

# St. Louis Lawyer

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**Lawyers in the State Legislature:**  
Are they a dying breed, and why is this important?



*Salute . . .*

*We honor the memory of Ken Klein and his 25 years of service to the Bar Association of Metropolitan St. Louis.  
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# A government of laws, not of men...or corporations

by Thomas G. Glick



As lawyers, it's not difficult for us to generally subscribe to the political philosophy that society works better when it is governed by "the rule of law." As American attorneys, we most often trace the roots of this philosophy to Plato or Aristotle, but in truth, ancient philosophers in many cultures enunciate similar concepts, including Chinese and Islamic thinkers.

In comparing the success of our country and culture, we frequently cite the "rule of law" as basis for our economic success over the last two centuries. We often hear from other cultures that the inviolability of property and contract rights in our legal system is what instills the confidence in our system that encourages individuals to take the economic risk that causes our economy to thrive.

However, if "rule of law" is the structural "foundation" of our society, it might be time we grabbed a flashlight and headed into the basement. Every property owner in or around St. Louis knows that this foundation, like those in our homes, requires constant vigilance for cracks and leaks. Unfortunately, the bad news that property owners often learn is that even with constant vigilance, the early discovery of a tiny trickle of water in a well designed and maintained basement can result in significant and expensive repair costs.

As lawyers, we are explicitly the guardians of our society's rule of law foundation, so even with the queasy horror of substantial sacrifice on the horizon; I think we must continuously inspect the rule of law to ensure it is watertight. This seems a particularly

appropriate analogy given the alarming mortgage crisis that has predicated our current national recession.

Initially, the home loans and foreclosure did not seem to implicate the rule of law: we all heard stories about improper, impatient, and immoral activity by big banks and lenders that snowballed into disaster. The banking industry had thrown its political weight around to generate laws that allowed a lot of people to get into homes they could not realistically afford. Initial blame was focused on lending behemoths, who with the help of their Wall Street brethren, had effectively destroyed our economy with a legal but complex version of the classic scam, Three Card Monte. This scam was accomplished by using classic huckster techniques of misdirection and fast talk. They repeatedly sliced and recombined bad loans until they convinced everyone that worthless paper was worth buying. This was offensive, unethical, and irresponsible, but for the most part, legal.

Now, in the wake of the toxic-asset crisis, we have come to realize it predicated the current foreclosure crisis. But there is a big difference between creation and manipulation of a hazy set of laws, and the outright decision to put an American citizen out of his home based on less than absolute certainty that she has benefited from full due process.

This year, as the summer turned into fall, our general population began to

learn more and more about the internal workings of foreclosures by large institutional lenders -- or those that bought the debt from them. We heard anecdotal revelations that foreclosures and evictions had proceeded against families that had paid their mortgage, tried to pay their mortgage, and in at least one case against a family that were free and clear fee simple owners, when

their legal description accidentally ended up on someone else's loan documents.

We began to understand that these problems resulted, in part, from something the media dubbed "robosigners."

Robosigners are not actually mechanical automatons, but low-wage employees who presumably took these jobs in order to pay their own mortgages. Large banks and institutions hired such people to execute legal documents, including affidavits, required for the foreclosure process. Most robosigners were not only improperly trained to understand the documents they were executing but were assigned so many documents on a daily basis that the clear expectation of their employers' was that such documents be executed without any inquiry to the facts of any individual case.

To me the phrase "robosigner" is merely a polite euphemism that we

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adopted for these employees, which might just as accurately be "perjurers." My suggestion of this more accurate term is not meant to cast blame strictly on the many employees in many areas of the country for many different employers who ascribed their names on false affidavits. Instead, I selected this term because it allows me to make my next logical step from the perjurers to those who suborned perjury from them.

In this case, those who suborned perjury wield substantially more power than the perjurers. These institutions have the assets necessary to hire public relations consultants and lawyers. They also have a history of making political contributions that give them access to governmental decision makers. So upon discovery of this crisis they were able to proffer and "spin" their answers to give them a solid air of credibility.

Indeed, these banks and related institutions were able to exploit the vast schism of disagreement between right and left that polarizes our current political landscape. We have grown accustomed to any and all controversies being cast in the light of fundamental, diametric divergent views. When we learned that in some cases the intuitions had acted contrary to the rule of law on a broad scale, to me, as an attorney, this matter took on substantially more importance than a mere political football in an endless, dispiriting contest.

When I heard that hucksters had warned against genuine correction of the problem, using excuses about the potential for substantial negative economic consequence, I was unconvinced. Substantial negative economic consequence does not, in my opinion, provide a valid reason for taking action divergent from the rule of law, like executing a false affidavit.

These talking points are then filtered through to us by the media's "master logicians" -- the same talking heads that present every unseasonably cold day or surprise snowstorm as irrefutable evidence to undermine the global warming phenomenon. Nevertheless, in reporting on this crisis they somehow discovered that there was something wrong with "anecdotal evidence." This led many of these unqualified squawk-boxes to report and endorse the lenders' position that the overwhelming majority of foreclosures were against people who had not paid their mortgages. I assume that this position was an attempt to convince the public that if lenders' had bothered with such niceties as "due process" they would have almost always reached the same conclusion, foreclosure. Unfortunately, there is more wrong here than the mere hypocrisy of shouting "anecdotal evidence!" at your opponents while using inconclusive evidence in other contexts to further your own aims. This approach to the foreclosure issue overlooks the fundamental questions at stake.

In making policy decisions we recognize that our efforts to benefit the most people invariably have a negative impact on a few people. That's just the way life works. However, as lawyers, we also recognize that there are some actions that despite some benefit to the majority, so disadvantage the minority that they cannot be permitted. Often we find such rules in the philosophical underpinnings of our normal laws that are inscribed in our Constitution. For this reason, even though there is merely anecdotal evidence of a very small number of people being evicted from their property without due process of law, that is an adequate basis for us to act.

In elementary school civics we learned

that our criminal justice system was based on the maxim that it is better for ten innocent people to be set free than for a single person to be wrongly punished. Later in law school, we learned how criminal procedure was modeled around this concept, including most importantly the burden of proof we describe as "beyond a reasonable doubt." I am not suggesting that lenders be subject to a higher burden of proof in order to proceed with foreclosures. Instead I am suggesting that constitutional questions of due process in this civil setting are just as crucial to our system as criminal cases. And it is not a tremendous leap for anyone who completed a Constitutional Law Class to recognize that the drafters of our Constitution also saw property rights as pretty important.

As a result, I feel that more than mere outcome-based analysis is required for the foreclosure crisis. In the last two years I have grudgingly acknowledged that there are some institutions in our country that from a macro-economic prospective are "too big to be allowed to fail." But we cannot accept that there are any entities that are too big -- or too important -- to follow the rule of law. ■

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