

The PROSECUTOR



Director's Thoughts

Just before 11:00 p.m. on the last night of the recent legislative session, there remained only two prosecution-sponsored bills still needing final legislative action; SB 206 and SB 180. After about 2½ hours of sitting in the gallery of the House of Representatives with two other prosecutors, listening as all manner of stuff was debated, ad nauseam, SB 206 was the next bill up for debate and SB 180 was immediately below it. With an hour left we figured there was no way they weren't going to get to them. At that point, instead of asking the reading clerk to call up the next bill, the Speaker said something to the effect, 'Well, members, we have reached the end of our business. I have

been informed by the President of the Senate that they have ended their work.' Thus ended SB 206 and SB 180. Such is the sausage making process. As Cubs fans have told us for a century, there's always next year.

Leaving aside the above sad story, how did prosecution and government civil side related legislation fare in general? The general consensus I heard from the regulars on the last night of the session was, "It could have been a heck of a lot worse." Some of the highlights:

Money

Unless you refused to watch, listen to or read any news during January, February and early March, you know that the issue that trumped all others during the 2010 General Legislative Session (even more than Fed bashing)

was \$\$\$\$. Budget issues not only took up a large amount of available legislative attention, the tight funding situation also dictated, to a large extent, whether a bill would pass. Anything with a fiscal note that exceeded 37¢ had very little chance,

regardless of its underlying merits. (Actually, the fiscal threshold was a bit higher than 37¢, but fiscal notes did stop many otherwise worthy bills.)



In the end, our legislature, bless their hearts, put together a budget that was better than almost anyone expected when the session began. No fired UHP Troopers. No RIF in the AG's Office. Only a few less orange cones on the highways this summer. And the retirement system survived largely intact, at least for current employees.

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Director's Thoughts



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Of Public Attorney Interest

By and large, things went pretty darned well. Of those bills on which SWAP took a position, most of the ones we liked passed, and most of the ones we didn't like didn't. As to those bills of interest to civil side public attorneys, I didn't hear any really loud howls of protest or concern. Thanks to all who spent so very many hours in preparation before the session and on the hill during the session. Without their hard work and expertise we'd be done for.

To get the full run down on what happened during the session, make sure you attend the UPC Spring Conference,

which, as always, will include a comprehensive legislative recap and update. The conference will be held on April 22-23 at the South Towne Expo Center, 9575 South State Street in Sandy. You should already have received your conference brochure.

Retirement System

For most public attorneys, the issue of greatest interest and concern during this year's session was what would be done to the Public Employees' Retirement System. If you are currently employed by the state or by a participating local governmental agency, it's good news. The defined benefit system survived intact for current participants and for persons hired prior to

July 1, 2011. For state employees, the 1.5% contribution to your 401(k) also survived.

If, however, you are planning to be a Double Dipper, you may have to rethink your plans. Essentially, there will be no more double dipping after July 1, 2010. If you are close to retirement and hope or plan to then go back to work in a job that is under the state retirement system, you need to very quickly educate yourself on the pending changes.

As to persons who first go to work for the state or for a participating local governmental entity after July 1, 2011, the retirement world has changed. I won't go into detail here because, presumably,

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none of my readers fall into that group. The only exception is the Judicial Retirement System. Already a sweet deal, it will remain unchanged for judges appointed after July 1, 2011. So, polish up that resume and get really cozy with the members of your judicial nominating commission, not to mention the governor.

Elsewhere in this newsletter you will find a summary of the provisions contained in the two retirement bills and a retirement comparison table. Legislative Research and General Counsel prepared both. I urge you to review them.

Spring / Summer Plans

With the sun having crossed the equator on its way north, with daylight saving time upon us and with Easter behind us, those lazy, hazy, crazy days about which Nat King Cole sang can't be far away. It's been a while since Ole Doc Nash dispensed any advice, but here's his wellness prescription for the next six months.

Make liberal use of your back yard BBQ grill. Once a month is not nearly enough. Use it for something other than hamburgers and chicken. (Hint: they're called roasting ears for a reason.) And eat it outside. Depending on the cook's skills, the food may not taste better, but you'll be better off for having spent time outside, off the couch and away from the TV.

Whip together an easy picnic from time to time and spend a long evening with family and friends in a city or county park. Better yet, take an

afternoon off and move the picnic to a nearby canyon or lake.

Take advantage of those holidays. Both July 4th and 24th fall on weekends, so we here in Utah will have four three-day holiday weekends this summer. Use them! Maybe even extend them.

Use that personal leave. There is a reason your employer gives you vacation time, and it's not so you can save up more than you can carry over, then donate it to the office leave bank at the end of the year. Don't get to Columbus Day and realize you spent the entire summer doing nothing better for your stress level than arguing with defense counsel and judges.

If you follow Doc's orders, you will not only feel better, you will be able to do your job better. Judges will find your memos and arguments to be more cogent, defense counsel will try to avoid you – and your co-workers won't, and people around the office will wonder why you are smiling.

Ole Doc Nash can already hear his staff talking among themselves about him not practicing what he preaches. He'll make you a deal. He will try his best to follow his own advice, and hopes that all of you, his dear friends, will do likewise.

Mark Nash
Director, UPC

~~ CORRECTION ~~

There was an error in the March, 2010 edition of *The Utah Prosecutor* newsletter. The author of the excellent article on the Mexican Justice System, entitled *Heroes South of the Border - Mexican Prosecutors Fighting for Justice Amidst Violence and Change*, is **Robert E. Steed, an Assistant Utah Attorney General**, not Robert Steel (who is an attorney in the Utah Federal Defenders Office).

Our apologies to Mr. Steed for the mistake and our thanks to him for his excellent and very informative article!

United States Supreme Court

Preparation of pretrial motions not automatically excluded from 70-day limit

Taylor James Bloate was indicted for weapons and drug charges. The Speedy Trial Act requires a criminal defendant to have a trial within 70 days of his indictment or initial appearance. Failing to meet that deadline, he is entitled to have his charges dismissed. Bloate's indictment started the 70-day clock on August 24, 2006. The court ordered all pretrial motions be filed prior to September 13. Bloate requested an extension, which was granted, but later waived his right to file pretrial motions. Over the next three months other delays were granted, often at the request of Bloate. On February 19, 2007, 179 days after he was indicted, he moved for a dismissal of his charges claiming that the 70-day limit had elapsed. The trial court denied the motion and ruled that



PROSECUTOR PROFILE



Randall McCune, Assistant Cedar City Attorney

Randall McCune was born and raised in Idaho Falls, Idaho. His mother was born in Germany and fits the stereotypical strong German woman. His father grew up on a farm in Oregon where father knows best. He remembers it being entertaining watching that conflict growing up. By the eighth grade, Randall started watching Matlock religiously with his mother, and that sparked his first interest in the law. Other than that, the only other career he dreamed of was the absent-minded professor (inventor of flubber, etc.). He attended Ricks College in Rexburg, ID (now BYU-Idaho) and then finished his degree in Political Science with a minor in Spanish at Idaho State University in Pocatello, ID, in 2003. He then moved on to attend the J. Reuben Clark Law School where he graduated in 2006. Naturally, his favorite sports team is BYU because it's in his blood, literally, his parent's met there.

Randall is married to Jennifer, of whom he jokes they met in jail. Well, down the hall from jail, anyway! They met when he was a deputy court clerk in Jefferson County, Rigby, Idaho. She started a paid internship there and her friend, who'd started there the day prior, had told Jennifer that Randall "wasn't much to look at." But, when she met him she didn't think he "was that bad looking." He attributes that success to the important lesson of not overselling something because then expectations get too high. They are parents to Anthony, age 5, Isabella ("Isa" pronounced Eesa for short), age 3, and Zachary, 4 mos old.

Randall doesn't listen to music much as he prefers to enjoy the silence or listen to an audio book. He enjoys volleyball and is currently officiating for the women's league and playing in the newly started co-rec league. His favorite food is pistachios, but due to price it's a rare delicacy. His favorite treat is a Butterfinger. He bravely admits that his favorite movie is *While You Were Sleeping* but quickly clarifies that romantic comedies are good but dramatic romantic movies are bad! His favorite TV series is *Heroes*. He loved watching Saturday morning cartoons as a kid including *Teenage Mutant Ninja Turtles*, *Garfield* and the *Smurfs*. And, he believes the true purpose in having children is to have an excuse to watch their cartoons (*Phineas and Ferb*) and play with their toys. In his travels, Randall has visited places such as Rochester and Buffalo, NY, Orlando, FL, Rawley-Durham, NC, and Ft. Lauderdale, FL. However, his only trip out of the country involved his brother taking a wrong turn in San Diego and they ended up in Tijuana. He tried to talk his brother into going into the city, but as soon as he saw that their stop signs didn't say stop (they said "Alto"), he refused to go any further. If he could travel anywhere, he'd go to Scotland.

Matlock was an influence in Randall's interest and decision to go to law school. Most of his family didn't care too much, however, his father tried to convince him to aim for an honorable profession. Nonetheless, he followed his heart and has worked in the Cedar City Attorney's Office for three and a half years. His most rewarding aspects of the job involve either convicting someone that just refuses to acknowledge they have done something wrong or seeing people a couple of years after a single run in, knowing that they've kept their nose clean. Randall recalls his most embarrassing court experience occurring about a month after becoming an attorney. He had started working with Cedar City and had a stack of trials and a stack of verbal mistakes! It started with him mispronouncing the detective's name about ten times before the judge corrected him, and then he stated 'Provo City' instead of 'Cedar City' when asking about where the crime occurred. "That was a bad day!" But, he persevered and although he loved school and the jobs he'd had before, he prefers the consistency of his career at this point. He enjoys feeling that in his duties, he's done the most he can do and has left no stone unturned. Keep up the great work Randall!

PREFERRED NAME - Randall

BIRTHPLACE - Idaho Falls, ID

FAMILY - The youngest of seven children; Father of three children ages 5, 3 and 4 mos.

PETS - None, that's what kids are for...

FIRST JOB - At age 14 worked for brother at a used video store

OTHER NOTEABLE JOBS: Former law clerk for UPC. (Yay!)

FAVORITE BOOK—*Wheel of Time Series* by Robert Jordan

LAST BOOK READ—*Leven Thumps and the Gateway to Foo* by Obert Skye

FAVORITE QUOTE - Too many. I'll keep one for a week or so and then move to the next one. I'm more of a concept guy, than a word-for-word guy.

FOREIGN LANGUAGE - Spanish or Spanglish (at times)

Retirement Bills - Summary

Prepared by the Office of Legislative Research and General Counsel -- March 2010

2010 Two Key Retirement Bills that Passed¹ by the Utah State Legislature

S.B. 43 Post-retirement Employment Amendments (*Sen. D. Liljenquist*)

This bill:

- repeals a requirement that a participating employer, who hires a retiree, contribute into a qualified defined contribution plan, the same percentage of a retiree's salary that the participating employer would have been required to contribute if the retiree were an active member of the retirement system;
- caps at the normal cost rate, the amount that a participating employer who hires a retiree before July 1, 2010 may contribute into a defined contribution plan;
- provides that a retiree from the Utah State Retirement System who returns to work with any participating employer on or after July 1, 2010, is returned to active member status and may, with a two year minimum, earn additional service credit if the retiree is reemployed within one year from retirement;
- provides that a retiree who returns to work with a participating employer after one year from the date of retirement may elect to either:
 - receive a retirement allowance and forfeit any retirement contribution related to the reemployment; or
 - cancel the retiree's retirement allowance and earn additional service credit for the period of reemployment (two year minimum required to earn additional service credit);
- requires a participating employer to pay the amortization rate to the retirement system that would have covered the retiree who is:
 - reemployed after July 1, 2010; and
 - receiving a retirement allowance;
- repeals the maximum allowance that a member may receive for a member who initially retires on or after July 1, 2010, in the following systems:
 - the Public Safety Contributory Retirement System;
 - the Public Safety Noncontributory Retirement System;
 - the Firefighters' Retirement System;
 - the Judges' Contributory Retirement System; and
 - the Judges' Noncontributory Retirement System; and
- prevents the Commissioner of Public Safety, an elected or appointed sheriff, or a chief of police from retiring in place on or after July 1, 2010.

Pre S.B. 43 (before July 1, 2010)

Separation requirement: A retiree may not return to work with the same agency within six months of retirement.

- Six-month separation does not apply to reemployment:

- that is part-time (under 20 hours per week); or
- with a different agency.

- After separation, a retiree who returns to work on a full-time basis may keep drawing a retirement allowance and employer pays the same contribution rate into the reemployed retiree's 401(k).

Post S.B. 43 (beginning July 1, 2010)

(If reemployment begins on or after July 1, 2010)

Separation requirement: A retiree may not return to work with any URS covered entity within one year of retirement.

- Separation requirement also prohibits part-time and contract work during the separation period.

- After one year a retiree who returns to work on a full-time basis may elect to:

- keep receiving the allowance and forfeit any new retirement contribution, but employer pays an amortization rate to URS; or
- cancel the allowance and earn additional service credit (two year minimum required to earn additional service credit).

Post S.B. 43 (beginning July 1, 2010)

(If reemployment begins before July 1, 2010)

Separation requirement: no change.

- Requirement for employer to contribute the same percentage contribution as other employees into a retiree's 401(k) is repealed.

- If a 401(k) contribution is made to a reemployed retiree, it is capped at the normal cost rate.

Retirement Bills - Summary

(Continued)

S.B. 63 New Public Employees' Tier II Contributory Retirement Act *(Sen. D. Liljenquist)*

This bill caps employer contribution amounts and reduces retirement benefits for new public employees and new public safety and firefighter employees.

This bill:

- defines terms;
- provides that the Retirement Office report when the funded status of the trust fund reaches 100% funded which triggers a requirement that the Retirement and Independent Entities Committee study and determine the need for adjustments in employee compensation and benefits;
- provides that existing retirement systems and plans are under "Tier I" for which an employee is eligible to participate if the employee initially enters regular full-time employment before July 1, 2011;
- creates "Tier II" retirement systems and plans for which an employee is eligible to participate, if the employee initially enters regular full-time employment on or after July 1, 2011, and which includes a:

- Tier I employees are employees who began employment before July 1, 2011 and are not effected by the bill.
- Tier II employees are new employees who begin employment on or after July 1, 2011

Four new Tier II systems or plans are created with the following employer contributions:

	Hybrid	Defined Contribution
Public Employees'	10%	10%
Public Safety and Firefighters'	12%	12%

- New Public Employees' Tier II Hybrid Retirement System;
- New Public Employees' Tier II Defined Contribution Plan;
- New Public Safety and Firefighter Tier II Hybrid Retirement System; and
- New Public Safety and Firefighter Tier II Defined Contribution Plan;
- provides that except for judges, all new public employees including public safety, firefighters, governors, and legislators may only participate in a Tier II retirement system or plan;
- provides that new employees may choose between the Tier II hybrid system or the Tier II Defined Contribution (DC) plan except governors and legislators are only eligible for the Tier II DC plan;
- provides that the retirement benefits for public employees that elect the Tier II hybrid system include:
 - full retirement benefits at age 65 or after 35 years of service credit;
 - 2.5% cost-of-living adjustments on the retirement allowance;
 - a 1.5% multiplier for each year of service;
 - a 401(k) employer contribution if the cost of the defined benefit is less than 10%;

Tier II Hybrid system includes:

- Age 65 or 35 years of service for full retirement benefits (25 years for PS & Fire)
- 1.5% multiplier for each year of service
- 2.5% cost-of-living adjustments
- 401(k) employer contribution if the cost of the defined benefit is less than 10% (12% for PS & Fire)
- allowing the purchase of up to five years service credit before retirement
- death benefit
- disability benefit
- line-of-duty death benefit only for PS & Fire

Retirement Bills - Summary

(Continued)

(Tier II benefits continued)

- provision allowing the purchase of the up to five years service credit immediately before retirement;
- a death benefit; and
- a disability benefit;
- provides that the retirement benefits for public employees that elect the Tier II DC plan is a 10% defined contribution;
- provides that the participating employer shall contribute 10% of employee salary for Tier II public employees in the hybrid system or DC plan plus the amortization rate of the corresponding Tier I system;
- provides that the retirement benefits for public safety and firefighter employees that elect the Tier II hybrid system include:
 - full retirement benefits at age 65 or after 25 years of service credit;
 - 2.5% cost-of-living adjustments on the retirement allowance;
 - a 1.5% multiplier for each year of service;
 - a 401(k) employer contribution if the cost of the defined benefit is less than 12%;
 - a death benefit;
 - a line of duty death benefit; and
 - a disability benefit;
- provides that the retirement benefits for public safety and firefighter employees that elect the Tier II DC plan is a 12% defined contribution;
- provides that the participating employer shall contribute 12% of employee salary for Tier II public safety and firefighter employees in the hybrid system or DC plan plus the amortization rate of the corresponding Tier I system;
- provides for a vesting period of four years:
 - for the Tier II hybrid systems; and
 - for the Tier II defined contribution plans but allows an employee who leaves employment before vesting to return within 10 years to complete the vesting period;
- closes for employees who initially enter employment beginning on or after July 1, 2011, the:
 - Public Employees' Contributory Retirement System;
 - Public Employees' Noncontributory Retirement System;
 - Public Safety Contributory Retirement System;
 - Public Safety Noncontributory Retirement System;
 - Firefighters' Retirement System; and
 - Utah Governors' and Legislators' Retirement System.

¹ Both bills passed the Legislature on March 1, 2010 and will take effect on July 1, 2010.

Retirement Benefits

Utah Retirement Defined Benefit/Contribution Summary 2010 System Comparison



	Public Employees' Non-Contributory (Big System) (Existing employees and hires before July 1, 2011)	Tier II New Public Employees' Contributory Hybrid (One of two options for new employees beginning July 1, 2011)	Tier II Defined Contribution New Public Employees' and New Public Safety and Firefighters' (One of two options for new employees beginning July 1, 2011)	Public Safety Non-Contributory and Firefighters' Contributory (Existing employees and hires before July 1, 2011)	Tier II New Public Safety and Firefighters' Contributory Hybrid (One of two options for new employees beginning July 1, 2011)	Judges' Non-Contributory (No change in 2010)
Participants	State/Public Education Classified School Higher Education Political Subdivisions Other governmental entities	Same as Public Employees' Non-Contributory	<u>Includes all Public Employees' Public Safety, Firefighters, and Legislators and Governors</u>	Peace Officers, Correctional Officers, and approved Special Function Officers Full-time Firefighters regularly assigned to a fire department	Same as Old Public Safety and Firefighters	Judges of the Supreme, Appellate, District, Circuit, and Juvenile Courts
Eligibility for Retirement	any age 30 years age 60 20 years (AR) age 62 10 years (AR) age 65 4 years any age 25 years (FAR or employee/employer purchase of up to 5 years immediately prior to retirement)	any age 35 years age 60 20 years (FAR) age 62 10 years (FAR) age 65 4 years <u>optional employee/ employer purchase of up to 5 years immediately prior to retirement</u>	<u>fully vested after four years of employment</u>	any age 20 years age 60 10 years age 65 4 years	any age 25 years age 60 20 years (FAR) age 62 10 years (FAR) age 65 4 years <u>optional employee/ employer purchase of up to 5 years immediately prior to retirement</u>	any age 25 years age 55 20 year (FAR) age 62 10 years age 70 6 years
Service Benefit Formula	2% (for all years) x FAS No maximum benefit	1.5% (for all years) x FAS No maximum benefit	N.A.	2.5% x FAS x 1st 20 years 2% x FAS x years above 20 **70% maximum benefit of FAS reached at 30 years	1.5% (for all years) x FAS No maximum benefit	5% x FAS x 1st 10 years 2.25% x FAS x 2nd 10 years 1% of FAS x remaining years 75% maximum benefit of FAS reached at 22.5 years

Retirement Benefits (cont.)

Utah Retirement Defined Benefit/Contribution Summary 2010 System Comparison



	Public Employees' Non-Contributory (Big System) (Existing employees and hires before July 1, 2011)	Tier II New Public Employees' Contributory Hybrid (One of two options for new employees beginning July 1, 2011)	Tier II Defined Contribution New Public Employees' and New Public Safety and Firefighters' (One of two options for new employees beginning July 1, 2011)	Public Safety Non-Contributory and Firefighters' Contributory (Existing employees and hires before July 1, 2011)	Tier II New Public Safety and Firefighters' Contributory Hybrid (One of two options for new employees beginning July 1, 2011)	Judges' Non-Contributory (No change in 2010)
Employer/Employee Contribution	Employer: for FY 2010 14.22% for state and school Employee: 0% noncontributory	<u>*Employer:</u> 10% of salary <u>Employee:</u> some percent of salary, if the employer's 10% does not fund the defined benefit	N.A.	Employer: for FY 2010 30.18% for state P.S. 12.95 for div. A Firefighters (less 11.87% offset for insurance premium) Employee: 0% state P.S. noncontributory 15.05 div. A Firefighters	<u>*Employer:</u> 12% of salary <u>Employee:</u> some percent of salary, if the employer's 12% does not fund the defined benefit	Employer: for FY 2010 36.35% (less 22.27% offset for court fees) Employee: 0% noncontributory
Final Average Salary Definition	Average of highest 3 years	Average of highest 5 years	N.A.	Average of highest 3 years	Average of highest 5 years	Average of highest 2 years
Cost of Living Adjustment	Up to 4% annually (CPI) (Simple) after 1 year	Up to <u>2.5%</u> annually (CPI) (Simple) after 1 year	N.A.	Up to 4.0% annually (CPI) (Simple) after 1 year (some public safety employers have not yet adopted 4.0% remain at up to 2.5%)	Up to <u>2.5%</u> annually (CPI) (Simple) after 1 year	Up to 4% annually (CPI) (Compounded) after 1 year
Employer Defined Contribution Benefit % of Salary	State/School: 1.5% 401 (k) Local government: Optional	<u>Some percent, if any, left after funding the defined benefit</u>	<u>*10% (all public employees, legislators, and governors)</u> <u>*12% (all public safety officers and firefighters)</u>	State: None Local government: Optional	<u>Some percent, if any, left after funding the defined benefit</u>	None

FAS = Final Average Salary

AR = Actuarial Reduction (3% per year under age 65)

FAR = Full Actuarial Reduction (some % each year under age 65)

*In addition, employer pays the corresponding Tier I amortization rate of the employee's compensation for the corresponding Tier I system liability

** Maximum benefit repealed for those who retire beginning July 1, 2010 in S.B. 43 Post-Retirement Employment Amendments (2010 General Session)

Source: S.B. 63 New Public Employees' Tier II Contributory Retirement Act (2010 General Session); Utah Retirement Systems Preliminary Retirement Contribution Rates FY 2010-11; and Title 49, Utah State Retirement and Insurance Benefit Act, *Utah Code Annotated 1953*

Prepared by The Office of Legislative Research & General Counsel -- March 18, 2010



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the pretrial motion preparation time was excluded from the 70-day limit. Bloate was later convicted. The Eighth Circuit confirmed the denial of the motion to dismiss holding that the pretrial motion period was automatically excludable from the 70-day limit.

The U.S. Supreme Court disagreed and held that although certain types of delays are excludable from the 70-day limit calculation, other delays are only excludable if the district court makes certain findings enumerated in the statute. In this case the time to prepare pretrial motions is not eligible for automatic exclusion from the 70-day limit. For this exclusion to be valid the court should have conducted further proceedings and made specific findings to support the exclusion. Reversed and remanded. *Bloate v. U.S.*, 130 S. Ct 1345 (2010).

Battery by touching cannot serve as basis for enhanced ACCA sentence

Curtis Darnell Johnson pleaded guilty to possession of ammunition by a convicted felon and was sentenced under the Armed Career Criminal Act which allows for a sentencing enhancement if a defendant has three prior convictions for a violent felony. Among the three convictions proffered by the government was a conviction for simple battery. Normally under Florida law simple battery is a misdemeanor but it had been enhanced to a felony because of a previous battery conviction. Johnson argued that the Florida felony offense of battery did not contain an element of using “physical force against the person of another,” it merely contained the requirement of “actually and

intentionally touching” another person. As such, he argued that it should not constitute a violent felony for purposes of the ACCA enhancement.

The U.S. Supreme Court agreed and held that the 18 U.S.C. § 924(e)(2)(B) (i)’s definition of a violent felony has an element of “physical force” which it interpreted to include conduct involving “violent force – i.e., force capable of causing physical pain or injury to another person.” In this case, the Court reasoned that a slight touching could not satisfy the definition of violent force and accordingly, the simple battery conviction did not constitute a “violent felony” for purposes of the ACCA sentencing enhancement. However, the Court emphasized that its interpretation of physical force is only applicable to the ACCA’s definition of a “violent felony.” Reversed and remanded. *Johnson v. U.S.*, 130 S. Ct 1265 (2010).



challenged the exchange before the SITLA Board of Trustees. The SITLA Board upheld the Director’s decision. NPCA appeals the SITLA Board’s ruling. On appeal, the court must determine whether the SITLA Board appropriately dismissed the NPCA’s challenge. The issues underlying this determination include whether the NPCA has standing to challenge the SITLA Director’s decision and whether the SITLA Director’s approval breached its fiduciary duties.

The Utah Supreme Court ruled that NPCA had standing to challenge the SITLA Director’s approval of the land exchange. It further held that the SITLA Board correctly upheld that approval and was not a breach of its trust obligations. As such, the Court affirmed the dismissal of NPCA’s appeal. *Nat’l Parks Conservation Ass’n v. Bd. Of Trs.*, 2010 UT 13.

Vehicle passenger’s Fourth Amendment rights violated

Luke Zachary Baker was a passenger in a vehicle stopped for a broken taillight. Police officers had a drug trained dog sniff the vehicle and then ordered Baker out of the car. He was searched and officers located drugs and drug paraphernalia on his person. Baker filed a motion to suppress the evidence, which was denied by the district court. The Utah Court of Appeals reversed the denial and that matter is now before the Utah Supreme Court.

The Supreme Court reviewed the construction or application of the Fourth

Utah Supreme Court

Director’s approval of land exchange upheld

The School and Institutional Trust Lands Administration (“SITLA”) exchanged land with Garfield County, with the approval of the SITLA Director. The National Parks conservation Association and William Wolverton (collectively, “NPCA”)

See BRIEFS on page 11



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Amendment to the permissible length and scope of detention of Baker and to the search. It concluded that when officers conducted the dog sniff, they improperly extended the duration of the stop. It further reasoned however, that the evidence should not be excluded on this basis because officers relied “in good faith on settled judicial precedent” in conducting the search. However, the court further held that officer’s violated Baker’s rights when they searched him because they failed to have an objectively reasonable belief that Baker was armed and dangerous. Accordingly, the court affirmed the decision of the court of appeals. *State v. Baker*, 2010 UT 18.

Exclusion of expert testimony overruled

Four-year old Jacob Eskelson had a bead lodged in his ear. During attempts to remove the bead Jacob became agitated. Instead of stopping the procedure at that time, Dr. Jonathan Apfelbaum requested that Mrs. Eskelson restrain the child. Further attempts were made causing Jacob considerable pain and were unsuccessful. The following day Mrs. Eskelson took Jacob to a specialist. During the course of treatment it was discovered that there was blood in the ear and his eardrum had been perforated. Civil action was brought against Dr. Apfelbaum for deviating from the standard of care. At trial, Eskelson’s sought to introduce expert testimony from Dr. Bateman. After a two and a half hour hearing, the district court excluded the expert, finding that the expert’s testimony did not comply with rule 702. Upon excluding the expert from testifying, the court

granted summary judgment to Dr. Apfelbaum.

The Utah Supreme Court held that the expert witness’s testimony should not have been stricken and accordingly, summary judgment should not have been granted. It reasoned that the expert’s testimony constituted a threshold showing of reliability, his testimony was permissibly based on facts from the child’s mother’s deposition testimony and that the expert reliably applied his experience and knowledge to the facts of the case. Reversed and remanded. *Eskelson ex rel. Eskelson v. Davis Hosp. And Medical Center*, 2010 UT 15.

City council’s rezoning is a legislative action

In response to a city council’s unanimous vote to rezone property, a not-for-profit organization consisting of members of the city’s citizenry filed a petition for referendum. They also sought a permanent injunction prohibiting the rezoning pending the outcome of the referendum. The district court ruled that the zoning ordinance was administrative in nature and nonreferable.

The Utah Supreme Court held that a city council’s adoption of a new zoning classification is per se legislative action, rather than an administrative act. As such, the action is subject to referendum by the affected citizens. Reversed. *Friends of Maple Mountain, Inc. v. Mapleton City*, 2010 UT 11.



Detention of passenger illegal but good-faith exception applied to uphold denial of motion to suppress

Bradford Gettling was a passenger of a vehicle of which the driver was arrested. During the arrest of the driver, the police officer noticed Gettling making furtive movements in the back seat. Gettling and the front seat passenger were then ordered out of the vehicle. A dog sniff was conducted resulting in the search of the vehicle and the location of methamphetamine and drug paraphernalia in a closed glasses case. Gettling admitted they were his. A motion to suppress was filed to exclude the evidence, however the district court denied the motion. On appeal Gettling argues that he was illegally detained following the arrest of the driver.

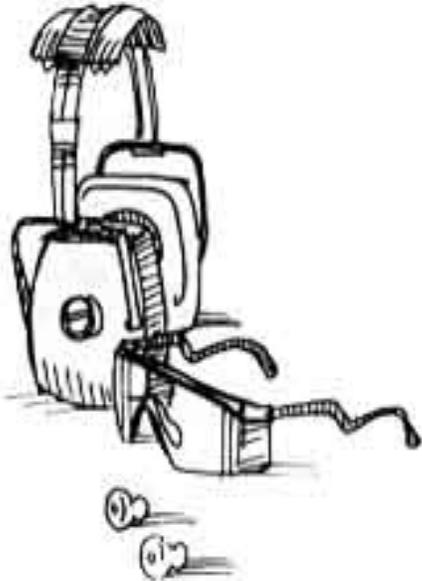
The Utah Supreme Court agreed with Gettling and held that he had been illegally detained even in light of his “furtive movements” in the back seat. It reasoned that the lawful purpose of the traffic stop was concluded with the driver’s arrest and further detention of the passengers was a violation of their Fourth Amendment rights. However, the court applied the federal good-faith exception to the exclusionary rule and upheld the district court’s denial of the motion to suppress. Affirmed. *State v. Gettling*, 2010 UT 17.

Trial courts prohibited from retroactively applying amended statute

David and Dixie Harvey sought disconnection of their land from Cedar Hills City. Following the filing of their petition but prior to the court granting summary judgment in favor of Cedar

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2010 LEOJ COURSE



June 16, 17, 18, 2010

8 a.m. to 5 p.m. each day

Camp Williams, Salt Lake County

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This class always has a waiting list. If you register and cancel or fail to attend, we often cannot fill your spot and the money and space is wasted.

If you are accepted for the class, we expect that you will block your calendars and arrange to be absent from court during the course. It is impossible for a prosecutor to “run to court for a quick plea” during this course. Please do not register if you are not presently certain that you will attend.



Continued from page 11

Hills City, certain applicable sections of the Utah Code were amended by the legislature. The district court granted summary judgment reasoning that disconnection was prohibited under both versions of the disconnection statute. It determined the dispositive issue to be that disconnection would form an unincorporated island and both versions of statute were identical on that issue. On appeal the court must decide which version of statute is applicable and whether the court erred in ruling based on what it identified as the dispositive issue.

The Utah Supreme Court held that the former disconnection statute was applicable and that the trial court was prohibited from retroactively applying the amended statute. It further held that under the 2001 version of the disconnection statute, other fact issues remained to be determined as to the material increase in the burdens borne by Cedar Hills. Reversed and remanded. *Harvey v. Cedar Hills City*, 2010 UT 12.

Utah Court of Appeals

City immune from suit based on fire protection purpose

In an effort to maintain a standard of water pressure in the distribution system for fire protection purposes, Washington City brought into service a new line. In doing so, an increase in water pressure was provided to many homes. However, as a direct result of that increase in water pressure Wilkinsons' home and personal property were damaged. Wilkinsons

filed an action against the City. The district court granted summary judgment to the City and concluded that since it was undisputed that the increase of water pressure was for fire protection purposes, the City is immune from suit under the Utah Governmental Immunity Act. Wilkinsons appeal and argue that the "true purpose" is a genuine and disputed issue of material fact.

The appellate court concluded that there were no statements regarding a contrary purpose for the increase in water pressure brought properly before the district court. Being confined to the disputed facts that were properly before the district court, the appellate court held that the district court did not err in granting summary judgment and correctly determined that the City was immune from suit based on the fire protection purpose for increasing the water pressure. Affirmed. *Wilkinson v. Washington City*, 2010 UT App 56.

Incorrect legal description renders title voidable, not void

Sonja Bangerter's property was sold to collect an outstanding dental bill. The original sale of the property contained an incorrect legal description, which created a defective title and failed to convey the title to any other entity. Appellants contend that the incorrect legal description, which was later corrected, rendered the title voidable, rather than void as ordered by the district court. Accordingly, appellants argue that Bangerter's claim is an improper collateral attack on the validity of the sheriff's sale.

The Utah Court of Appeals held that the sheriff's sale was voidable, not void. It reasoned that an incorrect legal description is a minor

irregularity, especially one that is promptly corrected. In addition, the court concluded that Bangerter had not challenged the sheriff's authority to conduct the sale. The sale cannot be attacked collaterally but must be attacked directly in a suit against the sheriff. Reverse and remand to allow Bangerter to move the court to set aside the sheriff's sale. *Bangerter v. Petty*, 2010 UT App 49.

Police officer termination upheld

Officer Jack Guenon was terminated based on violating four department policies: (1) mishandling evidence, (2) theft or misappropriation of private property, (3) intentionally viewing pornography on city-issued laptop, and (4) two acts of insubordination. The Midvale City Employee Appeals Board affirmed the termination decision. Guenon argued on appeal that the insubordination charge stemmed from two incidents of him not following the chain of command in reporting concerns but that those actions were protected under the Whistle Blower Act. He also claimed that the sanction of termination is disproportionate to the charges.

The appellate court held that Guenon failed to adequately marshal the evidence as required by the Board. Guenon had omitted from his opening brief several critical facts that support the Board's findings. It further held that one incident of insubordination was protected under the Whistle Blower Act, however, the second was not as it was not made in good faith. It also held that the termination sanction was proportionate to the charges, despite his years of service. It reasoned that that the City's Standards of Conduct provided for such a sanction "without regard to the employee's length of

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service or prior record of conduct.” Accordingly the termination fell expressly within the range of sanctions permitted by the City’s regulations. Affirmed. *Guenon v. Midvale City*, 2010 UT App 51.

Dangerous weapon sentence enhancement not to be merged with other criminal sentences

Michael Kerr appeals his convictions of aggravated assault, possession of a dangerous weapon, as well as dangerous weapon penalty enhancements. He argues that the trial court erred when it failed to merge the dangerous weapon sentence enhancements into his sentences. He also argues that the court erred in failing to rule that the enhancement sentence constituted cruel and unusual punishment and that he received ineffective assistance of counsel because she failed to raise these arguments.

The appellate court held that Kerr’s arguments failed and affirmed the trial court’s order. It reasoned that “the concepts of merger, double jeopardy, and lesser-included offenses are inapplicable in cases where the legislature intended a statute to be an enhancement statute.” Additionally, the court clarified that the possession offense was for possessing the weapon, while the enhancement was for using the weapon. Kerr’s cruel and unusual punishment claim fails because it was not preserved for appeal and under plain error review, he failed to demonstrate that any sentencing error should have been obvious to the trial court. Finally, the court found the ineffective counsel claim to be without merit. Trial counsel’s failure to object to the weapon enhancement cannot

constitute deficient performance. Affirmed. *State v. Kerr*, 2010 UT App 50.

Tenth Circuit Court of Appeals

Right to speedy trial not waived when awaiting prosecution by other sovereign

Andy Eugene Seltzer was indicted in November 2006 for counterfeiting and being a felon in possession of a firearm. Although an arrest warrant was issued, he was being held in a county jail on other unrelated state offenses. Despite Seltzer twice demanding a speedy trial and his attorney requesting arraignment on three occasions, the prosecutor decided not to proceed until the state matters were complete. Finally in November 2007, Seltzer entered a guilty plea on the state offenses and was sentenced in February 2008. In June federal prosecutors began trial preparations and in August 2008 issued a superseding indictment based on the original charge. Seltzer moved the court to dismiss on the basis that his right to a speedy trial had been violated. The trial court granted the motion. The government appealed claiming the delay was justified by the necessity to resolve the state charges first.

The Tenth Circuit held that the Sixth Amendment right to a speedy

trial requires prosecutors to justify any delay of the trial. In this case, the court held that the government’s reason, to delay the trial until state charges were resolved, was insufficient. “The government has the obligation to bring the defendant to trial in a timely manner and, absent an acceptable justification, this factor weighs in favor of the defendant.” Affirmed. *U.S. v. Seltzer*, 595 F.3d 1170 (10th Cir. 2010).

Government not precluded from questioning when door opened by defendant re evidence otherwise inadmissible under Crawford

Gerardo Lopez-Medina was convicted of possession of methamphetamine with intent to distribute and sentenced to prison. He appealed the conviction claiming, among other issues, that his confrontation right was violated when the trial court admitted hearsay statements through the testimony of a police officer that were made by the confidential informant on redirect. The government argued that the defense attorney elicited information through questioning, which opened the door for additional questions on the same subject, during redirect.

The Tenth Circuit agreed with the government that defense counsel opened the door to further questioning of the police officer. It reasoned that when the government requested a sidebar conference following the defense counsel’s initiation of questioning, the defense counsel admitted it was his “full intention” and he “didn’t care what door [he] opened.” The defense counsel further stated, “If I



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open up a door, please feel free to drive into it. But I am going to explore the entire case.” The court stated that it was clear from these statements that the defense counsel intentionally relinquished his client’s confrontation right through his path of questioning. Affirmed. *U.S. v. Lopez-Medina*, 596 F.3d 716 (10th Cir. 2010).

Judge exceeded authority by limiting evidence to certain victims

Steven J. Schneider and Linda K. Schneider were operating a medical clinic and indicted for illegal distribution of drugs resulting in patient deaths and other offenses. Originally the trial was expected to take eight weeks to complete, however, the district judge advised counsel to limit their witness lists so the trial could be completed within four to five weeks. The judge ruled that the government would only be permitted to present evidence pertaining to certain victims, thus excluding potential repetitive evidence and speeding up the trial. The government brought an interlocutory appeal.

The Tenth Circuit held that, with the exception of a district court making a decision subject to constitutional protections, the court “may not interfere with the prosecutorial function.” In this case, the district court impermissibly interfered with “the government’s ability to prosecute criminal activity” and is not entitled to do so “any more than it can intrude upon a defendant’s opportunity to defend.” Pretrial orders are vacated and case is remanded. *U.S. v. Schneider*, 594 F.3d 1219 (10th Cir. 2010).

Other Circuits

Forfeiture of gun dealer’s inventory not disproportionate to the crime

A licensed gun dealer convicted of unlawful use of drugs was properly ordered to forfeit his inventory of hundreds of firearms. The Third Circuit emphasized that given the potential risk posed by the combination of drugs and guns, the forfeiture was not grossly disproportionate to the crime. Affirmed. *U.S. v. Cheeseman*, 2010 WL 699550 (3d Cir. 2010).

Other States

Doctrine of nonmutual collateral estoppel abandoned

Dustin William Sparks was charged with two felony murders. Prior to his case coming to trial two other people were tried for the same murders. One person was convicted of voluntary manslaughter but the other was acquitted. Concerned about the possibility of inconsistent verdicts, the trial court cited to *People v. Taylor*, 527 P.2d 622 (Cal. 1974), and ruled that the verdicts prohibited Sparks from being tried for any crime greater than voluntary manslaughter.

The California Supreme Court overruled *Taylor* and reasoned that case law since *Taylor*, including U.S. Supreme Court opinions, had “undermined *Taylor*’s reasoning and

the authority on which it relied.” Accordingly, the doctrine of “nonmutual collateral estoppel” established in *Taylor*, was abandoned. The court further explained that a verdict of one defendant should have no impact on the trial of another defendant. The Court of Appeal judgment setting aside the trial court’s ruling is affirmed. *People v. Superior Court*, 48 Cal. 4th 1 (Cal. 2010).

Testimony by someone other than lab report preparer meets confrontation clause requirement

Donald Bullcoming appealed his conviction of fourth-degree felony aggravated DWI. He argues, among other issues, that a laboratory report of Bullcoming’s blood draw results is testimonial evidence and subject to his Sixth Amendment right to confrontation. As such, he claims his rights were violated because the analyst who testified before the court was not the one who conducted the testing and prepared the report.

The New Mexico Supreme Court held that Bullcoming’s rights were not violated by the admission of the report. It reasoned that the analyst was simply required to transcribe the generated results from the gas chromatograph machine without the need for any additional interpretation, judgment or methodology. In addition, the analyst who testified came from the same lab and was an expert regarding the gas chromatograph machine which provided Bullcoming with the opportunity for an in-depth cross-examination. Accordingly, the analyst’s presence and testimony was sufficient to satisfy the rights afforded by the confrontation clause. Conviction affirmed. *State v. Bullcoming*, 226 P.3d 1 (N.M. 2010).

End of BRIEFS



18 Month MCLE Compliance Period



~~REMINDER~~

(Don't get caught on July 1st with your CLE down!)

Notice has been sent out by the MCLE Office and by UPC that the MCLE Office is in the process of changing compliance years from a calendar year to a fiscal year – July 1 - June 30. In order to accomplish this, the MCLE Board has shortened the current compliance period for all attorneys licensed to practice in Utah to 18 months. It works as follows.

EVEN YEAR COMPLIANCE (Those who's last reporting cycle ended December 31, 2008.)	Your current MCLE compliance period began on January 1, 2009, and will end on June 30, 2010 . Your MCLE compliance report will be due by July 31, 2011.
ODD YEAR COMPLIANCE (Those who's last reporting cycle ended December 31, 2009.)	Your current MCLE compliance period began on January 1, 2010, and will end on June 30, 2011 . Your MCLE compliance report will be due by July 31, 2011.

During these shortened compliance periods only, each attorney must obtain 18 hours of MCLE approved training, including one hour of Ethics/Professional Responsibility AND one hour of Civility/Professionalism. Unlike past years, civility credit does not cover your general ethics requirement, or vice versa.

So, How Can I Pick Up the Hours I need?

UPC's Spring Conference: April 22-23, South Towne Expo Center, 9575 South State Street, Sandy. Case Law Update, 2010 Legislative Update, Civility and more.

UPC/SWAP/POST: Legislative update sessions will be presented in almost all counties of the Regional Legislative state during late April and early May; two hours CLE credit per session. Update Sessions: Watch for your brochure in the mail.

Self Study: UPC has a wide variety of self study lectures available, either on DVD or on-line. No charge.

2009 Fall Prosecutors Training Conference and the 2009 Government Civil Practice Conference (on-line): Go to the UPC website: www.upc.utah.gov, go to the right side and click on 2009 Fall and Civil Training Videos. Make sure to note the user name and password so you will be able to gain access.

UPC website: Select from a wide variety of lectures from the National Advocacy Center. Those are available on DVD. To borrow a DVD call UPC at (801) 366-0202.

Utah State Bar: Go to <http://www.legalspan.com/utah/catalog.asp>. There the Utah State Bar has a large number of MCLE approved presentations on a wide variety of topics. NOTE: the Bar charges a fee to watch these presentations.





On the Lighter Side

Angels *(As explained by children)*

I only know the names of two angels, Hark and Harold. (age 5)

Everybody's got it all wrong because angels don't wear halos anymore. I forget why, but some scientists are working on it. (age 9)

It's not easy to become an angel! First, you die. Then you go to Heaven, and then there's still the flight training to go through. And then you got to agree to wear those angel clothes. (age 9)

My guardian angel helps me with math, but he's not much good for science. (age 8)

Angels don't eat, but they drink milk from Holy Cows!!! (age 6)

When an angel gets mad, he takes a deep breath and counts to ten. And when he lets out his breath, somewhere there's a tornado. (age 10)



Angels have a lot to do and they keep very busy. If you lose a tooth, an angel comes in through your window and leaves money under your pillow. Then

when it gets cold, angels go south for the winter. (age 6)

All angels are girls because they gotta wear dresses and boys didn't go for it. (age 9)

My angel is my grandma who died last year. She got a big head start on helping me while she was still down here on earth. (age 9)

Some of the angels are in charge of helping heal sick animals and pets. And if they don't make the animals get better, they help the child get over it. (age 8)

What I don't get about angels is why, when someone is in love, they shoot arrows at them. (age 7)

DO YOU HAVE A JOKE, HUMOROUS QUIP OR COURT EXPERIENCE?

We'd like to hear it! Please forward any jokes, stories or experiences to mwhittington@utah.gov.

Submission does not ensure publication as we reserve the right to select the most appropriate material available and request your compliance with copyright restrictions. Thanks!

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UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 22-23	SPRING CONFERENCE <i>Caselaw update, legislative update and more</i>	South Towne Center Sandy, UT
April & May	STATEWIDE REGIONAL LEGISLATIVE UPDATES	23 Locations statewide
June 24-25	UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE <i>Outstanding training for non-attorney staff in prosecution offices</i>	University Marriott Salt Lake City, UT
August 5-6	UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONFERENCE <i>For all prosecutors whose caseload consists primarily of misdemeanors</i>	Zion Park Inn Springdale, UT
August 16-20	BASIC PROSECUTOR COURSE <i>A must attend course for all new prosecutors, or those new to prosecution</i>	University Inn Logan, UT
September 22-24	FALL PROSECUTOR CONFERENCE <i>The annual fall professional training event for all Utah prosecutors</i>	Yarrow Hotel Park City, UT
October 20-22	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>For public attorneys who work the civil side of the office</i>	Moab Valley Inn Moab, UT
November 17-19	ADVANCED TRIAL ADVOCACY SKILLS COURSE <i>Advanced training for those with 5+ years and lots of trials under their belt</i>	Hampton Inn & Suites West Jordan, UT

NATIONAL COLLEGE OF DISTRICT ATTORNEYS (NCDA)*
AND OTHER NATIONAL CLE CONFERENCES

April 25-29	EVIDENCE FOR PROSECUTORS	Agenda	Register	San Francisco, CA
May 16-20	OFFICE ADMINISTRATION	Agenda	Register	Rancho Barnardo, CA
May 17-21	EQUAL JUSTICE FOR CHILDREN <i>Investigation and prosecution of child abuse</i>	Agenda	Register	Charleston, SC
June 6-16	CAREER PROSECUTOR COURSE			Charleston, SC
July 11-14	NDAA SUMMER CONFERENCE			Napa, CA
August 23-27	STRATEGIES FOR JUSTICE		Register	National Harbor, MD
Sept. 27– Oct. 1	SAFETYNET	Draft Agenda		Easton, MA

For a course description, click on the course title (if the course title is not hyperlinked, the sponsor has yet to put a course description on-line). If an agenda has been posted there will be an “[Agenda](#)” link next to the course title. Registration for all NDAA sponsored courses is now on-line. To register for a course, click either on the course name or on the “[Register](#)” link next to the course name.

NATIONAL ADVOCACY CENTER (NAC)

A description of and application form for NAC courses can be accessed by clicking on the course title.

Effective February 1, 2010, The National District Attorneys Association will provide the following for NAC courses: course training materials; lodging [which includes breakfast, lunch and two refreshment breaks]; and airfare up to \$550. Evening dinner and any other incidentals are NOT covered. For specifics on NAC expenses [click here](#). To access the NAC on-line application form [click here](#).

See the matrix

[BOOTCAMP](#)

[Register](#)

A course for newly hired prosecutors

NAC
Columbia, SC

Course Number	Course Dates
04-10-BCP	April 23-16
05-10-BCP	June 14-18
06-10-BCP	August 9-13

April 25-30

[childPROOF](#)

[Register](#)

Advanced trial advocacy for child abuse prosecutors

NAC
Columbia, SC

See the matrix

[TRIAL ADVOCACY I](#)

[Register](#)

A practical "hands-on" training course for trial prosecutors

NAC
Columbia, SC

Course Number	Course Dates
04-10-TAI	May 3-7
05-10-TAI	June 7-11
06-10-TAI	July 12-16
07-10-TAI	August 16-20
08-10-TAI	September 27 - October 1

August 3-6

[CROSS EXAMINATION](#)

[Register](#)

An in-depth examination of the theory and method of effective cross

NAC
Columbia, SC

August 23-27

[UNSAFE HAVENS II](#)

[Register](#)

Advanced trial advocacy training for prosecution of technology-facilitated Child sexual exploitation cases

NAC
Columbia, SC

September 13-17

[COURTROOM TECHNOLOGY](#)

[Register](#)

Upper level PowerPoint; Sanction II; Audio/Video Editing (Audacity, Windows Movie Maker); 2-D and 3-D Crime Scenes (SmartDraw, Sketchup); Design Tactics

NAC
Columbia, SC