resulted in the imposition of discipline on an attorney. Of

The General Counsel investigates these complaints, and those with merit are called formal complaints. The number of formal complaints has varied widely during the past 25 years.⁴⁶ The highest number of formal complaints was in 2000, which resulted in 487 formal complaints.⁴⁷ The lowest number of formal complaints was received in 2010, which saw only 195 formal complaints.⁴⁸ Interestingly, despite the population increasing, and grievances constant, the number of formal complaints is not increasing (and in recent years, has actually dropped). The types of violations resulting in discipline showed both worry and promise.⁴⁹ Overwhelmingly, most complaints were based on neglect, which ranged from 30-54% of the yearly totals during the twenty-five year period.⁵⁰ Neglect was always the biggest category of complaints. The worry and the promise is that these complaints are the easiest to avoid. If the biggest problem was incompetence or stealing money from clients, they would be difficult and expensive to remedy. Since most complaints involve neglect, there is hope to remedy the bar.

The Oklahoma Bar Association also breaks down complaints by the area of law resulting in the complaint.⁵¹ Family law drew the most complaints in 15 of the 25 years.⁵² Litigation and criminal law were second and third. Employment law,⁵³ immigration,⁵⁴ and corporate/commercial law drew the fewest complaints.⁵⁵ Interestingly, the most complaints stem from the areas of practice most associated with the general practitioner.

The Bar also reported complaints by the number of years in practice. Ironically, the greatest complaints were not against the newest attorneys struggling to learn, but were from the most experienced attorneys.⁵⁶ The most complaints involved attorneys with twenty-five years of experience or more. The experienced attorneys received the most complaints for 14 of the 25 years. Attorneys with less than five years received the fewest complaints in 20 of the 25 years. Since most complaints involved neglect, an easy theory is that older attorneys with an established clientele were busy and often neglected their clients. Younger attorneys, with a smaller client base, had time to communicate with their clients, and avoided the complaints of neglect.

Explanations for Pattern of Complaints

The past twenty-five years has seen a slow but consistent increase in the amount of formal complaints against attorneys, except for the most recent five years, in which the pattern has reversed. I will attempt to find a rationale which could explain these results.

course, this does not consider grievances that involve disputes about fees, which might be settled without imposing discipline.

⁴⁶ The Annual Reports of Professional Responsibility Commission and Professional Responsibility Tribunal are available at the Oklahoma Bar Association website, www.okbar.org. To obtain a spreadsheet of the attorney complaints of the last twenty-five years, please contact Professor Ludlum at mludlum@uco.edu.

⁴⁷ Annual Report of Professional Responsibility Commission and Professional Responsibility Tribunal January 1, 2000 Through December 31, 2000, 72 OKLAHOMA BAR ASSOC. J. 726 (2001).

⁴⁸ Annual Report of Professional Responsibility Commission and Professional Responsibility Tribunal January 1, 2010 Through December 31, 2010, 82 OKLAHOMA BAR ASSOC. J. 381 (2011).

⁴⁹ Categories are neglect, misrepresentation, trust violation, personal behavior, personal relationship, incompetence, excessive fees, conflict of interest, client's property, advertising, UPL, criminal, and other.

⁵⁰ Calendar year 2000 is excluded because the Bar did not report this data.

⁵¹ The categories are family, litigation, estate, commercial, corporate/civil, criminal, bankruptcy, administrative, workers compensation, real property, personal injury, immigration, employment, and other. Immigration was added as a category starting in 2008.

⁵² In the other years, criminal cases received slightly more complaints than family matters. Calendar year is excluded because the bar association did not report those figures. See Annual Report of Professional Responsibility Commission and Professional Responsibility Tribunal January 1, 2000 Through December 31, 2000, 72 OKLAHOMA BAR ASSOC. J. 726 (2001).

⁵³ Workers compensation is a separate category. For twenty-one of the twenty-five years, there were no employment related complaints filed.

⁵⁴ Immigration was added starting in 2008, and has only received two complaints in 2008-2010.

⁵⁵ There were only a handful of complaints in these three categories combined.

⁵⁶ The categories are licensed up to five year, six to ten years, eleven to fifteen years, sixteen to twenty years, twenty-one to twenty-five years, and 26 years plus.

To use a well-worn metaphor, the glass could be half-full or half-empty. On the half-full side, perhaps attorneys are becoming more ethical and/or competent, resulting in fewer legitimate complaints. This is a positive result, but the pattern has just emerged in the past few years. It would seem unlikely that the revolution of ethics and competence occurred in just a handful of years.

On the half-empty side, there are two different explanations. First, it is possible that the public expects unethical behavior of attorneys, so bad conduct does not result in complaints. This seems unlikely, since the number of consumer grievances appears fairly constant for the past twenty-five years. Second, it is possible that the public perceives that complaints would do little. Since the State Bar is run by attorneys, the public perceives that attorneys will not condemn each other. This is a serious concern. If the public does not trust attorneys to regulate themselves, faith in the legal system (not just opinions of attorneys) will decay.

Policy Implications

Attorneys, being self-regulated, must pay special attention to allegations of wrongdoing. From the public's perspective, a consumer complaint which does not result in discipline looks like corruption. Attorneys are protecting their friends. This will not only tarnish an already poor opinion of attorneys, but undermine the faith in the system as a whole. Any form of self-regulation which is not transparent creates an impression of no accountability, which is not good for the legal system. By analyzing the pattern of complaints, and identifying those areas in need, the bar can better serve its members, who can better serve the public. During the twenty-five year period which this paper examined, the likelihood of an Oklahoma attorney getting a formal complaint was one in twenty-five over the course of a year. This does not take into account that most attorneys who received bar complaints got multiple complaints.⁵⁷

The likelihood of an Oklahoma attorney getting a formal complaint which resulted in any kind discipline was one in a 641.⁵⁸ The chance of an Oklahoma attorney getting the ultimate sanction, disbarment, was very unlikely, as this result occurred to less than 1/10th of 1% of the bar membership each year.⁵⁹ There are several lessons to be taken from this analysis. First, few attorneys received ethical complaints of substance. This means that most attorneys are ethical people working hard for their clients. While this is positive, it should not be trumpeted since few complaints in a self-regulated industry creates the public impression of the bar protecting their friends.

Second, most of the complaints involved neglect. These complaints can be easily remedied by persistence and effort of individual attorneys. More training is needed to encourage greater communication between lawyers and clients. Technology could allow for more client contacts without a significant increase in time.

Third, if distinct sub-groups of attorneys can be isolated, perhaps remedies can be made to decrease the attorney complaints for that group. The categories which showed the most complaints were older attorneys who practices in the area of family and criminal law. This could explain the neglect. A general practitioner who handles hundreds of individual cases (divorces and misdemeanors) from many clients will have a problem keeping contact with all his/her clients. An attorney with two large clients with a myriad of legal interests can still keep in contract with the two large clients.

Conclusion

The report has many implications for future research. Attorneys from different jurisdictions should be compared to see if there are regional or state differences. By expanding the reporting details of complaints, we could examine more details than just the type of practice (family law, etc.) and specify what incident(s) led to the complaint. This could inform attorneys what specific behaviors lead to consumer problems. As a self-regulated profession, the legal community must constantly strive to reduce complaints.

⁵⁷ For example, in *State ex rel. Oklahoma Bar Association v. Scroggs*, 71 P.3d 15 (Okla. 2003), the respondent had previously been suspended the previous year, and was facing eleven complaints when he resigned pending disciplinary proceedings.

⁵⁸ The Annual Reports show a total of 468 instances of discipline in 25 years. This averages to 18.72 incidents of discipline per year. With an average of 12,000 active attorneys, it makes a one in a 641 chance, other things being equal.

⁵⁹ The Annual Reports show a total of 230 disbarments or resignations with discipline pending in 25 years. This averages to 9.2 disbarments each year. With an average of 12,000 active attorneys, it makes a one in 1,304 chance of being disbarred, other things being equal.