

**UTAH PROSECUTION COUNCIL,
GOVERNMENT CIVIL CONFERENCE**

“ATTORNEY ETHICS: THE JOURNEY THROUGH
MIDDLE-EARTH AND AN IMPERATIVE FOR
PROFESSIONAL SURVIVAL.”

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Perspective

- Many Lawyers (including Public Sector Lawyers) Frustrated/Disillusioned with practice of law.
- Utah Lawyers Reflect Pressures Through Depression/Suicide/Substance Abuse.

(Slides and Graphics, compliments of the Bar's Lawyers Helping Lawyers Committee and its Ethics presentation made April 24, 2014.)

Common Issues

- Financial Pressures



He's celebrating paying off his student loans.

Common Issues

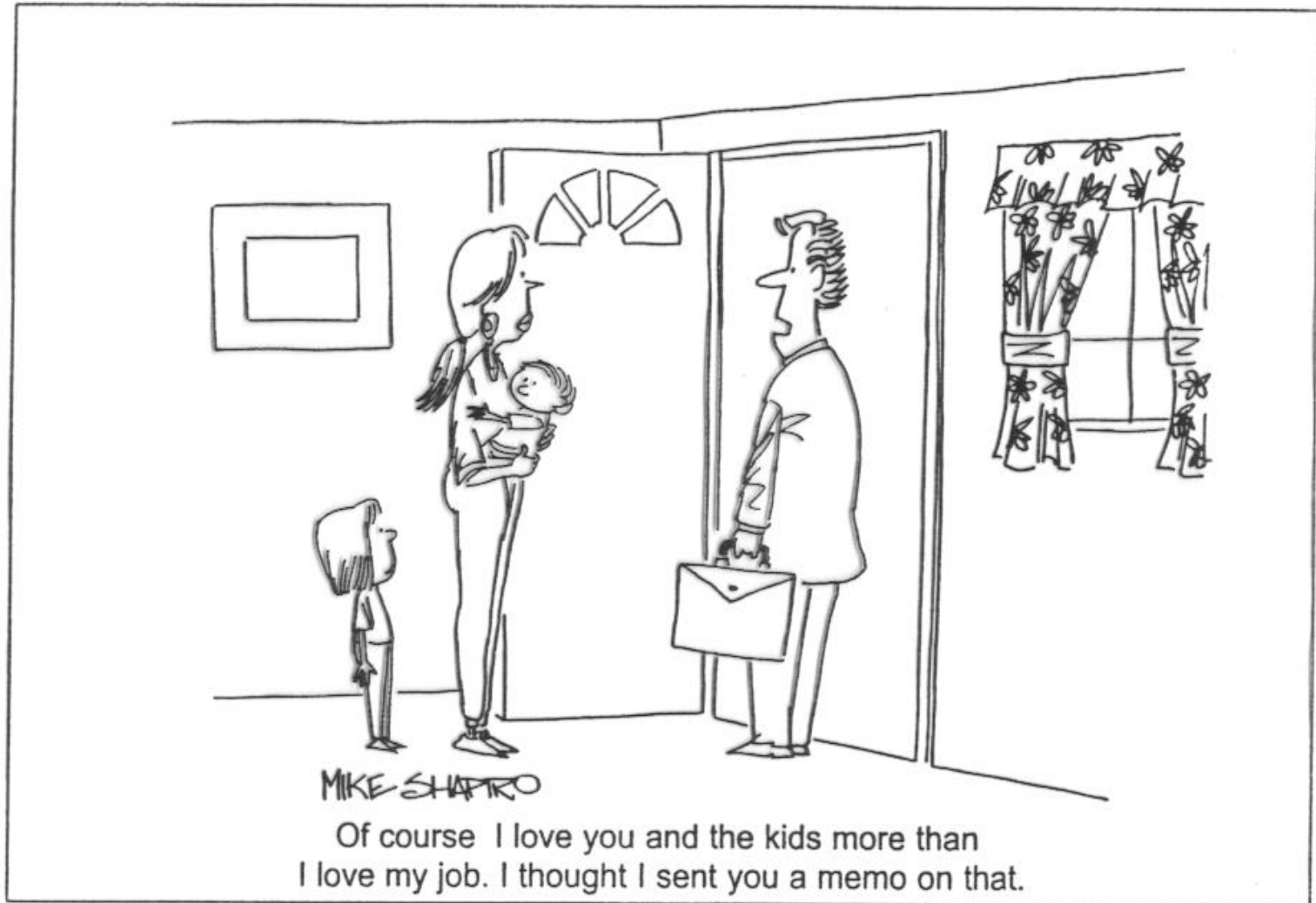
- Long Hours



Our ideal employee can function without sleep while working a 120 hour week. And is, of course, highly family oriented.

Common Issues

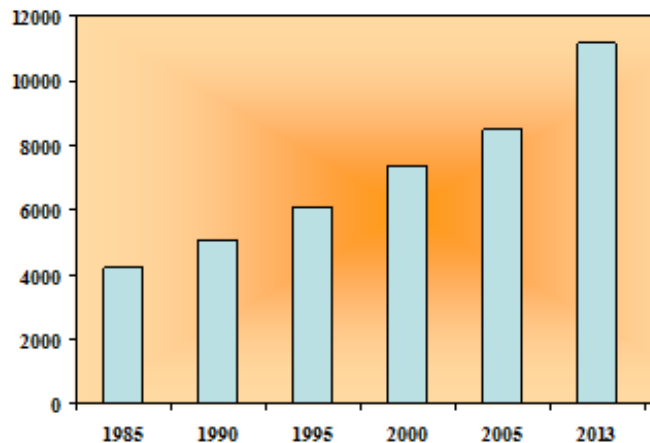
- Long Hours



Common Issues

- Competition for Jobs and Employment

The Utah Bar 1985-2013
(Membership)



Licensing Statistics

	2011-2012	2012-2013	Change
ACTIVE STATUS	8,491	8,785	294
Active Lawyers	7,318	7,601	283
Active, Under 3 years	989	974	(15)
Active, Emeritus	152	167	15
In House Counsel	32	43	11

ACTIVE STATUS BY LOCATION

1 st Judicial District	136	135	(1)
2 nd Judicial District	615	619	4
3 rd Judicial District	4,722	4,720	(2)
4 th Judicial District	764	777	13
5 th -8 th Judicial District	401	393	(8)
Out of State	683	683	0
No Division Designated	902	1,161	259

Common Issues

- Stress



I'm sorry, but the only way I can deal with stress is by passing it on to others

Mental Health Issues

- Substance Abuse

Substance Abuse
(drugs and/or alcohol)

Lawyers and Judges

struggle at twice the rate

of the general public

18-20%

Mental Health Issues

- Depression

Depression/
Stress/Mental Health

Almost **four times**
more likely to suffer
than 28 other professions

The Facts:

up to 37%
of lawyers and judges suffer from
depression

(25% of those actually manifest physical symptoms)

Mental Health Issues

- Suicide



Attorney Suicide

Suicide rate for lawyers = more than 5 times
the rate for the general population

Legal Profession = 69.3 per 100,000

General Population = 13 per 100,000

Canadian Lawyers Professional Assistance Program, 1994—1997 Study

Common Issues

- Reasons
 - Finances
 - Long Hours
 - Competitiveness
 - Stress / Pressures
 - Expectations / Demands
 - Clients
 - Partners
 - Opposing counsel
 - Judges
 - Family & Loved ones



Common Issues

Economic Issues Important, but Frustration and Disillusionment with the Practice of Law, Together with Public Status for Work, Cannot be Under Estimated.

Lawyer Bad Reviews

- According to [a recent Pew Research Center survey](#), most of the American public thinks attorneys don't contribute much to society's "well-being." Indeed, lawyers ranked [at the very bottom](#) of the professions that were the subject of the survey which included the military (ranked highest), journalists and business execs.

Lawyer Bad Reviews (cont)

- American College of Trial Lawyer March 3, 2012 Survey:
 - “Assume for a minute that had to choose a profession for a child or grandchild and you could only choose from the following list. Which one would you choose?”
 - **58% Doctor**
 - **20% Chef**
 - **12% Lawyer**
 - **8% Banker**
 - **2% Politician (No. 7 Question)**

Perception is Mixed

- Yet in [another survey conducted by Lawyers.com](#), at least two-thirds of the parents who were asked said that they would like their children to become lawyers (or at least marry one).” (Emphasis Added)
- “Being a lawyer means being a respected professional, and that’s something that parents want for their children,” said Larry Bodine, Esq., editor-in-chief of Lawyers.com. ‘Despite the tough economy facing the next generation, it’s exciting to note that nearly two-thirds of parents would be happy with a law degree in their child’s future.’” (Emphasis Added)

Perception is Mixed

- Public Opinion
 - 1998 University of Cincinnati Law Review University of Cincinnati Spring, 199866 *U. Cin. L. Rev.* 805. ROBERT S. MARX LECTURE: THE FACES OF MISTRUST: THE IMAGE OF LAWYERS IN PUBLIC OPINION, JOKES, AND POLITICAL DISCOURSE by Marc Galanter.

Lawyer Bad Reviews (cont)

- Public Opinion

The ABA poll reports that "[h]alf the public thinks that about one-third or more of lawyers are dishonest, including one in four Americans who believe that a majority of lawyers are dishonest." n22 ...When, in 1991, a national sample was asked to volunteer "what profession or type of worker do you trust the least," lawyers were far and away the most frequent response. Almost as many (23%) spontaneously volunteered lawyers as the next two categories (car salesman, 13%; politicians, 11%) combined. n25" (Emphasis Added)

Perception is Mixed

- Contradictory Public Views
 - But other survey evidence suggests that these expressions of lack of trust in lawyers should not be taken at face value. In a 1984 survey in which majorities of a national sample of adults expressed their views that lawyers charge unreasonable fees (61%) and recommend more legal work than is actually required (56%), some 71% agreed that "lawyers generally work very hard to protect the interests of their clients" (20% disagreed) and 64% agreed that "lawyers generally follow very high ethical standards in their work for their clients" (28% disagreed). n26 What we see is not unqualified condemnation of lawyers, but approval for lawyers' care of their clients combined with deep distrust." (Emphasis Added).

Perception is Mixed

- Contradictory Public Views
 - Asked whether or not various qualities described lawyers, the strongest positive responses were that lawyers were smart and knowledgeable (73% to 9%) and know how [*810] to solve problems (50% to 19%). The strong negatives were that they are greedy (59% to 19%) and make too much money (63% to 14%). Lawyers also get low ratings on being honest and ethical (22% to 40%) and caring and compassionate (18% to 46%).
 - **But when asked whether lawyers put their clients' interests first, the public is sharply divided. Some 31% say this does describe lawyers; 35% says it does not; and 34% are neutral (undecided).** ⁿ²⁷ This "indecision," I argue, reflects a prevalent tension in the perception of lawyers that helps us to understand the proliferation of jokes about lawyers, discussed below.

Perception is Mixed

- Tension and Public Opinion Conflict Reflected in Jokes
 - “A legal journalist recently reported the results of an Internet search that turned up 227 sites devoted to doctor jokes, 39 to accountant jokes, 17 to jokes about salesman and 3,473 to lawyer jokes. n71
 - Compared with the lawyer jokes of an earlier day, the contemporary corpus of lawyer jokes contains more overtly and aggressively hostile material. As our journalist summarizes, the premises of the jokes are that “lawyers are hard to understand; they charge too much; they are miserable people; they lie all the time; and they should die.” (Emphasis Added) Id.

Perception is Mixed

- Tension and Public Opinion Conflict Reflected in Jokes
 - **Because it is incorrect to ridicule down, being singled out as an acceptable target of jokes is a sign of high status and has the ultimate effect of boosting rather than lowering status. So lawyers' affable self-disparagement translates into an assertion of status; that is, we have so_much status we can endure a firestorm of jokes.” *Id.* (Emphasis Added.)**

Americans Remain Optimistic About the Law

- But ordinary Americans remain optimistic about law as a useful if clumsy tool to solve problems, both individual and collective, even though they are sanguine about the possibility that the system is biased in favor of the wealthy and powerful. Those who aspire to use the law to build a more just society [*841] should not worry about lawyer jokes. **It is not the jokes or popular mistrust that threaten the system, because that mistrust is balanced by acceptance and support.**

Public Sector Law Issues

- a. Often disrespected by Private Sector lawyers
- b. Some Enter and Exhibit Less than the Highest Motives.
 - 1. Some view as training ground.
 - 2. Public Sector is Stepping stone to higher office/Judgeship.
- c. Lofty Ambitions to “make a difference” sometimes frustrated by Reality.
- d. Positive Aspects over Private Sector.

Public Sector Advantages/Structure/Function May Create Ethical Issues.

A. Core Right of Client to Select Counsel and Terminate, with or without cause, Modified by Statute or Contract in Public Sector.

1. Cannon of Ethics 1.1
2. Modified for Utah public sector attorneys to avoid spoils system and give attorney independence, but subject to contract and ability to waive vested status, if statutes followed.

Public Sector Advantages/Structure/Function May Create Ethical Issues.

- a. Cities. 10-3-1105-06 Utah Code, as amended 2012 for Utah Cities) Career employees, including attorneys, are vested and can be terminated only for “cause,” except for Department Heads and Supervisors. However, career status can be contractually waved.) Also see, Howick v. Salt Lake City Corp., 310 P3rd1220 (Utah App 2013). Court rejected commentary note on Cannon 1.1 in favor of statutory policy, but followed 2012 public policy clarification made in that statue which allowed waiver of vested employment rights and contractual acceptance of at-will attorney employment status, even if not a Department Head.
- b. Counties. Section 17- 33-10, Utah Code.
- c. Attorneys General. Section 67-5-10 Utah Code. (Attorney’s probationary for 12 to 18 month; then, vested Career Status and can be terminated only for “just cause.” All but “special assistants” who work on “fee” basis barred from outside legal practice.)

Public Sector Advantages/Structure/Function May Create Ethical Issues.

a. Out-side Employment for Public Sector Attorneys.

1. Cf. Cannons dealing with Conflicts of Interest, edited and quoted in Utah Bar Advisory Opinion No. 06-01:

“**Rule 1.7** provides in relevant part:

‘ . . . A lawyer shall not represent a client if . . . There is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or . . . **by a personal interest of the lawyer.**’

Public Sector Advantages/Structure/Function May Create Ethical Issues.

b. Out-side Employment for Public Sector Attorneys.

“ . . . Rule 1.7(b) establishes a more flexible approach to conflict analysis. “Rule 1.7(b) . . . speaks to material limitations on the representation, suggesting that merely marginal limitations on the representation do not bar a lawyer’s participation, if the other part of Rule 1.7(b) can be satisfied. **Therefore, only “material” limitations trigger operation of the bar. . . .**” Hazard, *supra* note 8, § 1.7:301, at 251. Bar Ethics Advisory Opinion No. 99-05, footnote 15 (Emphasis Added).

Public Sector Advantages/Structure/Function May Create Ethical Issues.

Rule 1.11 provides in relevant part: . . .

(d)(2) (a lawyer) shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing . (Emphasis added.)

Public Sector Advantages/Structure/Function May Create Ethical Issues.

a. Duty of Supervisors

1. “Of course, all lawyers in the Office having direct supervisory authority over other lawyers in the Office must make reasonable efforts to ensure that the lawyers conform to the Rules. Utah Rules of Professional Conduct.” 5.1(b) cmt. 1 (1998); *Utah Ethics Advisory Op. 98-06* at 8, 1998 WL 779174 (Utah St. Bar), cited in *Bar Ethics Advisory Opinion No. 99-05*, fn 4 (Emphasis Added).

Public Sector Advantages/Structure/Function May Create Ethical Issues.

2. Duty to Continually Monitor and Take Corrective Action, if Conflict Arises.

- a. “Although an attorney may have initially concluded that an existing conflict would not adversely affect the representation, the attorney must continually evaluate the nature and extent of any limitations on the representation. If at any time during the representation an objective, reasonable attorney would conclude that the representation is adversely affected by competing interests, the representation must be terminated. Hazard, *supra* note 8, § 1.7:301 at 250. See also Kan. Ethics Advisory Op. 95-11 (Kan. Bar Assoc. Oct. 17, 1995).” *Bar Ethics Advisory Opinion No. 06-01*, fn17 (Emphasis

Public Sector Advantages/Structure/Function May Create Ethical Issues.

Question: Should more constraints be imposed by Canons of Ethics, statutory constraints and how should perceived conflict with public-interest be monitored and enforced?

Public Sector Advantages/Structure/Function May Create Ethical Issues.

a. Conflict by Ambition

1. Cannon 1.7: Utah Advisory Ethics Opinion.

“A material conflict of interest of the type prohibited by Rule 1.7(b) may arise when a lawyer’s professional interest governs the quality or results of the representation. For example, when a lawyer tailors the representation to protect the lawyer’s own professional interests, rather than a client’s legal interests, an impermissible conflict of interest arises.” See, e.g., Walberg v. Israel, 766 F.2d 1071 (7th Cir.1985) “[w]here a lawyer has a professional incentive to comply with a trial judge’s wishes, such as ensuring that he receives further court-appointed cases from the judge, divided loyalties are created, and these too can either mandate disqualification or lead to a post-conviction finding of ineffective assistance of counsel.” Bar Ethics Advisory Opinion No. 99-05, footnote 18 (Emphasis Added).

Public Sector Advantages/Structure/Function May Create Ethical Issues.

a. Conflict by Ambition

2. Consider:

- Promotions and Please Superiors
- Election Ambitions
- Judgeships
- Recognitions—media attention
- Resume' Enhancement
- Job Opportunities and/or Client Development

Public Sector Advantages/Structure/Function May Create Ethical Issues.

- Dealing with Inherent Duality of Government Organizations
 - Who is Client?
 - Cannon 1.13(h) and Salt Lake County Commission v. Short (Utah 1999)—Governmental entity is client.
 - Issue of dealing with competing and conflicted elected officials.
 - Cf. actual or perceived conflicts with government boards and commissions.
 - Caution about dealing with employees/elected officials who may have conflicts with governmental entity.
 - Dealing with elected officials who propose to act unconstitutionally or otherwise illegally—who decides and how does the lawyer survive?

Public Sector Advantages/Structure/Function May Create Ethical Issues.

Public Sector Client entitled to the same zealous
and effective advocate as Private Sector, and As
a Special Learned Professional, Public Sector
Lawyer has a Unique Duty to Exercise Moral
Controls.

Touchstone For Guiding Ethical Decisions, Resolving Conflicts, and Restoring Public Trust Rests in the “Attorney Oath.”

a. A Lawyer Holds a Public Trust.

“A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Every lawyer is responsible to observe the law and the Rules of Professional Conduct . . .” (Section 1; Emphasis Added.)

b. Duty to Discharge Duties with Honesty and Fidelity.

“I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty and fidelity; . . .” (Section 1.) (Emphasis Added.)

c. Zealous Advocacy Circumscribed by Ethical Boundaries.

“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. . . .” (Section 2.) (Emphasis Added.)

Touchstone For Guiding Ethical Decisions, Resolving Conflicts, and Restoring Public Trust Rests in the “Attorney Oath.”

- d. Duty to Challenge the System when Necessary, but Uphold Legal Process.

“ . . . While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process. (Section 5.) (Emphasis Added.)

- e. Balancing Advocacy and Ethic Guided by Moral Judgment and the Spirit of the Canons of Ethics.

“ . . . Such issues (conflicts of between a client’s interest and a lawyer’s ethical duty) must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. (Section 9.) (Emphasis Added.)

Touchstone For Guiding Ethical Decisions, Resolving Conflicts, and Restoring Public Trust Rests in the “Attorney Oath.”

- f. Lawyer’s Conduct Must be Guided by Personal Conscience and Ideals of Public Service.

“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service. (Section 7.) (Emphasis Added.)

Touchstone For Guiding Ethical Decisions, Resolving Conflicts, and Restoring Public Trust Rests in the “Attorney Oath.”

- g. Zealous Advocacy Does Not Obviate Duty to be Professional/Civil/Courteous.

“ . . . These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the adversarial system, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system. (Section 9.) (Emphasis Added.)

Touchstone For Guiding Ethical Decisions, Resolving Conflicts, and Restoring Public Trust Rests in the “Attorney Oath.”

- h. The Unique Power Position of the Bar in Society Requires Members to Self-Regulate In The Public and Not Self-Interest.

“The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to ensure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves. (Section 12.) (Emphasis Added.)

Navigating the Battlefield of Zealous Advocacy, with Fidelity to the “Client,” while Acting Competently, Civilly and Honestly to All, and (at the Same time) Serving the Public Interest as an Officer of the Court and Not Allowing any Personal Interest to Govern the Outcome of a Matter, is No Small Balancing Act.

- a. Real World Realities Apply Pressures from Many Angles.
- b. Effective Self-Governance of Bar is an Individual Duty of Each Utah Lawyer.
 - 1. Dishonest and unethical lawyers must become rare and the exception.
 - 2. Public trust and respect for the legal profession must be advanced in all quarters
- c. Defending the Rule-of-Law in American Society is an Important Duty of Each Lawyer.
- d. The Title of “Utah Lawyer” Should be a Synonymy for Professionalism, Civility, Public Servant, and Scholar.
- e. A Colloque Lawyer Under Stress Must be Assisted and Befriended.

Suggestions for Introspection

1. Periodically re-read the Attorney's Oath.
2. Mentally recommit to the philosophical underpinning of the Oath that we belong to a "learned profession" and hold a special place in American Society to protect "ordered liberty," with reverence for protection of life, liberty and equal justice for all.
3. Weigh tough decisions against the principles underlying and embodied in the Attorney's Oath and the Canons of Ethics.
4. As a public sector lawyer, give special thought to who is the Client, and if any special consideration exists to challenge elected official's direction and challenge the Constitutionality/legality of a directive.
5. Measure each critical and challenging decision for personal conflicts. That is, make sure personal ambition or economics are not conflicting with our Client's justified assumptions of our zealous advocacy and non-conflicted services as its attorney.
6. Be Civil, but effective advocates.
 - a. Note Bar Journal articles on Civility. See, Donald J. Winder, "Civility Revisited" 26 Utah B. J. 45 (Nov/Dec. 2013); but consider response by Ted Weckel, "Regarding the Standards of Professionalism and Civility and the Use of Disparaging Language as a Tactical Decision During a Criminal Trial," 27 Utah B. J. 32 (Mar/Apr. 2014). The Weckel response discusses authority for the zealous advocacy and the First Amendment right to persuade a jury, particularly in a criminal trial, by using pointed language.
 - b. See Keith Call Bar Journal "Focus on Ethics and Civility" article and others in 27 Utah B. J. 53, June, 2014.

Suggestions-- cont.

7. Without being prudish, don't affirm bad lawyer "Jokes" and give legitimization to unsavory stereotypes of attorneys, judges or the legal system.
8. Avoid criticizing the Judiciary and other counsel before clients and in public settings. Be cautious about personalized criticisms of Judicial Rulings and acts of other attorneys. Defend the judicial system, where appropriate.
9. Be law abiding and do not ignore Attorneys, with legal, social, ethical, moral problems. If reporting to the Bar is not appropriate, use confidential and privilege protected sources, like the Lawyers Helping Lawyers Bar Committee to fulfill the ethical and moral duty to report.

Conclusions

- a. I'm proud to belong to this profession.
- b. Best and most important function in society and for Ordered Liberty.
- c. Lawyers are best folks in the world—particularly those practicing in the public sector.
- d. We need to touch base frequently with the Oath of An Attorney by:
 - 1. Underpinning all judgments in that light, including: honing our commitment to it as a “learned profession”—not just a business or way to make a living.
 - 2. Cut through the fog of battle and remember to use as a touchstone: personal conscience, moral judgments, and to act with fidelity to the profession as an “Officer” of the Judiciary to advance the public good, even as we “zealously” represent our clients.
 - 3. This duty is truly a perilous and difficult Journey and a Quest though Middle-earth, but an Imperative to Professional and Personal Survival.