

THE CIVIL PROSECUTOR

UPC Fall Conference
2016

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Answering such
scintillating questions as:

**What are the Utah Standards of
Professionalism and Civility?
(I'm sure you're sitting on the
edge of your chairs)**

**What is the most valuable asset
that you as a lawyer can possess?
(No, it's not civility)**

**Which members of the Bar
should be the most civil? (And
not just because they're the
nicest people)**



Former US Supreme Court Justice
Sandra Day O'Connor

**“In society at large . . .
lawyers are compared
frequently, and
unfavorably I might add,
with skunks, snakes and
sharks.”**



Mark Twain said:

“We ought never to do wrong when people are looking.”

“Nothing so needs reforming as other people’s habits.”



Chief Justice Matthew B. Durrant

“A lawyer who develops a reputation as someone who takes unfair advantage, who is rudely confrontational, abusive, and unreasonable, severely undermines his or her effectiveness as an advocate. The meanest, nastiest, orneriest lawyers in town may well be the least effective advocates. . . Judges quickly learn of their reputation.”

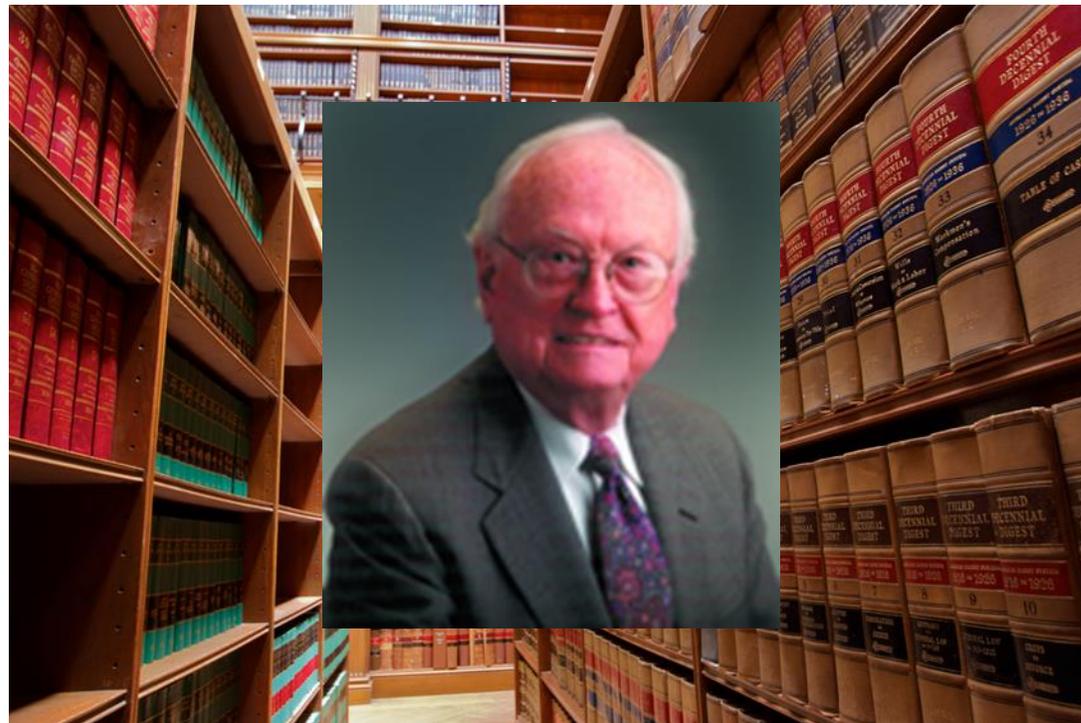


What is the most valuable asset you as a lawyer can possess?

- **Your reputation**
- **You build it every day of your career, and you can throw it away by one lapse**
- **To be an effective lawyer, cultivate your reputation for:**
 - **Honesty;**
 - **Fair-dealing;**
 - **Candor;**
 - **Integrity; and**
 - **Civility**



Hal Christensen Story



The Dual Function of Prosecutors

They are advocates for the government, and

They are ministers of justice.

What does it mean to be a minister of justice?

And what happens when those roles clash?



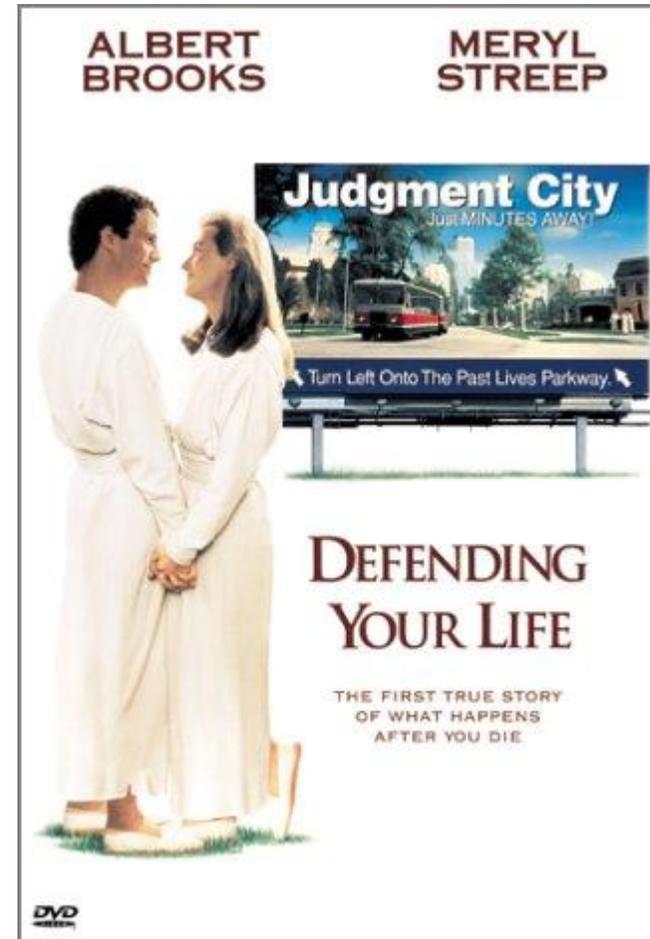
Utah Rules of Professional Conduct

Comment to Rule 3.8, Special Responsibilities of a Prosecutor:

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”



Let's watch a clip from the movie "Defending Your Life"



What Ministers of Justice Don't Get to Do

(even if they want to):

**Treat a defendant more harshly
because:**

- 1. They don't like his or her attorney;**
- 2. They want to engage in payback for bad or uncooperative behavior by the attorney; or**
- 3. They want to "send a message" to the attorney**



EXAMPLES

- **SCENARIO I:**
- **The “unreasonable” attorney – time for payback**
- **SCENARIO II:**
- **The personally attacking attorney – “You’ve got a lot of nerve asking me for a favor”**
- **SCEBARIO III:**
- **The case has been filed and the train has left the station – the battle lines have been drawn. Why should I “cave in” and let the defense attorney win?**
- **In the end, it’s not about you and the defense attorney**
- **It’s about you as a minister of justice**



Bottom line

Prosecutors are the most powerful players in the criminal justice system

But they are not just advocates, they are ministers of justice

And when their roles as advocates clashes with their roles as ministers of justice, they must be ministers of justice

Because of their unique role, it behooves them to be the most civil members of the Bar



It's not always easy to be a "minister of justice"

- **It might even require you to let an obnoxious defense attorney "win" by dismissing a case, if information comes to light that undermines confidence in a defendant's guilt.**
- **This is harder to do if you have a rancorous relationship with opposing counsel, or if you are so focused on your role as an advocate that you develop tunnel vision and a bunker mentality.**
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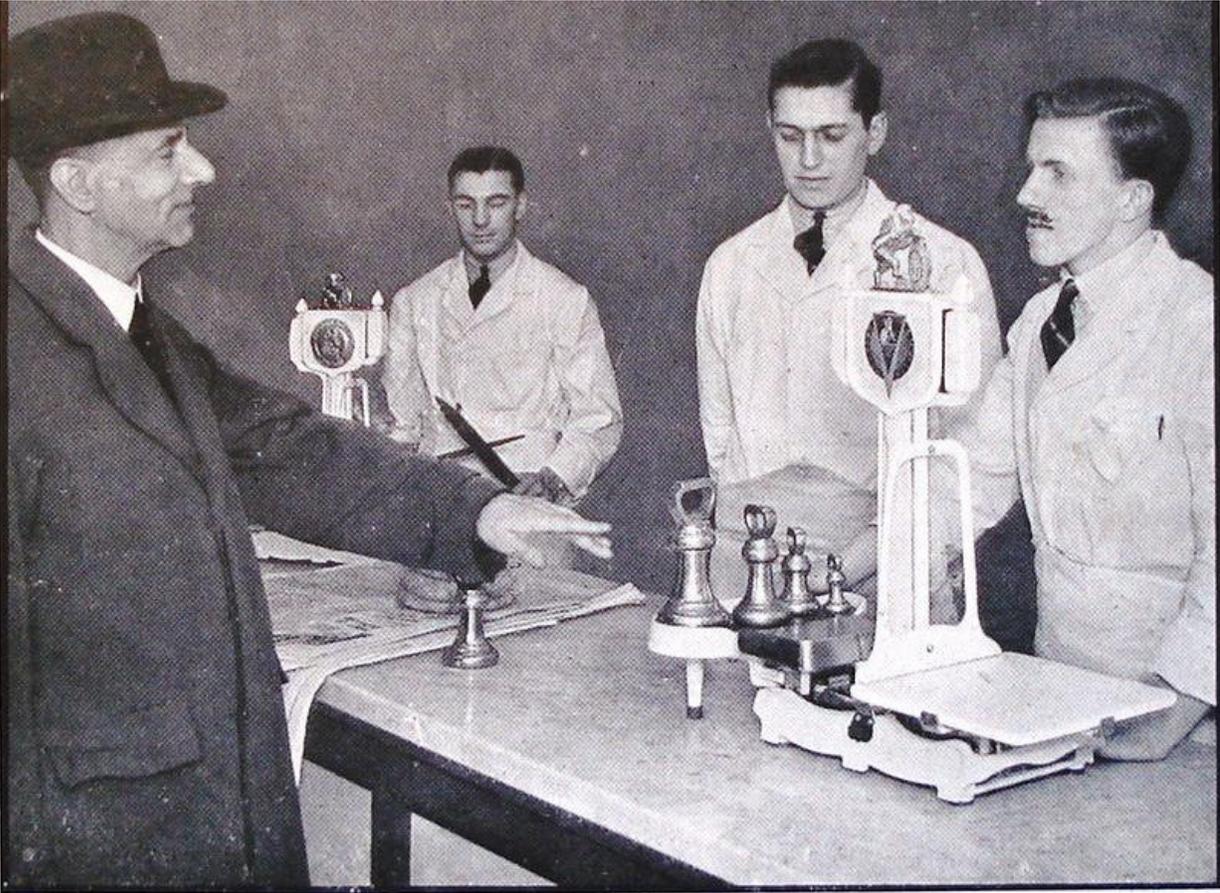


Article on UPC website:

"Setting the Record Straight on Prosecutorial Misconduct"

- **The unwary prosecutor, convinced of the righteousness of his case, may naturally become a zealous advocate for his client (the people) instead of an impartial minister of justice.**
- **If the prosecutor makes the decision concerning guilt too early in the process, he can develop "tunnel vision," and disregard or minimize subsequent evidence that contradicts his earlier conclusions of guilt.**
- **Some prosecutors' conduct may have been influenced by, or been in response to, defense counsel's untoward behavior.**
- **Despite these circumstances, prosecutors must learn to resist the urge to rebuff the defense attorneys' assaults using tactics that may conflict with their duty to seek the truth at all times.**
- **This is often contrary to human nature, but as ministers of justice, prosecutors are called to a higher standard that must be constantly reinforced both within their offices and within the profession.**
- ***From report issued by Texas District and County Attorney Association, in 2012.***

On to the Standards!



Preamble to standards
includes . . .

**“We expect judges and
lawyers will make mutual
and firm commitments to
these standards.”**

**Lawyers are to educate
their clients.**

Judges are to reinforce.



1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.



- **2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.**



3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.



4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.



5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.



6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.



7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.



8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.



9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.



10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.



11. Lawyers shall avoid impermissible ex parte communications.



12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.



13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.



14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.



15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.



16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.



17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.



18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.



19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.



20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.



Again, Chief Justice Durrant . . .

- **“Lawyers should conduct themselves with dignity and courtesy. They should be invariably honest and straightforward. Why? It should be enough that it is the right thing to do, and a more satisfying way to practice – a better way to live, for that matter. Those whose lawyering strategy is to inflict maximum misery often make themselves most miserable of all. ”**
- **“But I write to suggest one additional reason for adhering to the highest standards of courtesy and professionalism. Civility, dignity, and honesty not only make for a more satisfying and fulfilling professional life, but for more effective advocacy.”**



Concluding thoughts

Civil lawyers are more effective

Being civil is not only the professional thing to do – it's the smart thing to do

More than any other attorneys, prosecutors should strive to be civil, consistent with their duty to be not only advocates, but also ministers of justice.



Some things are more important than others

You should be civil, but . . .

You must be ethical

**And the most important asset
you will ever have as a lawyer, is
your reputation for honesty,
integrity and fair dealing**

Hold onto it with all your might!

