

The

# PROSECUTOR



## RECENT CASES

### United States Supreme Court

#### Exigency Exception Valid as long as Officers Don't Violate 4th

After smelling marijuana just outside defendant's apartment door, police knocked and announced their presence. They entered without a warrant after hearing scurrying around inside the apartment, indicating that the suspects were destroying evidence. The Kentucky Supreme Court excluded the evidence claiming that the police

created the exigency because they should have foreseen the suspects' action. However, the U.S. Supreme Court overruled, holding that the warrantless entry was justified even when police created the exigency, so long as the officers did not violate or threaten to violate the Fourth Amendment. *Kentucky v. King*, 563 U. S. \_\_\_\_ (2011)

#### States Immune from Inmate Religious Freedom Lawsuits for Damages

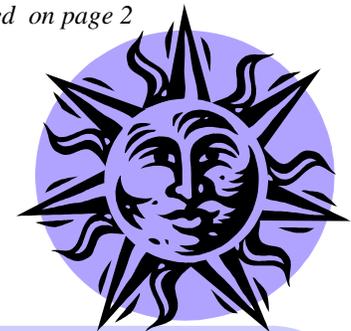
Prisoners may not sue states for money damages for violations of the federal statute that limits the states' power to impose burdens on inmates' exercise of religion, the U.S. Supreme Court held. The provision of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000, that authorizes "appropriate relief" for states' violations of religious rights

does not constitute the necessary "unequivocal expression of state consent" to waive sovereign immunity against inmate lawsuits for damages. *Sossamon v. Texas*, U.S., No. 08-1438, 4/20/11

#### Penalty Phase Jury Instruction Not Unfair

An Ohio instruction directed the jurors at the penalty phase of a capital trial not to deliberate on which noncapital sentence to impose until after they had first decided to acquit the defendant of the death penalty. The U.S.

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Supreme Court held that federal habeas corpus relief is not available to state prisoners on the basis of a challenge to such a jury instruction. *Bobby v. Mitts*, U.S., No. 10-1000, 5/2/11

## Utah Supreme Court

### Law Governing Procedure Is the Law in Effect at the Time of the Procedural Act

Two crime victims appealed a trial court's decision to not require the Utah Division of Child and

Family Services ("DCFS") to pay their treatment costs. The Utah Supreme Court held that appellants lacked a statutory right to appeal. Utah Code section 77-38-11(2)(b) gives crime victims a right to appeal, however, such section had been repealed by the legislature for a one year period during which appellants appealed. The Court reasoned that when it comes to the parties' procedural rights, the law governing the underlying procedural act is the law in effect at the time of the procedural act, not at the time that the parties' substantive claims arose. *Utah v. Clark*, 2011 U T 23

### Sandy City Loses Water Rights after Failure to Record Deed

Sandy City recorded an "Agreement of Sale" for a water right in 1977, but did not record the deed until 2004. The Haik Parties purchased the same water right in 2003 and recorded their deed that year. The Utah Supreme Court concluded that although the Agreement of Sale put the Haik Parties on record notice that Sandy City had an equitable interest in the water right, the Haik Parties first recorded their deed to the disputed water right and did so in good faith. *Haik v. Sandy City*, 2011 UT 26

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#### United States Supreme Court (p. 1)

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*Sossamon v. Texas*- States Immune from Inmate Religious Freedom Lawsuits for Damages  
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#### Utah Appellate Court (p. 3, 5)

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#### Other Circuits / States (p. 8)

*Harris v. State*- Reliability Standard for Drug-Detection Dogs  
*Griffin v. State*- Evidence on Social Networking Sites Should Be Carefully Authenticated  
*State v. Beauchamp*- Dyeing Declaration Exception Survives  
*Lampton v. Diaz*- Limits on Prosecutorial Immunity  
*Gruwell v. State*- Expert Testimony on Pedophile Personality Traits is Character Evidence

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## Ineffective Assistance Found

The Utah Supreme Court concluded that Lenkart's trial counsel rendered ineffective assistance because his failure to analyze a Code R kit, after being asked to by Lenkart during his rape trial, constituted deficient performance. Furthermore, such performance prejudiced Lenkart because a later examination concluded that the results of the Code R kit were more consistent with Lenkart's testimony, evidence that would have changed the entire evidentiary picture at trial. *Utah v. Lenkart*, 2011 UT 24

## Utah Court of Appeals

### Judges Have Discretion to Dismiss Case Even When Defendant Found Incompetent

After a trial court dismissed a case, the State appealed, arguing that Utah Code section 77-15-6 requires that defendants found incompetent to stand trial be committed into custody for the purpose of treatment intended to restore competency. The Appellate Court affirmed, concluding that section 77-15-6 does not eliminate the district court's discretion to dismiss a criminal case "for substantial cause and in furtherance of justice," see Utah R. Crim. P. 25

(a), even when such a dismissal might coincide with an initial competency determination. *Utah v. White*, 2011 UT App 155

### Civil Stalking Injunction Requirements

After having a civil stalking injunction entered against her, one of Osburn's arguments was that the trial court failed to find that all of the criminal stalking statute elements were met. The appellate court affirmed, concluding that there is no requirement that the trial court find that the victim was actually afraid or distressed. Utah Code Ann. Section 76-5-106.5(2) (2008). *Bott v. Osburn*, 2011 UT App 139



In a similar case, the appellate court affirmed the trial court's civil stalking injunction against Defendant because Defendant engaged in a course of conduct, comprised of two or more incidents, that would cause a reasonable person to fear for his safety. Utah Code Ann. Section 76-

5-106.5(1)(b). In isolation, one of the two incidents comprising the course of conduct would have been insufficient to cause a reasonable person to fear. However, the court reasoned that the two incidents in conjunction with each other did reach the statute's threshold. *Coombs v. Dietrich*, 2011 UT App 136



### An Interrogator's Emphasis on Benefits of Honesty Could Interfere with Voluntariness

On appeal for his attempted aggravated murder conviction, one of Featherhat's arguments was that his mirandized statements were not made voluntary due to the interviewer's statements about why Featherhat should be honest. The Appellate Court affirmed, holding that while an interviewer's emphasis on the benefits of honesty and cooperation could muddy a defendant's understanding about how his statements could be used against him, in this case the totality of the circumstances supported a knowing and voluntary waiver. *Utah v. Featherhad*, 2011 UT App 154

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# PROSECUTOR PROFILE



## Lana Taylor

Assistant Attorney General

When it comes to Law Enforcement, Lana Taylor gets it. As a child, she wanted to grow up to be a police officer, but she didn't want to have to touch the criminals. Hence, being a prosecutor was the next best thing. Though her family told her she would make more money if she got a MBA instead, Lana decided to go to law school after she

participated in her first mock trial in 9<sup>th</sup> grade.

As an Assistant Attorney General, she is currently assigned as legal counsel for the Utah Department of Public Safety. She initially began as a prosecutor in the Meth Unit at the DEA Metro Narcotics Task Force and then worked some time in the Insurance Fraud Section.

Before being hired at the AG's office, Lana worked at the DA's office as a prosecutor for almost 8 years. While there, she had the opportunity to prosecute a wide variety of cases including misdemeanors, cases in juvenile court, as well as felony drug crimes and homicides.

Lana grew up in Bountiful, Utah as the youngest in her family (as you can tell from the picture, her family is very close and spends a lot of time together). She is a big Runnin' Utes fan. She often travels to other states to watch their 'away' games, which means she'll be familiarizing herself with new PAC 12 cities this year.

For Lana, the most satisfying aspect of her job is working with law enforcement to ensure that officers understand the statutory and constitutional requirements of police work. She enjoys being able to work with prosecutors to resolve issues as they arise. Every day she comes to work, there is a new challenge that requires creative solutions.

Staying true to her childhood ambitions, Lana is assigned to work directly with various law enforcement agencies, which gives her a unique perspective on what goes into an investigation and a better understanding of the nature of the criminal activity that is being prosecuted. One important lesson she has learned over her years of prosecuting is to not be afraid to fight the fight just because it will require a lot of time and effort or there is a chance of losing.



NICKMANE - LT

FAVORITE HOBBIES -  
Watching football, reading,  
watching movies, going to  
concerts

FAVORITE MUSIC - Dwight  
Yoakam

FAVORITE BOOK - *A Room of  
One's Own* by Virginia Woolf

FAVORITE T.V. SERIES -  
Sex and the City

FAVORITE MOVIE - *Gone with  
the Wind*

FAVORITE CARTOON AS A  
KID - Ed Grimley

LAST BOOK READ - *Other  
Voices, Other Rooms* by Truman  
Capote.

FAVORITE QUOTE - "Nothing  
great was ever achieved without  
enthusiasm." Ralph Waldo  
Emerson



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## Clarification on When Thirty Day Period to Appeal Begins

The Appellate Court was asked to determine when the thirty day period to appeal began for Grant. It held that the final, appealable judgment that commenced the running of the time for appeal was the Judgment and Commitment to the Utah State Prison entered on April 16, 2010, since it satisfied the requirements of rule 22(c)(1) and (d). Because the Minutes—Sentence, Judgment, Commitment entered on May 7, 2010, did not include a material modification, it did not extend the time for appeal. *Utah v. Grant*, 2011 UT App 158.

## Wide Discretion Given to Trial Court's Factual Finding

A trial court found that Hughes had jaywalked and therefore his detention by an officer was justified. Hughes appealed, noting that the officer's testimony should be viewed as suspect because it occurred almost 10 months earlier and his report made no mention of Hugh's jay walking. However, the appellate court affirmed, refusing to

second-guess the trial court's factual finding. *Salt Lake City v. Hughes*, 2011 UT App 128

## Guilty Plea Withdrawals Must Be Filed Before Sentencing

If a motion to withdraw a guilty plea is not filed prior to sentencing, the Utah Appellate Court lacks jurisdiction over a direct appeal to review the validity of the plea. Instead, any such challenge should be pursued under the Post-Conviction Remedies Act. *Utah v. Smith*, 2011 UT App 124

## Tenth Circuit Court of Appeals

### Reliability Standard for Drug-Detection Dogs

Two appellate courts came to very different conclusions as to what the reliability standard should be for drug-detection dogs used to generate probable cause to conduct warrantless vehicle searches. The Tenth Circuit held that so long as a



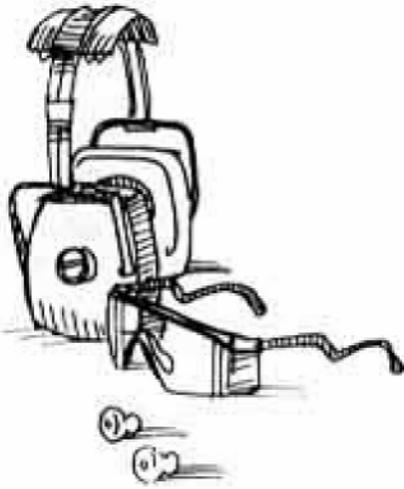
dog was certified by a legitimate credentialing organization, courts need not look further. By contrast, the Florida Supreme Court decided that merely establishing that a dog has been certified to detect illegal drugs is not enough. Likening a drug-detection dog to an informer, the state court said there must be a reasonable basis for believing the individual dog to be reliable on the basis of the totality of the circumstances, including the dog's record in the field. *United States v. Ludwig*, 10th Cir., No. 10-8009, 4/22/11, and *Harris v. State*, Fla., No. SC08-1871, 4/21/11



### Check Does Not Have to Be Cashed To Meet Money Laundering Elements

A defendant who obtains the proceeds from a fraudulent scheme in the form of a check commits money laundering when he or she deposits the check into a bank account, the Tenth Circuit held. The court disagreed with the argument that Defendants do not receive the proceeds until after the check has been cashed and, therefore, depositing the check would not constitute a transaction involving the proceedings of a crime for purposes of 18 U.S.C. §1957. *United States v. Huff*, 10th Cir., No. 10-4079, 4/19/11

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# 2011 LEOJ Course

--June 15, 16, 17, 2011

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

--Camp Williams, Salt Lake County

This is the only course that will qualify a judge, Board of Pardons member, or prosecutor, for the LEOJ CCW permit. *See* Utah Code Ann. § 53-5-7 1 1(2)(b). Advance registration is required.

To register, contact Ken Wallentine by email,

[KenWallentine@Utah.gov](mailto:KenWallentine@Utah.gov). There is no fee for the training.

Participants must supply their own eye and ear protection, ammunition, and firearm. Space is limited, registration accepted on *first come, first served*, basis.

*\*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.

# All The Facts, Ma'am - - - Or What The Board of Pardons Needs From You

**By: Angela Micklos, Vice Chair, Utah Board of Pardons & Parole**



The mission of the Board of Pardons and Parole is to further public safety by rendering just decisions regarding the length of incarceration, parole supervision, termination of sentence, and commutation of sentence and pardons. The Board embraces the following values necessary to accomplish this mission: to provide optimum protection of the public and safeguard the rights, privileges and interests of victims and offenders; to make consistent, rational, and careful decisions, without regard to race, color, religion, gender, political affiliation, or national origin, on the merits of each case, taking into account aggravating and mitigating circumstances; to provide service in the most cost effective, efficient manner; and, to respond to all inquiries in a timely fashion and to work with other agencies to find solutions to problems.

Imagine trying to fulfill these goals without a complete picture of the underlying crime(s). It's not an easy task. As we lack a crystal ball, ample information is our best tool to ensure that we make appropriate and fair decisions that reflect our mission and values, and serve the greater public in a consistent fashion. Most prosecutors (and defense attorneys) would agree that there's no such thing as too much information. How many times do attorneys lament a jury's decision because the jury didn't get to hear "the whole story" or "the rest of the story?" The Board is in the same boat. We need "the whole story" in order to reach just decisions that balance the interests of the offender, the victim, and society. Although the Department of Corrections supplies us with information regarding each inmate's post-incarceration behavior, the Presentence Report prepared by AP&P is the only document about the criminal offense(s) that we receive as a matter of course. We routinely request information in advance of parole hearings, but we often don't receive documents in time to aid us in preparing for and conducting hearings. If we receive documents after the hearing, we must delay reaching a decision until we've afforded the inmate an opportunity to review and respond to the newly acquired information. While we're happy to do this (and in fact, our rule requires us to do such), it's certainly not the most efficient, nor is it preferable to having the information in advance of the hearing. The sooner we receive "the whole story", the more time we have to digest the pertinent facts and refer to and/or confront the inmate with them during parole hearings. As in litigation, preparation is the key to a meaningful hearing that will undoubtedly yield the best possible decision.

Therefore, our plea to both prosecutors and defense counsel is this: please, please, please send us police reports, charging documents, mental health reports, medical reports, relevant photos, autopsy reports, and any other item(s) that may be relevant to our decision. If there are specific facts that you consider aggravating or mitigating, we'd like to hear about those as well. These documents are especially critical in serious person crimes where public safety is clearly impacted. It seems that the most logical time to accomplish this task is on the date of sentencing - - - assuming the defendant is sent to prison. This will negate a future need to dig up your file, blow off the dust, request it from archives, . . . etc., so hopefully it'll pose a minimal burden to you and your agency. You may either fax the documents to (801) 261-6481, or scan and email them to Dona Kim at [dkim@utah.gov](mailto:dkim@utah.gov). If you have any questions or concerns, please feel free to contact me at (801) 261-6447 or [amicklos@utah.gov](mailto:amicklos@utah.gov). Thanks in advance for your cooperation and understanding.



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## Other Circuits/ States

### Evidence on Social Networking Sites Should Be Carefully Authenticated

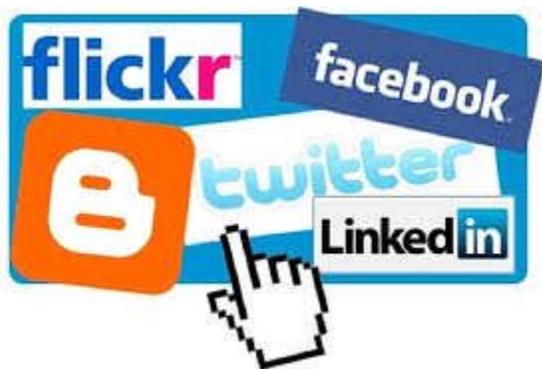
An investigator's testimony that he accessed a MySpace page displaying a person's photograph and birth date was not sufficient to authenticate the page and a wall posting on it as having been created by that person. The Maryland Court of Appeals emphasized that

postings to a page on a social networking site should be carefully authenticated due to risks of unauthorized account access. *Griffin v. State*, Md., No. 74, 4/28/11

### Dyeing Declaration Exception Survives

Although Americans live in a society more secular than the one in which the dyeing declaration exception originated, such a change in beliefs cannot justify eliminating the hearsay exception, the Wisconsin Supreme Court held.

The court refused to create a per se prohibition against dying declarations on the grounds that such statements are in almost all cases uncontroverted. *State v. Beauchamp*, Wis., No. 2009AP806-CR, 5/3/11



### Limits on Prosecutorial Immunity

Absolute prosecutorial immunity does not apply to a U.S. attorney's post-trial transfer of private federal tax records to a state ethics commission, the Fifth Circuit held. Prosecutorial immunity does not extend "to post-trial conduct relating to a new action before a new tribunal." *Lampton v. Diaz*, 5th Cir., No. 10-60437, 4/18/11

### Expert Testimony on Pedophile Personality Traits is Character Evidence

Proposed expert testimony that a defendant charged with molesting a child lacks the personality traits common among pedophiles is not analogous to "framework" evidence, and is therefore governed by the general rule on character evidence, the Wyoming Supreme Court held. *Gruwell v. State*, Wyo., No. S-10-0168, 4/18/11

## The Utah Prosecution Council

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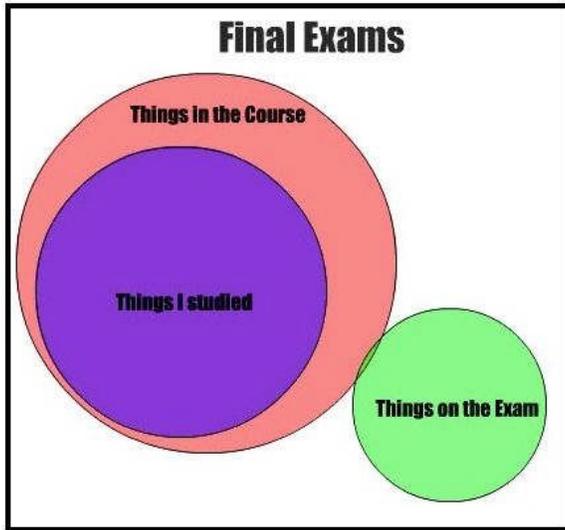
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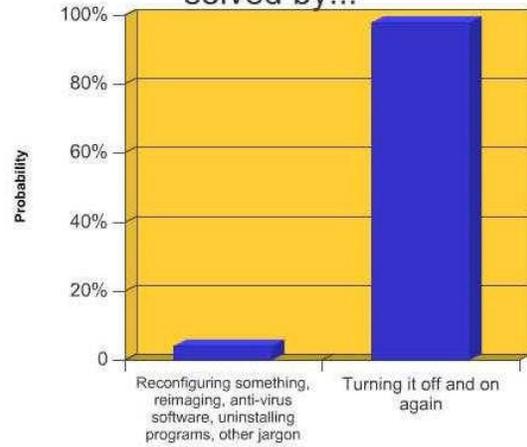
[www.upc.utah.gov](http://www.upc.utah.gov)



# On the Lighter Side

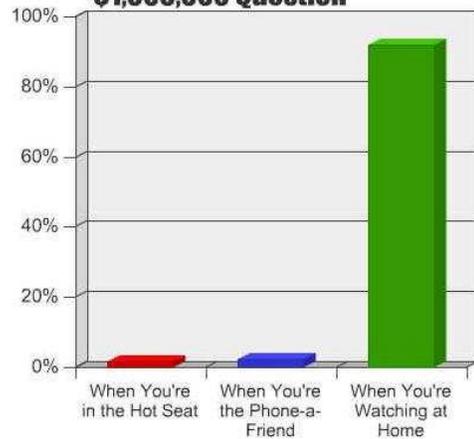


Likelihood of a computer issue being solved by...



Problem-solving technique

Likelihood of You Knowing the Answer to the \$1,000,000 Question



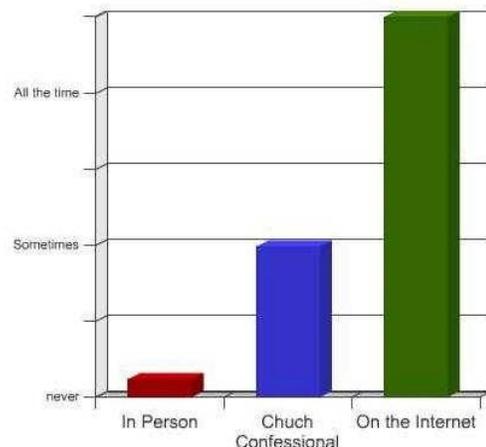
What I do while waiting for my toast to pop up



Content of a Pop Song



People show their true feelings...



## UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

June 23-24	<a href="#">UTAH PROSECUTORIAL ASSISTANTS ASSOCIATION CONFERENCE</a> <i>Substantive training for non-legal staff in prosecution offices</i>	Riverwood Conf. Cntr. Logan, UT
August 4-5	<a href="#">UTAH MUNICIPAL PROSECUTORS ASSOCIATION SUMMER CONF.</a> <i>The annual opportunity for municipal prosecutors to gather for mutual training</i>	La Quinta Inn Moab, UT
August 15-19	<a href="#">BASIC PROSECUTOR COURSE</a> <i>Substantive and trial advocacy training for new and newly hired prosecutors</i>	University Inn Logan, UT
September 14-16	<a href="#">FALL PROSECUTOR TRAINING CONFERENCE</a> <i>The annual training and interaction event for all the state's prosecutors</i>	Yarrow Hotel Park City, UT
October 19-21	<a href="#">GOVERNMENT CIVIL PRACTICE CONFERENCE</a> <i>Training and interaction for civil side public attorneys</i>	Zion Park Inn Springdale, UT
November 17-18	<a href="#">COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR</a> <i>Elected and appointed county/district attorneys meet in conjunction with UAC</i>	Dixie Center St. George, UT
Nov. 30 - Dec. 2	<a href="#">ADVANCED TRIAL SKILLS TRAINING</a> <i>Substantive and trial advocacy training for experienced prosecutors</i>	Location pending

## National Advocacy Center (NAC)

**THE NAC IS CLOSING**

***The last courses scheduled to be held at the National Advocacy Center are Unsafe Havens II, August 22-26, and Lethal Weapon, September 12-16. All other previously listed NAC courses have been canceled. The National District Attorneys Association is working to establish another center for prosecutor training. It will provide details as the plan develops. 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.***

August 21-26	UNSAFE HAVENS II <i>Advanced Trial Ad Training for Prosecution of Technology-Facilitated Child Sexual Exploitation</i>	<a href="#">Summary</a>	Columbia, SC
September 12-16	LETHAL WEAPON <i>Advanced trial ad training and substantive instruction in auto homicide prosecution</i>	<a href="#">Summary</a>	Columbia, SC

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES\*  
AND OTHER NATIONAL CLE CONFERENCES

June 5-14	CAREER PROSECUTOR COURSE	<a href="#">Summary</a>	<a href="#">Register</a>	Charleston, SC
June 20-24	UNSAFE HAVENS I	<a href="#">Summary</a>	<a href="#">Register</a>	Portland, OR
July 11-13	<a href="#">SafetyNet</a> (In conjunction with AOL) <i>Addresses multiple areas within the investigation and prosecution of technology-facilitated child sexual exploitation. All applicants <b>must</b> be affiliated with an ICAC Task Force to be considered. There is no registration fee for this course.</i>	<a href="#">Summary</a>		Dulles, VA
July 15-20	<a href="#">NDAA SUMMER COMMITTEE &amp; BOARD MEETINGS &amp; CONFERENCE</a>			Sun Valley, ID
July 27-30	<a href="#">ASSN. OF GOVERNMENT ATTORNEYS IN CAPITOL LITIGATION</a> <i>Perhaps the best annual training for prosecutors handling a capitol case</i>			New Orleans, LA
Aug - Sept	<a href="#">DEMYSTIFYING SMART DEVICES</a>			Location Pending
September 26-30	STRATEGIES FOR JUSTICE <i>Advanced Investigation and Prosecution of Child Abuse and Exploitation</i>	<a href="#">Summary</a>	<a href="#">Register</a>	Denver, CO

\* For a course description, click on the “[Summary](#)” link after the course title. If an agenda has been posted there will also be an “[Agenda](#)” link. Registration for all NDAA courses is now on-line. To register for a course, click on the “[Register](#)” link. If there are no “[Summary](#)” or “[Register](#)” links, that information has not yet been posted on the NDAA website.