

PROSECUTOR



a Prosecution Council member.

Thomas Low, the Wasatch County Attorney, was selected as chair of the Council. Thomas started his career as a private attorney in Utah County in 1993. Beginning in 1999 he served as a Deputy Wasatch County Attorney until the appointment of his predecessor to the bench in 2003, at which time Thomas took over the big office. On the Prosecution Council Thomas represents UPC Region II which includes the counties in the 3rd and 4th Judicial Districts, with the exception of Salt Lake County.

As Vice-chair / chair elect the Council selected Assistant Logan City Attorney Lee Edwards. Lee became a lawyer in 1996. His first prosecution job was in the Washington County Attorney's Office. In 1998 he joined the Logan City Attorney's Office. Lee is one of two city prosecutors who serve

on the Prosecution Council. They are appointed by the Utah Municipal Attorneys Association and do not represent any specific region.

Thanks to both Thomas and Lee for agreeing to work for you in those capacities.

The Legislature

The 2008 general session of the Utah legislature is history. We all joke about, often disagree with and sometimes heap ridicule upon our citizen law makers – certainly I am guiltier than most – but they have a tough, very unenviable job. We, their constituents, expect them to build and maintain a first class highway system, without pot holes of course, pay for excellence in our schools, colleges and universities adequately fund the courts and, lets not forget, provide proper salary and benefit packages for state employees, especially state attorneys

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Director's Thoughts



New UPC Officers

At its January meeting the Prosecution Council, in accordance with statutory requirements, chose new leadership. Many thanks to Cache County Attorney George Daines who had served as UPC Chair for two years. While he will no longer chair the meetings, George's leadership and judgment will not be gone. He has three more years on his current term as

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Utah Supreme Court

An owner who seeks to avoid “abandonment” of her property under the Dedication Statute

must have sought to block access to the land with the intent to keep out the public. Even criminal trespassers qualify as members of the public under the Statute.



Utah County brought an action to enjoin the Butlers from blocking access to Bennie

Creek Road, which ran over his property. The road provides access to forest, hiking trails, camping areas, and the Nebo Loop Road. The County wanted the road declared a public thoroughfare under the Dedication Statute. The statute says, “a highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.” Utah Code Ann. § 72-5-104(1) (2001). Under the statute, an owner must prove that she blocked access to the land with the intent of keeping out the public. At trial, Butler introduced evidence that he had blocked access to the road and interrupted public use. After hearing witnesses including prior owners of the land and recreational users of the road, the trial court found that Butler had failed to show intent to keep out the public. It found that the gates on the road were used with the intent to control livestock and “No Trespassing” signs on the road were used only to prohibit the public from wandering off of the

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Case Summaries

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road. Therefore, the court found, the road was unrestricted to public access and the Butlers should remove any blockades. The Butlers appealed on the ground that the trial court erred in finding that the road was “continuously used” as a public thoroughfare because the public’s access was at various times interrupted by weather conditions and there were “No Trespassing” signs. However, the Utah Supreme Court held that “continuous use” doesn’t mean “constant use.” Intermission is not interruption and weather conditions did not interrupt the road’s use under the Statute. Also, evidence showed that the primary reason for the gates and signs was to control livestock and, therefore, the requisite intent to restrict public access was not present. The Butlers also argued that trespassing does not constitute “public use” under the statute. The court found that even criminal trespassers are members of the “public” under the statute. However, even if individuals trespass on the property, the property owner can successfully interrupt public access under the statute by putting up a gate with the requisite intent to keep the public out. The court found that there was no such intent in this case and, therefore, granted the County’s petition. *Utah County v. Butler*, No. 20070009 (Utah Feb. 12, 2008).

Utah Court of Appeals

A report of intoxication from defendant’s ex-wife and an officer’s testimony that the defendant was driving too cautiously do not amount to reasonable suspicion.

Bench’s ex-wife called police to report that Bench had just dropped their children off at her home and appeared to be intoxi-

cated. She described the vehicle and his approximate location. Officer Hudson heard the call and located a vehicle that matched the description given by Bench’s ex-wife. He began following Bench closely to see if there were any signs of drunk driving. Hudson reported that Bench was driving in a very cautious manner. He was driving 10 mph under the speed limit and signaled for five seconds before changing lanes. Hudson initiated a stop and, after further investigation, arrested Bench for driving under the influence. At trial, Bench moved to have all of the evidence resulting from the stop suppressed on the ground that the stop was illegal because Hudson did not have the required reasonable suspicion to pull him over. The trial court granted the motion



and the City appealed. The Utah Court of Appeals affirmed. The court stated that a stop is initially justified if the officer has reasonable suspicion that, prior or contemporaneous with the stop, a person engaged in criminal behavior. The court found that there was no reasonable suspicion in this case. The City argued that Bench’s slow and deliberate manner of driving as well as the report from his ex-wife was sufficient to give Hudson reasonable suspicion. The court found that safe, cautious driving is not indicative of intoxication and is a natural response of someone who is being followed by a police officer. Therefore, this evidence did not forward the City’s case. Also, the call from Bench’s ex-wife was insufficient as well because it lacked the reliability generally associated with informant tips. It is common for ex-spouses to

harbor feelings of resentment toward one another. These feelings could induce an ex-spouse to give a false tip. Because both pieces of evidence forwarded by the City do not amount to reasonable suspicion, the stop was an unlawful search. *Salt Lake City v. Bench*, No. 20060929 (Utah Ct. App. Jan. 25, 2008).

A property owner who seeks to avoid “abandonment” under the Dedication Statute may successfully interrupt public access to the property by putting up gates and signs if that owner has the requisite intent to keep the public out.

West Center Street in Leeds runs across real property owned by Terry Prisbrey. Prisbrey sought to restrict access to the road by putting a chain link fence across it and affixing a “No Trespassing” sign to the fence. His wife also put out roadblocks and even stood out on the road herself to prevent individuals from using the road. In response, the town of Leeds filed an action seeking declaratory judgment deeming West Center Street open to the public and an injunction enjoining Prisbrey from restricting access to the road. Utah Code Section 72-5-104 (1) states that “[a] highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.” The trial court found that the public had used the road continuously for ten years and so granted the Town’s requests. The Utah Court of Appeals reversed. The court found that the overt acts of putting up roadblocks and signs was enough to show that the owners of the property intended and calculated to interrupt the use of West Center Street as a public thoroughfare. Because each of the roadblocks was an interruption sufficient enough to restart the running of the Dedication Statute, West Center Street has not been used as a public road for a period of ten years continuously.

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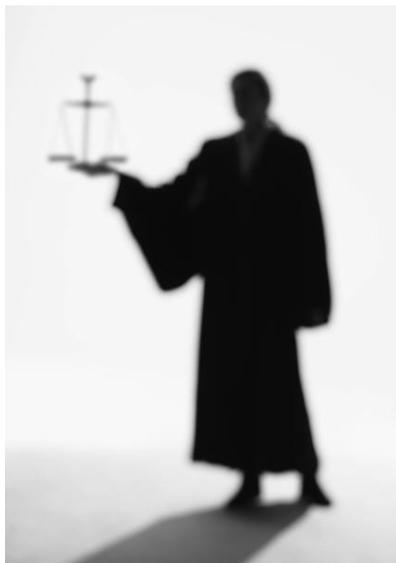
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Therefore the request of the Town was denied. *Town of Leeds v. Prisbrey*, No. 20061085 (Utah Ct. App. Feb. 12, 2008).

Commissioners are given authority under case law and statutory law to recommend enforcement of a protective order. This does not usurp a judge's authority since a judge may reverse the commissioner's recommendation. The Cohabitant Abuse Act's requirement that a judge, rather than a jury, determine whether there should be a protective order is constitutional.

Karen Buck obtained an Ex Parte Protective Order against Robinson. Robinson opposed the protective order before the court, but the commissioner of the court signed the order indicating his recommendation that it be upheld. Robinson later filed a motion and memorandum seeking to declare as unconstitutional the practice of allowing commissioners to conduct evidentiary hearings. He argued that (1) the commissioner exceeded his authority when he gave a recommendation to uphold the petition for a protective order, (2) that the Cohabitant Abuse Act is unconstitutional because it does not require a trial by jury, and (3) the trial court erred in sanctioning his counsel for violation of Rule 11 for submitting the trial by jury question to a court when the question had been answered by another court. The Utah Court of Appeals denied the motion. It found that the commissioner did not exceed his authority. The Utah Supreme Court and Section 78-3-31(8) of the Utah Code hold that commissioners have the authority to recommend upholding protective orders. Once a commissioner has recommended a protective order, that order is effective until further order of the court under the Cohabitant Abuse Act. Then, the individual bound by the protective order may ap-

peal the recommendation within ten days. The recommendation authority accorded to commissioners has been repeatedly upheld as a proper because it provides a timely answer to requests for protective orders. Additionally, the commissioner is not usurping the authority of a judge who may later refuse the recommendation upon appeal. On the second issue, the court stated that the Cohabitant Abuse Act requires that the petitions are to be decided by the court and not a jury. Robinson has forwarded no evidence demonstrating that protective orders are subject to a trial by jury. In fact, a trial by jury would undermine the pur-



pose of petitioning under the Act, which is to provide a timely and simplified process for receiving a protective order. On the third point, Robinson's counsel was obligated to make a reasonable inquiry before submitting the jury argument to the court. This he did not do since he had submitted the same question to a court on an earlier occasion and was given a sufficient answer referring to case law that is binding in this jurisdiction on the matter. *Buck v. Robinson*, No. 20060760 (Utah Ct. App. Jan. 25, 2008).

Allowing a judge to determine a statutorily designated mini-

imum sentence after considering aggravating or mitigating factors does not violate a Defendant's Sixth Amendment right to trial by jury.

Defendant was charged with three counts of sexual assault for attacking and raping his former girlfriend. Each count was punishable by an indeterminate prison term of six, ten, or fifteen years to life. Utah Code Ann. § 76-3-201(7)(a). Utah's indeterminate sentencing scheme required a trial court to impose the middle of the three minimum terms "unless there [we]re circumstances in aggravation or mitigation of the crime." Utah Code Ann. § 76-3-201(7)(a)(2003). Prior to sentencing, the trial court allowed the parties to submit a statement where they could testify to other facts in aggravation or mitigation. Therefore, a judge was allowed to exercise discretion to increase or decrease the minimum term of the defendant's sentence. At the sentencing hearing, the court decided to sentence Defendant for the minimum sentence of 15 years for each count with the first and third counts to be served concurrently and the second count to be served consecutively. The court identified Defendant's criminal history, his lack of remorse, and the cruel nature of the assault as aggravating factors. After the trial court announced the sentence, counsel for Defendant did not make any objections. Defendant appealed on the ground that (1) the trial court considered impermissible factors when determining Defendant's sentence and (2) the sentence was illegal because it violated his right to have findings of fact made by a jury. The Utah Court of Appeals disagreed. It found that the Defendant's first argument could not be considered on appeal because counsel failed to object during the sentencing hearing. The court also rejected his second argument on appeal. The Supreme Court has stated that it is within a judge's discretion to increase the minimum penalty for a crime. A defendant is only entitled to a sentencing trial by jury if the penalty goes over the statute's *maximum* sentence,

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which it did not in this case. *State v. Garner*, No. 20060823 (Utah Ct. App. Jan. 25, 2008).

Attorney's fees may be awarded under the private attorney general doctrine if the plaintiff vindicates an important right for the public and does not have a pecuniary interest in the suit.

Salt Lake County allowed Hermes Associates to expand an existing shopping center onto public streets, against County ordinances. = The Culbertson's brought an action against the County entitled *Culbertson I*. In this action, the supreme court found that Hermes acted willfully in instituting the project against county ordinances and that the County acted with complicity, allowing the expansion despite the fact that it was illegal. In *Culbertson II* the court awarded the Culbertsons their requested amount for special damages. The Culbertsons then filed a motion seeking attorney's fees under the private attorney

general doctrine. The trial court denied the motion on the ground that it did not have authority to award fees under its inherent equitable powers. Culbertson's filed an appeal arguing that the court did have this authority. The Utah Court of Appeals agreed with the Culbertsons. Fees are generally only recoverable if they are provided for under statute or contract. However, a court may exercise its inherent equitable power to award attorneys fees when "it deems it appropriate in the interest of justice and equity." *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759,782 (Utah 1994). Awarding such fees is only appropriate in extraordinary circumstances where the Plaintiff has vindicated an important public policy with no pecuniary benefit for themselves. The trial court found that the results obtained by the liti-

gation "primarily benefited the Plaintiffs and not the public as a whole." However, the court of appeals found that though the development would have heavily impacted the Plaintiffs, it also greatly benefited the public at large. Also, the Plaintiffs had no pecuniary interest in the litigation because they only wanted access to their property. The court also found that this case does qualify as an "extraordinary" circumstance meriting payment of attorney's fees. It was extraordinary because individual property owners had to bring litigation to force the government to abide by its own ordinances. *Culbertson et al. v. Board of County Commissioners of Salt Lake County*, No. 20060573 (Utah Ct. App. Jan. 25, 2008).



Communications between a patient and health care provider are privileged unless the physical, mental, or emotional state of the patient is relevant to proving an element of the claim or defense. Defendants seeking in camera review need only prove that evidence sought is favorable to the defense.

Worthen and B.W., his wife's adopted child, were admitted to the University of Utah Neuropsychiatric Institute (UNI) after they attempted to commit suicide. During her evaluation, B.W. claimed that Worthen had sexually abused her. The

State charged Worthen with ten counts of aggravated sexual abuse of a child. However, at Defendant's preliminary hearing there were many inconsistencies in B.W.'s testimony. Defense counsel made a motion for an in camera review of B.W.'s medical records anticipating that they may contain evidence that B.W.'s hatred toward her parents motivated the reports of abuse. The judge granted the motion. The State appealed arguing that (1) the trial court neglected to determine whether the records came within the rule 506(b) exception for privileged communications, (2) the records do not go to an element of the defense, and (3) defendant failed to establish to a reasonable certainty that the records contained material evidence. The Utah Court of Appeals disagreed. Rule 506(b) protects, as

privileged, the communications between a patient and health care provider if they are made in confidence with the purpose of treatment. An exception to Rule 506(b) applies when the patient's "physical, mental, or emotional condition" is relevant "in any proceeding in which any party relies upon the condition as an element of [a] claim or defense." Utah R. Evid. 506(d)(1). The State argued that motive to fabricate

is not an element of the claim or defense and so does not fall within the exception to the rule. However, the court said that the elements of a criminal offense aren't necessarily the same as a criminal defense and that the defense may offer any evidence that would cast doubt concerning any element that the prosecution seeks to prove. Evidence of B.W.'s potential resentment toward her parents would, therefore, qualify. On the third argument, the court said that the defense does not have the burden of proving reasonable certainty, as the State claims. The Defendant must show only that the evidence sought is favorable to the defense and then the court will determine whether the evidence is material after reviewing the records. *State v. Worthen*, No. 20060757 (Utah Ct. App. Jan. 25, 2008).

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Thoughts



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All while removing sales tax from food, reducing property tax and not raising the sales, income or gas tax. Then there are those minor issues such as illegal immigrants, Salt Lake City's domestic partner health insurance coverage policy, "U.N. influenced" programs in our high schools, boutique cities for the benefit of big developers and hundreds of other issues, all of which are vitally important to some constituent. Why would anyone want the job?

As I write this the final gavel of the 2008 General Legislative Session came down two days ago. Since then I have participated in two conference calls, the purpose of which was to determine which of the 436 passed bills have relevance to prosecutors, civil side public attorneys, law enforcement and local governmental officials – there were, as always, a whole bunch – and to divvy those bills up among some really great volunteers who will prepare written summaries. The upcoming Spring Conference will feature a comprehensive legislative update of bills relating to criminal law and criminal procedure, to civil issues vital to public attorneys, sheriffs and other city and county officials and to several recent changes to court rules.

Many thanks to those who

so excellently represent our legislative interests. They work throughout the year, not just during the 45 days of madness on the hill. Many thanks also to those who take on the task of preparing, within just ten days, the written summaries of the bills.

Make sure you are registered for and attend the Spring Conference. It will be held on April 3-4 at the Red Lion Hotel, 161 W 600 S in Salt Lake City. In addition to the 2008 legislative update, you'll get the annual case law update and a couple of other really interesting presentations. You should already have received the conference brochure. If not, give us a call at (801) 366-0202 or register on-line at: www.upc.state.ut.us.

PIMS

PIMS, for the uninitiated, is the acronym for UPC's Prosecution Information Management System; our computerized case management system for prosecutors. The PIMS project has been divided into two phases.

Phase I involved the planning for and development of new case management software to replace the aging Prosecutor Dialog® software. Phase I also included the installation of the PIMS software in prosecution of-

fices around the state. Those installations, of necessity, included conversion of the existing Prosecutor Dialog® data into a format that could be used in PIMS. Phase I is nearing completion. I'm happy to report that most (but not quite all) offices who were using Prosecutor Dialog® have now been converted to PIMS. Last week UPC computer guy Stan Tanner was in Kanab doing the conversion for the Kane County Attorney's Office and appointments have been made with other offices.

Regardless of whether your office has previously used Prosecutor Dialog®, any other case management software or none at all, we'd be happy to fix you up with PIMS. UPC provides the software, installation and training at no cost to your office. For additional information, a demonstration and/or an installation appointment, either call or e-mail Ron Weight. (801) 366-0202, rweight@utah.gov. Ron is UPC's IT Manager and is the project manager of the PIMS project.

PHASE II of the PIMS project involves the forging of electronic connections between PIMS and the State Courts' data management system (CORIS) and between PIMS and law enforcement case management systems.

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with Prosecutor Dialog® software was one of the main reasons the Prosecution Council decided to embark on the PIMS project.

Since November of last year we have been working toward the goal of having the PIMS/CORIS link completed by September 30, 2008. Thanks to a generous grant from CCJJ and the very close cooperation of the Salt Lake District Attorneys Office and the Information Technology Division in the Administrative Office of the Courts, we are moving steadily toward that goal.

For a variety of reasons, forging the PIMS / law enforcement link presents more challenges than does the connection with the Courts. 1) Unlike the centralized state courts system, there are dozens of law enforcement agencies. 2) Law enforcement agencies use a variety of software programs for their data management needs. 3) Each sheriff and chief will have to make the decision to share data with PIMS.

Accordingly, the work to forge a link between PIMS and law enforcement is being delayed until after the work with the courts is completed. The Prosecution Council is, however, very strongly committed to completing the law enforcement connection, thereby allowing the electronic transfer of law enforcement data directly into PIMS. At this juncture there is some exciting programming work going on at the Department

of Public Safety which may obviate a need to forge individual links with each separate law enforcement agency.

NDAA

For most prosecutors, the most visible part of the National District Attorneys Association for the past ten years has been the outstanding and free training provided at the National Advocacy Center (NAC) in Columbia, South Carolina. As you are likely aware, however, congressional funding for the NAC ended with the end of 2006 federal fiscal year. For almost a year thereafter, in the hope that congressional funding would be restored, NDAA supported the operation of the NAC out of its financial reserves. Unfortunately, at least at this point, NAC funding remains elusive. NDAA continues to operate the NAC and provide the same very excellent slate of courses as in the past, but is unable to pay the expenses of those who attend. Those who attend NAC courses are now responsible for their travel and lodging expenses and some of their meals. NDAA is working hard for restored NAC funding in the FY09 federal budget, but don't bet the farm on it.

The use of NDAA reserves to fund NAC operations, combined with serious management problems at NDAA headquarters, have put NDAA into a deeply serious financial position. Following the resignation of the past executive leadership, the NDAA Executive Committee has appointed new, interim executive leadership of

the association. Mary Galvin, the Interim Executive Director, is a former DA from a relatively large jurisdiction and, for the past year and a half, has been Dean of the National College of District Attorneys where she has shown remarkable judgment and energy in dealing with the financial challenges. Her #2 is David LaBahn, a former Executive Director of the California District Attorneys Association, the largest prosecutors association in the country. Both Mary and Dave are long time members of and have a deep commitment to NDAA. They are working, literally 12 - 18 hours per day, to return NDAA to a financially sustainable position. In that effort they enjoy the full support of the NDAA Executive Committee.

I am confident, although not 100% certain that NDAA will survive this crisis. I believe it will emerge with strong, effective leadership, having learned painful but important lessons for the future. Above all else I want to stress that this is not a time for NDAA members to think of jumping ship. To summarize a statement made by current NDAA President Jim Fox in a recent meeting, NDAA's survival may be on the line but its demise is assured if it loses the financial support of its members. If you're not a member, I urge you to join now. The loss of this long time and well respected voice of America's prosecutors would have very serious consequences for all prosecutors.

-Mark Nash
Director, Utah Prosecution Council



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Tenth Circuit

The statement “having stimulant effect on the central nervous system” contained in 21 C.F.R. §1308.12(d) classifying certain types of controlled substances is a descriptive phrase and does not impose a requirement that the government prove stimulant effect on the nervous system in a drug prosecution.

Shurtz was arrested after he sold drugs to a confidential informant on three separate occasions. After the third controlled buy, Shurtz and his passenger, Watterson, were stopped by police. Watterson ran from the vehicle at the command of Shurtz and was caught carrying a cooler of pills, two firearms, and drug paraphernalia. Shurtz was thereafter convicted with two counts of distribution of methamphetamine among other charges. He appealed his conviction on the ground that the government failed to prove that the amount of methamphetamine involved would have a stimulant effect on the central nervous system under 21 C.F.R. §1308.12(d). Shurtz claims that the face of the statute requires such a finding. The statute says: “(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material . . . which contains any quantity of the following substances having a stimulant effect on the central nervous system: . . . (2) Methamphetamine” The Tenth Circuit said that the question regarding the meaning of the statute is determined by resolving whether the phrase “substances having a stimulant effect on the central nervous system,” is descriptive or limiting. The court found that the phrase is descriptive. The court found that this list presents those

drugs that Congress and the Attorney General have determined to be controlled substances. And that where Congress intended for the substance to determine legality, they have indicated this unequivocally. Plus, congressional intent and long-standing practice both indicate that no quantity limitations should be inferred where they are not explicitly stated. The court also distinguished other statutes that Shurtz quoted that didn’t contain this descriptive language. The court stated that the phrase is to aid the Attorney General in classifying emerging drugs. Therefore, the ruling of the lower court was affirmed. *US v. Shurtz*, No. 07-3072 (10th Cir. Dec. 19, 2007).



An upward adjustment for sentencing does not have to be linked to the sentencing guidelines. The court may make a determination based on the facts of each case.

Mumma received a line of credit at a bank after providing the bank with two signed documents containing a fake social security number. The following year she filed for bankruptcy and upon the petition falsely stated that she didn’t have any bank accounts. She was charged with making a false statement to a financial institution and bankruptcy fraud. She pled guilty on both counts. A pre-sentence report revealed that Mumma had several prior con-

victions and arrests for financial crimes including passing worthless checks and forgery. While released on bond for the loan application and bankruptcy fraud charges, she and her husband defrauded their neighbors, the Carty’s. Wolverton, who had been investigating the allegations, testified at the sentencing hearing that the Mummas fraudulently obtained \$12,175 from the Cartys and did not repay them. Mumma’s counsel stated that the evidence presented at the sentencing hearing was not reliable or relevant under U.S.S.G. § 1B1.3 and that a sentence within the guidelines was appropriate. The district court disagreed. It found that the conduct could be considered under 18 U.S.C. § 3553(a) which set forth factors for sentencing including the need for the sentence to deter future crimes and protect the public given the defendant’s history of crime. The court highlighted the fact that Mumma was not remorseful, she had engaged in past financial fraud, and that she engaged in fraud while released on bond. The court stated that this justified a sentence in excess of that given by the sentencing guidelines. The court sentenced her to 48 months imprisonment, 300% more than the 12-month sentence given in the guidelines. Mumma appealed, arguing that her history of financial crime may justify an upward variance but that the crimes were not dramatic enough to support the sentence in this case. The Tenth Circuit held that there was no clear error. It found that the district court need not link its length of variance to the Guidelines. It found that the facts are to be the determining factor and that these facts did justify the extent of the variance because Mumma is a habitual prevaricator who has not been deterred by former arrests and has no remorse for her crimes. *U.S. v. Mumma*, No. 06-3163 (10th Cir. Dec. 7, 2007).

For the doctrine of collateral estoppel to apply, the former action must have threatened criminal punishments and the

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current and former actions must address an identical issue.

A suit was brought against Smith to terminate his parental rights over his two daughters, E.S. and K.S. due to allegations that he had sexually molested their half-sisters, B.J. and A.H. Deprived-child/termination proceedings under Oklahoma law answer whether a child is deprived and whether parents should retain the right to care for them. Deprived includes living in an unfit place “by reason of neglect, cruelty, or depravity.” Okla. Stat. titl. 10 § 7001-1.3 (a),(b). If an aggravating factor is found, parental rights may be terminated. One of these aggravating factors is that the parent has physically or sexually abused a child or their sibling in a manner “that is heinous or shocking to the court” *Id.* The jury at Smith’s termination proceeding found that E.S. and K.S. were deprived but answered “no” to the question of whether the abuse was in a manner that was “heinous or shocking to the court.” While this action was pending, the State charged Smith with criminal child sexual abuse of B.J. Smith moved to have the charges dismissed under the doctrine of collateral estoppel. He argued that the civil court jury had found he had not sexually abused B.J. and, therefore, this issue was barred from being tried in a criminal case. The criminal court denied the motion finding that the issues differed between the two cases. Smith petitioned for habeas relief. The district court denied the petition, but the Tenth Circuit granted a certificate of appealability. The Tenth Circuit stated that the doctrine of collateral estoppel only protects against multiple *criminal* punishments for the same offense. The court found that in this case the termination proceeding would not have imposed a criminal punishment because the focus of the proceedings was to quickly resolve the placement of the children and not set in place criminal penalties. The court also stated that collateral estoppel only applies if an issue of ultimate fact has already been fully litigated and determined. The court found that the issue

brought up in the criminal case is not the ultimate issue that was addressed in the termination proceeding because the former issue looked the abuse with aggravating factors—whether the abuse was “heinous and shocking to the court”—while the criminal proceeding did not require the jury to find aggravating factors. *Smith v. Dinwiddie*, No. 06-5116 (10th Cir. Dec. 12, 2007).

Ninth Circuit



Contempt orders must be filed and set forth in detail the factual basis for the contempt conviction. It is not enough that they are stated in the record. A judge may summarily convict and sentence an individual for contempt in the courtroom if that judge has given proper notice.

Schiff, Cohen, and Neun went to prison for income tax invasion. Shortly after being released, Schiff opened a store in Las Vegas where he sold books, tapes, and videos about how to “legally stop paying income

taxes.” Schiff represented himself during a twenty-three day trial in which he Schiff was convicted aiding and assisting in the filing of a false federal income tax return. He was also convicted of contempt fifteen times by the trial judge based for his inappropriate behavior in the courtroom. Schiff refused to heed warnings from the judge after he began to read parts of his book arguing that mandatory income tax was voluntary. He improperly questioned witnesses and he also made statements suggesting that the government lacked the power to investigate criminal violations of the Internal Revenue Code. Schiff challenged the contempt convictions on the ground that (1) the district court erred in failing to file the contempt orders, (2) the sentence violates his right to due process because he did not receive notice of the sentencing hearing, and (3) the sentence violated his Sixth Amendment right to a trial by jury because his sentence exceeded six months. The Ninth Circuit agreed on the first and second arguments and remanded, giving the lower court the opportunity to refile the contempt orders. The court said it was not sufficient that the court made the reasons for the sanctions clear in the record. The law is clear that contempt orders must be filed setting forth in detail the factual basis of the contempt conviction. The court disagreed with Schiff’s second and third arguments stating that Schiff is assuming that where a person is cited for contempt during trial and punished after he is entitled to notice under the Fifth Amendment. He also assumes that where a person is given a single punishment for multiple acts, that person is entitled to a jury trial if the punishment is for more than six months. The Ninth Circuit found that the district court summarily convicted and sentenced Schiff at the time each of the acts occurred and that he was given sufficient notice that the progressive punishment would be imposed for each act of contempt. *United States v. Cohen*, No. 06-10145 (9th Cir. Dec. 26, 2007).

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All posts are from <http://www.re-quest.net/g2g/humor/courtroom/index.htm>

Mileposts

By Attorney: And where was the location of the accident?

By Witness: Approximately milepost 499.

Attorney: And where is milepost 499?

Witness: Probably between milepost 498 and 500.

Confusing the Issues

Attorney: What gear were you in at the moment of impact?

By Witness: Gucci sweats and Reeboks.

I forget...

By Attorney: This Myasthenia Gavis, does it affect your memory at all?

By Witness: Yes.

Attorney: And in what ways does it affect your memory?

Witness: I forget things.

Attorney: You forget things? Can you give us an example of something you've forgotten?

Compound Questions

By Attorney: When he went -- had you gone -- and had she -- if she wanted to and were able, for the time being excluding all the restraints on her not to go -- gone also -- would he have brought you -- meaning you and she -- with him to the station?

By Opposing Counsel: Objection your Honor! That question ought to be taken out and shot.





Continued from BRIEFS on page 9

Statements are not custodial under *Miranda* and are, therefore, admissible if they are voluntarily made and can be terminated by the defendant at any time.

Edwards was found seriously injured in her apartment on the morning of July 9, 1996. She had suffered blows to the head and face that left lacerations in her skull that she died of shortly after being found. Saleh, Edwards' ex-husband, was a suspect. Saleh was in jail for beating his son-in-law. Detective Ramirez went to the prison and interviewed Saleh after reading him his *Miranda* rights. Saleh asked for an attorney and then began to cry saying that he wanted the electric chair so he could join Edwards. The next day, Saleh telephoned Ramirez

and repeated what he had said the day before about wanting the electric chair so that



he could be with Edwards. He denied killing Edwards. The State charged Edwards with first-degree murder. At trial, the State presented evidence that Saleh had a history

of abusing Edwards, that after the attack Saleh had beaten his son-in-law in a similar manner, and that Edwards' blood was found on a fascia board outside of Edward's apartment. The State also was allowed to introduce the statements made by Saleh said during his telephone conversation with Ramirez. Ramirez was convicted but appealed on the ground that the statements should not have been admitted. The Ninth Circuit denied his appeal. It stated that the statements were not inadmissible under *Miranda* for he had made them during a telephone call that he had placed voluntarily and where he could have terminated the telephone conversation at any time. Therefore, the telephone conversation was not custodial because custodial interrogation requires that there is some restriction on his freedom of action resulting from the interrogation. *Saleh v. Fleming*, No. 04-35509 (9th Cir. Jan. 3, 2008).

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Visit the UPC online at
www.upc.state.ut.us



Calendar

Utah Prosecution Council (UPC) And Other Utah CLE Conferences

April 3-4	ANNUAL SPRING CONFERENCE <i>Case law update, legislative update, ethics and more</i>	Red Lion Hotel Salt Lake City, UT
May 13-15	ANNUAL DOMESTIC VIOLENCE CONFERENCE <i>Held this year in conjunction with the annual CJC conference</i>	Zermat Resort Midway, UT
August 7-8	UTAH MUNICIPAL PROSECUTORS SUMMER CONFERENCE <i>Really good stuff for all whose caseload includes primarily misdemeanors</i>	Zion Park Inn Springdale, UT
August 18-22	BASIC PROSECUTOR COURSE <i>Substantive and trial skills training for new prosecutors</i>	University Inn Logan, UT
September 10-12	FALL PROSECUTORS TRAINING CONFERENCE <i>The annual fall meeting for all Utah prosecutors</i>	Iron Cnty Conf Center Cedar City, UT
October 15-17	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Specifically for civil side attorneys from county and city offices</i>	Zion Park Inn Springdale, UT
November 2008	ADVANCED TRIAL SKILLS TRAINING <i>This will probably be a homicide related course</i>	Date & Location TBA location pending
November 12-14	COUNTY ATTORNEYS' EXECUTIVE MEETING & UAC CONFERENCE <i>The only opportunity during the year for county/district attorneys to meet</i>	Dixie Center St. George, UT

National Advocacy Center (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title or by contacting Utah Prosecution Council at (801) 366-0202; e-mail: mnash@utah.gov.

Federal funding for the National Advocacy Center has yet to be resolved. In the meantime, NDAA continues to offer courses at the NAC, albeit not with full reimbursement of expenses as in the past. Students who attend the NAC are asked to pay for most of their expenses. For specifics, contact the NAC directly.

See the table
for course dates
on the following page.

TRIAL ADVOCACY I
A practical, hands-on training course for prosecutors

NAC
Columbia, SC

See NAC SCHEDULE on page 13

Calendar con't

NAC SCHEDULE continued from page 12

<i>Course Date</i>	<i>Course Number</i>	<i>Registration Deadline</i>
July 28 - August	12-08-TA1	March 28th
August 18-22	13-08-TA1	April 18th
September 8-12	14-08-TA1	May 2nd
September 29 - October 3	15-08-TA1	Mar 23rd

April 7-11 June 16-20 August 11-15	BOOTCAMP: AN INTRODUCTION TO PROSECUTION <i>A course for newly hired prosecutors</i> Reg. deadlines: Jan. 30th for the April course; Feb. 15th for the June course; April 11th for the Aug. course	NAC Columbia, SC
August 25-28	CROSS-EXAMINATION <i>A complete review of cross-examination theory and practice</i> The registration deadline is April 25^h	NAC Columbia, SC
September 22 - 26	TRIAL ADVOCACY II <i>Practical instruction for experienced trial prosecutors</i> The registration deadline is May 16th	NAC Columbia, SC

National College of District Attorneys (NCDA) and American Prosecutors Research Institute (APRI)

March 30 - April 3	PROSECUTING DRUG CASES - NCDA	Myrtle Beach, SC
April 6-10	CONTEMPORARY TRIAL ISSUES - NCDA*	Lake Tahoe, NV
April 21-25	MEETING CHALLENGES IN PROSECUTION & VICTIM ADVOCACY*	Chicago, IL
May 4-8	SPECIAL PROSECUTIONS COURSE - NCDA*	San Diego, CA
May 18-22	OFFICE ADMINISTRATION COURSE - NCDA*	Marco Island, FL
June 1-11	CAREER PROSECUTOR COURSE - NCDA* <i>The one course that should be attended by everyone who make prosecution their career</i>	Charleston, SC
June 22-26	CRIME SCENE INVESTIGATIONS - NCDA*	Las Vegas, NV

* For a course description and on-line registration for this course, click on the course title or call Prosecution Council at (801) 366-0202, e-mail: mnash@utah.gov.