What About Judicial Lynching?

By Dan Meador

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In one of his recent telephone calls, Ralph Winterrowd asked, "What do you know about judicial lynching?"

The question caught me off guard. "I haven't personally lynched a judge, but it should be pretty simple – all you need is a rope and a tree."

Ralph usually calls on his cell phone when he's driving so our conversations are frequently cut off due to gaps between transmission towers. On that particular occasion we lost contact before Ralph had the opportunity to explain his question, but I continued to think on the subject. For some time we've been working on the assistance of counsel issue and have gotten far enough that we're attacking the problem from several directions.

Ralph is using a frontal approach. Defendants cannot answer enforcement or judicial questions, and cannot enter pleas in courts, because they aren't learned in the law and they don't have assistance of counsel, as required by the Sixth Amendment to the U.S. Constitution. I recently sent a request for one of the justices on the Oklahoma Supreme Court to submit my name for addition to the court's registry as "counselor at law" – "attorney at law" and "counselor at law" are distinct capacities.

An attorney at law "represents" clients where a counselor at law "protects and defends" clients. Historically, attorneys at law were not permitted to defend people in criminal proceedings. Unless a defendant waives his right to assistance of counsel, a court is incomplete unless a counselor at law participates in the defense.

Ralph's digging is causing considerable distress to the Alaska law community. There hasn't been an Alaska counselor at law and probably not a legitimate attorney at law in the last quarter century. Frank Taucher of Tulsa has the Oklahoma law fraternity in approximately the same jeopardy. Yet institutional moguls – judges, justices and bar association officers – continue to defend the indefensible.

In my request sent to Justice Marion P. Opala, I asked that he either submit my name for addition to the Oklahoma Supreme Court registry as counselor at law or address three questions: (1) Who is entitled to assistance of counsel? (2) Are those entitled to assistance of counsel also entitled to effective assistance of counsel? (3) Who has standing to provide assistance of counsel?

I first met Justice Opala in the summer of 1978 when he presided at a friend's wedding. In 1994, I took advantage of our acquaintance when I submitted several written questions. In a December reply, Justice Opala told me that Oklahoma's first-level courts are operating as "statutory nonconstitutional courts." (The 1994 Opala letter is posted on the Law Research & Registry web page toward the bottom on the research page at http://www.lawresearch-registry.org/lrrserch.htm)

After his December 1994 reply, I resolved not to go to the well too often. But the bar monopoly has to be broken. Nearly a decade later I decided to call write another letter to my justice friend.

Former Chief Justice Danner closed down Oklahoma courts with the 1939 bar consolidation order. In the order, Danner admitted that the Constitution and laws of Oklahoma do not vest legislative authority in the judicial branch, but he reasoned that the Oklahoma Supreme Court, which has supervisory responsibility over all Oklahoma courts, has an inherent right to regulate practice and conduct in state courts. In the same general timeframe, chief justices in numerous states employed the same rationale to close down courts in their respective states. When you read three or four of the orders it's humorous as they quote each other as authorities. You would think the new revelation ranked with flying machines and sliced bread.

I've been wrangling with the legal profession problem since long before I began study of law. In 1976, I hired an attorney to do something that had to be done in two stages. We agreed on a fee and I paid in advance. He completed the first task within a few days. About three months later I asked him to do the second. He told me he needed more money – four times what I agreed to and already paid.

I went ballistic. However, rather than throttling him, I submitted a malpractice complaint to the Oklahoma Bar Association. Two or three weeks later I received a letter from an OBA official. They had allegedly investigated the complaint and failed to find irregularity on the part of the attorney. I was advised to retain services of another attorney. In the meantime, I had no recourse for recovery of what I already paid the crook except to sue him.

Do you want to sue an attorney? Good luck. Find one willing to sue another for anything short of homicide.

In 1990, I sat through a criminal trial where the guy was being tried a second time for the same offense. The first resulted in a hung jury so was declared a mistrial.

I don't know if the guy is guilty or innocent. That wasn't the problem. The case rested totally on circumstantial evidence that didn't identify the perpetrator and there were at least two legitimate suspects who had comparable access and opportunity.

The first trial bankrupted the guy. He had a court-appointed attorney for the second. Because of lazy, shoddy, incompetent defense, he was found guilty and sentenced to 25 years.

I didn't have a personal interest in the case. I attended both trials as a journalist. But the shoddy defense so offended me that I subsequently took and scored well enough on the LSAT that I was admitted to law school at Oklahoma City University and probably would have pursued a law degree had I not secured a lucrative contract for something else. Little did I anticipate that one day justice would one day top of my priority list.

Justice Opala performed the wedding ceremony for a friend in summer 1978. The friend was the daughter of one of the country's better product defense attorneys. The groom was a young, aspiring attorney. That fall the newlyweds decided to host a "struggling young professionals" party the Saturday following Thanksgiving. Billie invited me. At first I tried to beg off. "I don't want to listen to attorney talk and I don't like Scotch whiskey."

She promised that young doctors, dentists and other professionals were invited and she all but begged me to attend. "I want you there so I have somebody to talk to. I'll buy a bottle of bourbon."

The big OU-Nebraska football game was traditionally played the Saturday following Thanksgiving. That year's game was to be the afternoon party centerpiece; through the seventies one or both were normally in the hunt for the national title. Most of the struggling young professionals were OU graduates.

There was a steady drizzle and it was uncommonly cold for Oklahoma in November, and to top everything else, OU lost the game. The party was pretty flat and winding down by early evening. As I suspected, the affair was dominated by young attorneys. After the turkey was gone and the game over, most everyone was lounging in the livingroom as the last two surviving teams were winding up the progressive bridge tournament. So far as I'm concerned, bridge ranks on my list of favorites just after watching grass grow. Billie's groom, Mort, was one of the finals players.

To that point I pretty well ignored attorney talk, but once we congregated in the livingroom it was impossible to escape. Mort and two other young attorneys in the law firm he worked for were discussing the conduct of an opposing attorney in a case they were handling. I happened to be taking a drink when Mort said something about "attorney ethics" – I choked, my drink spewing half way across the room. Then I giggled as I tried to excuse myself.

Say "smart-assed attorney."

Mort took the opportunity. He was suddenly presiding at court. "Well, Mr. Poet, you seem to be cynical about legal profession ethics."

"Cynical probably isn't the precise term. 'Legal ethics' is a conspicuous oxymoron. Analogously, it's on the order of virtue among whores."

Don't misunderstand. I like some attorneys and even a few judges. Beyond that they're fun to play with as nearly all of them suffer catfish syndrome. If he kept his mouth shut, a catfish would never get caught, but once his mouth is open, he can neither see nor hear. In that particular case, the game was on – Mort, along with all the other struggling young attorneys, took the bait. They staked out two unanimous positions. First, each in attendance was concerned about attorney ethical conduct, and second, each was concerned about public perception of the legal profession.

"Well, Mr. Poet, you obviously have a strong opinion on the subject. Have you given the matter sufficient thought to recommend a solution?"

As a matter of fact, I had, but I didn't believe they would appreciate my remedy so I would prefer to finish my drink and go home. "I don't want to offend anybody, particularly Billie. Maybe it would be better if I recited bawdy poetry or simply went home."

They agreed that nobody would be offended. "We need more input from the public, and as an educated, obviously articulate non-attorney, maybe your perspective will enable us to at least see our profession through the public's eyes."

The two doctors and the dentist even got in the act. "Unfortunately, medical professionals are vulnerable to unwarranted as well as legitimate malpractice suits so we have a considerable stake in legal profession ethics…"

To that point in my life there were two occasions where I needed assistance of attorneys. The first time was in the early seventies when an ice storm blanketed Oklahoma City. That night on her way home from work, my first wife was victimized by a hit-and-run driver. The same guy hit several cars on an ice-covered overpass. We tracked him down, and in the process discovered that he spent most of the night in a bar prior to ramming the several cars. He was also a top

executive in an Oklahoma-based insurance company. The Oklahoma City Police took complaints but didn't do anything with the case so we hired an attorney.

Things dragged on for two or three months before the attorney told us he had a settlement offer. When we went to his office, the offer he made was ridiculous. We rejected it. However, rather than adjourning the meeting he made a second offer.

Do I have "stupid" written on my forehead? When I threatened to wring his neck, he got right. He wrote a check on the spot.

I then related the account of the supposed OBA investigation just two years before. "My question is this: How the devil did the OBA conduct an investigation without holding a hearing of some kind? Was I offered the opportunity to present evidence and confront the crooked attorney?

"The obvious conclusion, based on my limited experience and incidents other people have related, is that the law profession is incapable of regulating itself.

"The conclusion isn't unique to the law profession. It has universal application. The law of entropy tells us that all systems tend to degenerate, and eventually fail, unless infused with new energy from some outside source. The thing that makes the law profession unique is that you also control the courts – we rely on you for justice both from the bench and the bar. We have precious little recourse – the brethren stand guard both at the gate and alter of justice. And corrupt judges are even more insulated than corrupt attorneys. My experience, and the experience of others I've visited with, tends to reinforce William Shakespeare's conclusion – kill the lawyers first.

"About a year ago I went to Wichita to visit friends. The Wichita newspaper had an article about the Kansas lottery for deer tags. Everyone who wants to hunt deer fills out an application. Prior to the season, the Kansas fish and game folks decide how many licenses to issue based on the estimated deer population. Once the number is determined, applicants are randomly drawn to determine who receives licenses.

"The purpose of the Kansas lottery is to avoid depleting the deer population. While I don't believe we would have that problem with attorneys; America has more attorneys per capita than any other country in the world, we could combine the lottery principle with the baseball three-strike rule to regulate the law profession.

"My suggestion is that we establish a three-person commission to regulate the profession, attorneys and judges included. No attorney can sit on the commission. Anybody who has a complaint about an attorney or judge is entitled to submit it to the commission. Commission members must review each complaint for plausibility. The complaint can't be completely frivolous; it has to be reasonable and have at least a semblance of factual substance. If the complaint satisfies the plausibility standard, the attorney or judge's name is entered in the commission complaint book.

"If there are three plausible complaints against an attorney or judge in a two-year period, his or her bar number is written on a ping-pong ball and the ball is dropped into a large hopper. Each January ten percent of the balls are drawn from the hopper. The commission issues something akin to deer tags to the first three complaining parties."

I had the full attention of everyone in the room. Most of the attorneys looked grim but the two doctors and the dentist seemed approvingly pleased.

"The more I thought about the plan, the better I liked it. It could be particularly beneficial for victims. Take me for example. I would cheerfully kill either of the attorneys I've hired, and I wouldn't need a weapon. I believe I could kill one or both with my bare hands. I'm not much of a hunter, but strangling either of those particular attorneys would be a pleasure. However, many attorney victims suffer considerable financial injury so maybe one or all of them who hold licenses on any given judge or attorney would decide to sell their licenses to the highest bidder.

"I know people who spend tens of thousands on big game hunting trips. Imagine what they would pay to bag an attorney or judge. Maybe there could be an annual auction the first week of February. Can't you see the stuffed torso of a judge in his black robe hanging on a trophy hunter's wall with him telling cocktail guests, 'I got that one just as he jumped that fancy picket fence.'"

Charlie, one of the attorneys, was pale as a ghost. I stopped to let him say something.

"You're serious, aren't you?" he stammered.

"Of course I'm serious. But look at it this way. You have the three-strike rule. Any time prior to the third complaint, you can find something else to do. Once your number goes in the hopper, there's only one way out, but to that point you can voluntarily get out of the law business.

"Consider the program in the context of survival of the fittest theory. In ten years or less we can weed out shysters and incompetents, so while it would benefit victims, it would simultaneously benefit the law profession by reducing it to honest, capable people such as those of you here – attorneys and judges who are truly interested in justice. Do you have any argument with those objectives?"

It seemed that the party was over so I shortly found my coat and headed for the door. Billie walked me to my pickup. I apologized for spoiling her party, but she kissed me on the cheek and told me, "I knew you wouldn't disappoint me."

The first summer after I began independent study of law, I dedicated most of my attention to the Declaration of Independence, the U.S. Constitution and the Oklahoma Constitution. I happened across the preamble to what we know as the Bill of Rights, the first ten amendments to the U.S. Constitution.

They aren't amendments, as such. They are declaratory and restrictive clauses added to the Constitution. Article I § 10 of the Constitution imposes "thou shall not" restrictions on States of the Union – states shall not emit bills of credit, mint coin or make any thing but gold and silver coin a tender for payment of debt. The Fifth Amendment due process clause is restrictive in the same sense: Thou shall not deprive any person of life, liberty or property without [judicial] due process of law [in the course of the common law]. And federal government officials shall not exercise any power that isn't enumerated in the Constitution. The declaratory and restrictive clauses are to federal officers and employees as the Ten Commandments are to Christian and Jewish faith communities.

The Oklahoma Bill of Rights is in Article II of our constitution – they need to be understood as declaratory and restrictive clauses. And as the U.S. Constitution, the Oklahoma Constitution has internal restrictive clauses.

There are three branches of Oklahoma government – legislative, executive and judicial. One is prohibited from exercising powers of the other two. The Oklahoma Constitution vests exclusive legislative authority in the legislative branch. Our constitution expressly prohibits

monopolies. We also have a provision that nullifies any contract that supposes to abridge constitutionally secured rights, benefits and protections.

That's where the Danner bar consolidation order of 1939 falls in the drink – it was and is brazenly unconstitutional. If defied and stands contrary to declaratory and restrictive clauses of the Oklahoma Constitution.

Also, what is the historical context of the 1939 bar consolidation order? Didn't it come toward the end of the New Deal takeover? In January 1937, representatives of the several States convened in Washington, D.C. for the third general conference of the Council of State Governments. At the conference they signed the Declaration of Intergovernmental Dependence, which Karl Marx would have loved.

And what has happened since? How do "adopted acts" enacted by joint resolution of our respective state legislatures accommodate general usurpation of power that tramples both state and federal constitutions? What happened to the counselor of law who protects and defends, among other things, the Constitution of the United States and constitutions of our respective states?

Twenty years ago a pastor friend articulated something I won't forget: Once in a while events are to compelling to be accident or coincidence.

When viewed in the context of what transpired in the previous three decades, and what has transpired in the subsequent six, the Danner bar consolidation order wasn't accident or coincidence. If judges were expected to stand guard at the gate while constitutions of the United States and our respective states were suppressed, trampled and ignored, they had to close down the courts – they couldn't let partisans committed to maintaining constitutionally legitimate government use common law courts and due process in the course of the common law to secure justice and thereby restore and preserve lawful government.

Justice Opala is considered the most intellectual of our current Oklahoma Supreme Court justices. And to his credit, it doesn't take him long to look at a hot horseshoe. He probably answered my request the day he received it. He said he couldn't function as a private lawyer so doesn't have authority to submit my name for addition to the registry, and he declined answering the three questions as he cannot privately comment on issues likely to be litigated in the Oklahoma Supreme Court.

That's fine with me, but he can be a witness. I want to hear more about statutory nonconstitutional courts. And he's probably waiting with bated breath. I suspect the good justice isn't a stranger to a chess board.

All this went through my mind when Ralph asked if I know anything about judicial lynching. I even recalled a written account of the Popular Rebellion of 1640. The chief mogul in charge of King Charles' Star Chamber courts was beheaded on a bill of attainder – he was summarily executed. That's what I though Ralph meant, but as it turns out, it wasn't.

Judicial lynching, as a term of art, can be equated to judicial accommodation. In other words, it's a judicial act, not an act against a judge. Ralph found several cases on the subject. Judicial lynching is probably the most heinous judicial crime imaginable as it undermines the very foundation of civilization. When a judge can rule that black is white and exclude truth from the record, appearance and self-interest are the primary purposes of the court. Justice is incidental, and when it would be contrary to the interests of entrenched political power, it simply isn't available.

In the Lattimar case, cited above, the court had this to say on the subject of judicial lynching:

"The defendant may be guilty; that does not concern us. But he is entitled to a fair and impartial trial, to the calm, deliberate, and uninfluenced judgment of his peers. Orderly and constituted government demands such trial. It is a safeguard in which all members of society are interested, and which should be jealously upheld and guarded. A judicial lynching is a graver and more startling crime than a lynching by the irresponsible rabble. It undermines the foundation of orderly government, and weakens respect for law and order. Much of the success of any form of government depends upon the opinion of those governed, of its power to protect them in the administration of the laws, and in the wisdom and integrity of those who govern. When the courts do not uphold the laws, respect for law and for government ceases. There should be no compromise with the spirit of lynching for any crime. The mob in Jerusalem was clamoring to Pilate to crucify the Saviour. He 'washed his hands' of guilt, and released the Christ to the 'tender mercies' of his accusers, thereby perpetrating the greatest judicial crime of the ages. The representative of imperial Rome compromised with the congregated doers of evil. It is little wonder that the empire declined and fell."

Sixty-odd years after the Danner bar consolidation order, we in Oklahoma have first-hand knowledge of how the law of entropy has eroded and undermined truth and justice. Others in virtually every other state articulate our same complaints. The question is, "How do we resolve the problem without literally lynching judges?" At what point does justice become a political rather than a legal question?

Several years back Gail and I attended a BBQ cook-off with friends in Wichita. One of the competitors had a large smoker that must have been ten feet tall. Other than being made of steel, it was build like an old outhouse. It had what could have been benches on either side – all it needed was commode holes. Had it been an outhouse, it would seat four, two on either side. I thought, "This could be a crapper in hell."

The door was open because the owner was getting ready to load it. I was standing directly in his way as I considered its potential. He was polite enough that he simply walked up and stood beside me. When I noticed him, I asked, "Do you suppose you could put two or three judges in there?"

He looked at the unit pensively as he considered my question. Finally he said, "I suppose so, but they're so crooked you would probably have to screw them in."

I'm satisfied that enough people share his perspective to warrant writing a bill authorizing a law profession lottery. There is more than ample evidence to document that the monopoly has accommodated and very probably perpetrated usurpation of power and overthrow of the constitutional republic. If the Oklahoma Legislature wouldn't consider such a bill, it would make an excellent initiative petition as it would offer Oklahomans who sign it the opportunity to speak and be heard.