

The PROSECUTOR



RECENT CASES

Utah Supreme Court

Parameters of When State Must Provide Indigent Defendants with Funding

The Utah Supreme Court held that under the Utah Indigent Defense Act, an indigent defendant who is represented by retained counsel need not show a compelling reason in order to obtain county-paid necessary defense services, such as investigative and expert witness fees.

State v. Parduhn, 2011 UT 55

LDA Must Be Present During Hearing Regarding Funding for Indigent Defendant

Judge Atherton ordered LDA to provide the defendant funding for an expert witness. However, the Utah Supreme Court vacated the order, holding that Judge Atherton violated LDA's right to due process by giving the order without giving LDA notice or an opportunity to be heard. *LDA v. Atherton*, 2011 UT 58

Warrant to Draw Blood Upheld

At a pretrial hearing, the district court concluded that the warrant issued to draw blood from the appellant lacked probable cause. However, viewing the facts contained in the affidavit in light of the totality of the circumstances, and with deference to the issuing magistrate, the Utah Supreme Court concluded that the magistrate had a substantial basis to believe that

evidence of a crime would be found in the defendant's blood. *State v. Walker*, 2011 UT 53

Post Conviction Relief Claim Fails

After being convicted of murdering his child's baby-sitter, Johnson appealed the dismissal of his petition for post conviction relief. However, the Utah Supreme Court concluded that the district court correctly dismissed Johnson's petition because his claims were either frivolous, previously adjudicated, or procedurally barred by statute. *Johnson v. State*, 2011 UT 59

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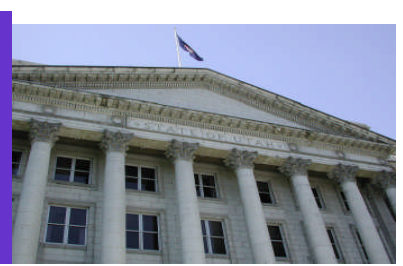
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Utah Court of Appeals

Separate Factual Basis Needed to Convict for Both Agg Assault and Intent to Assault

Berriell was convicted of agg assault and possession of a deadly weapon with intent to assault for attacking Rachel's boyfriend after learning that the boyfriend was physically abusing Rachel. On appeal, Berriell argued that the trial court erred in refusing to give a defense instruction to the jury. However, the court affirmed because there was no evidence that Rachel

was in imminent danger at the time Berriell attacked the boyfriend.

But the court did vacate Berriell's conviction for possession of a deadly weapon with an intent to assault, holding that the jury was not clearly informed that it had to find a separate factual basis for the possession of a deadly weapon with intent to assault conviction beyond the possession necessary to commit the aggravated assault. *State v. Berriell*, 2011 UT App 317

Statute of Limitations Is An Affirmative Defense That Can Be Forfeited

Jackson appealed, arguing that

prosecution of his charge was barred by the expiration of the statute of limitations. The appellate court first held that Unlawful Sexual Conduct is not a lesser included offense of rape, and therefore the longer statute of limitations for rape was not applicable to Jackson's prosecution for Unlawful Sexual Conduct.

However, the court went on to hold that a criminal statute of limitations is an affirmative defense that can be forfeited if not raised before or during trial, and therefore Jackson forfeited his right to make such a challenge. *State v. Jackson*, 2011 UT App 318

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Def Not Immediately Req'd To Articulate Legal Grounds Upon Guilty-Plea Withdrawal

The district court denied Ferretti's motion to withdraw his guilty plea moments before sentencing. In overruling, the appellate court acknowledged that their decision potentially allows criminal defendants to postpone their sentencing hearings at the eleventh hour, possibly resulting in cost and inconvenience to the State and court.

However, pursuant to both the terms of Ferretti's plea deal and the governing statute, Ferretti's motion to withdraw was timely, and the district court's requirement that Ferretti immediately identify valid legal grounds for withdrawal compromised his rights to effective assistance of counsel. *State v. Ferretti*, 2011 UT App 321



Defendant Did Not Conspire with Officials to Deprive Plaintiff of Rights

Pintar's irrigation resulted in flooding on the neighboring

Houcks' land after the Houcks made changes to their property. An altercation resulted, after which the Houcks contacted the Sheriff's Office which then charged Pintar with disorderly conduct. On appeal, the court affirmed the trial court's decisions of dismissal and summary judgment against Pintar's claims that the Houcks and Utah County Officials conspired to deprive Pintar of his constitutional rights.

However, the court did reverse the district court's grant of summary judgment to the Houcks on the Pintar's claim for declaratory relief and remanded it for further proceedings to determine whether the Pintar's use of irrigation water was reasonable. *Pintar v. Houck*, 2011 UT App 304

Sentencing Upheld

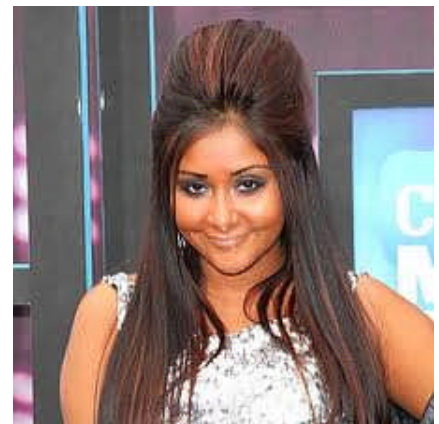
After being convicted for violently assaulting three deputies while incarcerated, Duran appealed the sentencing arguing that he should have been sentenced to probation rather than prison. The appellate court affirmed, reasoning that the trial court adequately considered all legally relevant factors in reaching its sentencing decision. *State v. Duran Jr.*, 2011 UT App 319

Disorderly Conduct Conviction Upheld

Tatton challenged her conviction for disorderly conduct. However, the appellate court affirmed,

holding that Tatton's actions of yelling at a driver and blocking the driver's attempts to leave, thus extending—rather than terminating—the driver's trespass, was indeed disorderly conduct.

The court also found that the trial court did not err in refusing to give a number of jury instructions, and that her "vagueness" argument was not clearly presented or adequately supported. *Layton City v. Tatton*, 2011 UT App 334



Parameters of When Order is Finalized So That It May Be Appealable

The appellate court dismissed an appeal pursuant to the Utah Supreme Court's decision in *Giusti*, which says: to be appealable, a minute entry or order contemplated as final by the district court "must explicitly direct that no additional order is necessary." Otherwise, when the district court does not expressly direct that its order is final, rule 7(f)(2) of the Utah Rules of Civil Procedure requires the prevailing party to file an order to

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PROSECUTOR PROFILE

Bernadette Gomez

Deputy Salt Lake District Attorney

Bernadette's life prepared her to be an effective, compassionate prosecutor; though it may not look like it at first glance.

Her first job, while a teenager, was working as a lifeguard at a public swimming pool in San Diego. Growing up, Bernadette wanted to be an interior decorator. She even spent several years as a licensed hairstylist. Then later, at the University of Washington, Bernadette double majored in environmental science and human behavior. So how does a lifeguard-trained, hair-styling, California-grown, Northwest-educated girl end up as a prosecutor in Salt Lake City?

Well, through it all, Bernadette always had a strong sense of justice, which led to her desire to go to law school. When she told her family about her desire, her uncle said, "What are you going to do with that BA degree if you don't get into law school?"

While a law student at the University of Utah, Bernadette worked as a law clerk at the Salt Lake County District Attorney's Office. It was then when she realized that she wanted to do trials and help make the community safer; in other words, become a prosecutor. Bernadette has now been a prosecutor for six years and is currently assigned to the Violent Felonies unit at the Salt Lake DA's Office.

One of Bernadette's favorite trial memories was during a DUI jury trial where she played the video of the FSTs. The officer had forgotten to turn down his music during the traffic stop and the music played loudly during the whole video. The song was called, "Through Glass," and the lyrics were something like, "I'm looking at you through the glass, I don't know how long it will last but it seems like forever."

On a more serious note, Bernadette believes that the most significant contributor to the type of prosecutor she has become resulted from her relationship with her father, who spent most of his life homeless and suffering from schizophrenia while self-medicating with alcohol. He had a lot of experience in the criminal justice system, and even spent time in prison, which Bernadette attributes to why his mental illness went untreated. When she visited him at the Seattle VA hospital in 1998, it had been 15 years since she had last seen him. After several very difficult years of taking care of him, he finally began taking his medication regularly and they were able to have a good relationship for the last few years of his life. From that experience, Bernadette learned a great deal about mental illness and how to compassionately deal with someone suffering from it, which has been very helpful as a prosecutor since prosecutors often deal with the mentally ill as well as those who might be faking it.

BORN - San Diego, CA

FAVORITE BOOK - *The Kite Runner*

FAVORITE SPORTS TEAM - Red Sox

FAVORITE MUSIC - Adele

FAVORITE TREAT - Swedish Fish

FAVORITE T.V. SERIES - *Dexter*

FAVORITE MOVIE - *Fargo*

FAVORITE FOOD - Mexican

LAST BOOK READ - *The Alchemist*





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trigger finality for purposes of appeal. If the prevailing party does not do so, the non-prevailing party must do so. *Bozarth v. Iron County Jail*, 2011 UT App 327



Felony Terroristic Threat Upheld in Stand-Off with Officers

Graham appealed his convictions resulting from a standoff with dozens of police officers. Graham claimed that he could not be convicted of felony terroristic threat because the sheriff's office does not constitute a "unit of government." He also argued that he could not be guilty of felony domestic violence in the presence of a child because he did not "use" a dangerous weapon (just carried one around).

However, the appellate court affirmed, holding that Graham's threats to harm the officers were intended to influence the conduct of government because they were targeted at the discretionary functions of government. Also, the jury could conclude that Graham "used" a dangerous weapon against his wife in the presence of their children. *State v. Graham*, 2011 UT App 332

UDOT's Late Filing of Condemnation Order Not Considered a Wrongful Lien

The Kapposes bought some property and recorded their deed in Weber County in 2002, a year before UDOT recorded a 1974 condemnation order on the same land. UDOT kept the Kapposes from selling the land by filing a notice of interest on the property. The Kapposes filed suit alleging that UDOT's notice of interest constituted a wrongful lien.

However, because UDOT's filing of the notice was authorized by statute and did nothing more than reference the lawfully recorded condemnation order, the appellate court held that UDOT's actions did not fall within the scope of the wrongful lien statute. *Kappos v. UDOT*, 2011 UT App 320

Urine Smell Supports Probable Cause of Drug Use

Defendant appealed on 4th amendment grounds. However, the appellate court affirmed, holding that while the informant's tip was insufficient to support a reasonable suspicion or probable cause determination, the cat urine odor detected by Officer Powers as he approached the vehicle was sufficient to give him reasonable suspicion that illegal drug use was afoot inside Defendant's vehicle.

Additionally, while the smell did not provide immediate probable cause to arrest Defendant because it was unclear which of the occupants

of the vehicle possessed the controlled substance, it did establish probable cause to believe that the vehicle contained contraband. *State v. Lloyd*, 2011 UT App 323

Tenth Circuit Court of Appeals

Padilla Rule on Immigration Advice Not Retroactive on Collateral Review

The Tenth Circuit deepened a circuit split when it held that *Padilla v. Kentucky* (which held that a criminal defense attorney has a duty to notify a noncitizen client of potential adverse immigration consequences of a guilty plea) does not apply retroactively to cases on collateral review. *United States v. Hong*, 10th Cir., No. 10-6294, 8/30/11



Venue for Using Phone in Aid of Conspiracy Not Limited to District Where Calls Occurred

Venue to prosecute the offense of using a telephone to facilitate a

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BACK TO THE BASICS: PROVING THE IMPAIRED DRIVING CASE

By Elizabeth Earleywine, Illinois TSRP

Trials are boring. Police officers and attorneys focus on the evidence; jurors don't. Real-life trials are not what jurors think they should be; they expect them to look and be like something they see on television or in the movies. Jurors expect trials to look like *Law and Order* or *My Cousin Vinny*. They expect the evidence to look like that found in the CSI style shows. These shows give their audience something to pay attention to, to remember and to talk about – visual imagery.

Most people do not retain words, most of us are visual. People think in pictures. Once your audience, be it the prosecutor, hearing officer, judge or jury, can visualize what you relate, then understanding, credibility and believability is assured. A visual depiction of the incident will grab and keep the listener's attention. Not only are your words important, but tone, delivery and style are critical as well.

Laying the Foundation

A successful DUI prosecution begins at the first observations of the suspected impaired driver and continues throughout the DUI investigation and arrest procedures, culminating at the trial. The use and presentation of visual information starts with the officer's documentation of these events and is the foundation for everything that comes after. Throughout your entire case, think about the ultimate audience. Who is it you need to convince?

DUI cases are among the most difficult that a patrol officer or a misdemeanor attorney will handle, particularly so early in their careers. Defense attorneys routinely take advantage of this. Additionally, popular culture has raised the burden of proof in all types of criminal cases. Jurors expect to be presented with "scientific" evidence even where none should be expected to exist. Law enforcement officers and prosecutors must answer these challenges proactively, by educating themselves in the science and the law and presenting their information in a manner that will be remembered and believed by the finders of fact.

So, if these are the challenges we face, how do we meet them? Get back to basics. Conduct a thorough, complete investigation. Record the evidence in detail, don't assume an in-car camera video will be available by the time of trial. Prepare before court. Use detail and words with impact to paint the picture for the judge or jury. It starts with the officer making the arrest and ends with the prosecutor giving the closing argument. The following are some reminders for getting back to basics at each stage in the investigation and prosecution.

Detail the Traffic Stop

The DUI investigation starts with the traffic stop. Focus on your observations of the defendant's driving behaviors and any evidence that may suggest impairment. Was your attention drawn to the defendant's vehicle by a moving violation, an equipment violation, an expired registration or inspection sticker, unusual driving actions, (i.e. weaving within a lane or moving at slower than normal speed), and/or evidence of drinking in the vehicle (alcoholic beverage containers, coolers, etc). Was your attention drawn to the defendant's personal behavior or appearance by such things as eye fixation, tightly gripping the wheel, slouching in the seat, gesturing erratically, face close to windshield, drinking in the vehicle and/or driver's head protruding from vehicle? These are just some of the indications that can paint that picture necessary for conviction.

BACK TO THE BASICS: PROVING THE IMPAIRED DRIVING CASE

(Continued)

Articulate the manner in which the defendant responded to your signal to stop, and how the defendant handled the vehicle during the stopping sequence, such as attempting to flee; no response; slow response; an abrupt swerve; sudden stop; and/or striking curb or other object.

Be Descriptive

Describe your personal contact and interview of the defendant, focusing on SIGHT: bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, and/or unusual actions; HEARING: slurred speech, admission of drinking, inconsistent responses, abusive language, unusual statements, and SMELL: alcoholic beverages, marijuana, “cover up” odors like breath sprays, and/or unusual odors. Once you decide to instruct the defendant to step from the vehicle, how the defendant stepped out of and walked from the vehicle also will provide evidence of impairment, such as angry or unusual reactions; inability to follow instructions; inability to open the door; leaving the vehicle in gear; “climbing” out of the vehicle; leaning against the vehicle for balance; keeping hands on vehicle; and/or inability to remain in an upright, standing position. These are observations that everyone can relate to, as opposed to field sobriety tests that some jurors may think they “couldn’t do sober.”

Standardized field sobriety tests are not to be discounted, of course. But when analyzing them and presenting them at trial, focus should be on common place observations, as opposed to “clues” and “points.” Why is a field sobriety test important to driving? Not because the subject cannot stand on one leg for thirty seconds without putting their foot down or raising their arms. They are important because they are divided attention activities. What is driving? A divided attention activity. If a person cannot follow simple instructions and maintain attention to the task at hand when that task is a relatively easy one, how can they expect to maintain attention to the task at hand when driving a 2000 pound vehicle? Tell the story in terms of the observations made in the field sobriety tests. It paints the picture and tells the story much more vividly than talking about them in the standardized manner.

Prepare Early

Next come hearings and trial. The importance of preparation cannot be overstated. Make it a habit to prepare as early as possible. The prosecutor must first read and then re-read the case file. This should be a thorough evaluation of the overall strength of the case. The case review should include the following: verify that you can prove each element of DUI beyond a reasonable doubt, and develop your case theory; ensure the officer had legal justification for the stop of the vehicle and had probable cause to believe that each element of the offense was present; identify witnesses whose testimony will be required to prove the elements of DUI; and identify evidence or other necessary relevant information that is mentioned in the reports, but is not in your case file.

Each case is only as strong as the facts of the case, and the witnesses and exhibits that will establish those facts. Even strong cases may not always remain good; for instance, a necessary witness may refuse or become unable to testify. It is extremely important to know your community, your jury pool, and your judge. What will it take to convince your judge and jury that the defendant is guilty? What defense arguments are you likely to face? Some pieces of evidence do not, by themselves, make a case stronger or weaker. However, when viewed to-

BACK TO THE BASICS: PROVING THE IMPAIRED DRIVING CASE

(Continued)

gether, even seemingly innocent facts may add something to your theory of the case. Therefore, don't ignore any of the facts in the officer's report.

Develop a Theory

You must develop a theory of the case. The theory of the case is simply your unified approach to all of the evidence that explains what happened. You have to integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position. Your theory must remain consistent during each phase of trial. The jury must accept your theory of the case as the truth. Thus, you need both a factual and a persuasive theory of the case to intelligently select a jury, prepare your opening statement, conduct witness examinations, and prepare your closing argument.

After you do this, you should have a good idea of what evidence will be contested. You should gather as much additional evidence as you can, both direct and circumstantial, to bolster your weaknesses and attack the defendant's theory of the case. After you have reviewed all the evidence, you can formulate your theory of the case. Once you have your theory of the case, you should try to determine the defendant's probable theory of the case. This will help you prepare both your case in chief and to cross-examine defense witnesses. A theory of the case will also help you convey the picture to the fact finder. Once the judge or jury can picture the incident in their own mind, credibility and believability are assured.

Remember your ultimate goal, to present the evidence, direct and circumstantial in such an overwhelming manner that the fact finder has no choice but to convict.





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felony drug conspiracy is proper wherever the phone was used or the underlying conspiracy was committed, the Tenth Circuit ruled. Although phone calls between the defendant and the buyer regarding the delivery of drugs took place entirely within Utah, the buyer sold some of the drugs to customers in Wyoming – which was enough to establish venue in Wyoming. *U.S. v. Acosta-Gallardo*, 10th Cir., No. 10-8075, 8/30/11

Not Much Is Required to Justify Detention For Warrants Check During Pedestrian Stop

The Tenth Circuit clarified that the Fourth Amendment does not require much beyond the facts inherent in any encounter with a pedestrian to justify detaining the pedestrian to run a computer check for warrants, even if the officer originally intends only to issue a

verbal warning. *U.S. v. Burlison*, 10th Cir., No. 10-2060, 9/12/11

Other Circuits/ State Courts

Boundaries Of Collective-Knowledge Doctrine

The 4th Amendment's collective-knowledge doctrine does not justify a search or seizure with information that was known to a member of a law enforcement team



but that was not communicated to anyone else, the Fourth Circuit held. The doctrine is limited to when an officer directs another officer to make a search or seizure, and a reviewing judge may not simply aggregate the information known by all officers to determine if the search or seizure was proper. *U.S. v. Massenburg*, 4th Cir., No. 10-4209, 8/15/11

Defense Counsel's Batson Violation Is Automatic Reversal

Batson violations are "structural errors" requiring automatic reversal, the Seventh Circuit held. However, the present case was up on habeas corpus review, and the court concluded that prior to *Rivera v. Illinois*, 556 U.S. 148, 85 CrL 3 (2009), a state court's ruling that such a Batson violation is subject to harmless-error analysis is not "unreasonable," as is required for relief under the federal habeas statute.

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v. Boatwright, 7th Cir., No. 10-1156, 8/19/11

More Needed to Link Child Sex Abuse to Child Pornography Warrant

The Third and Ninth Circuits recently decided that to obtain a search warrant for child pornography, more is required to reach probable cause than just evidence that the suspect sexually abused a child. *Virgin Islands v. John*, 3d Cir., No. 09-4185, 8/15/11, and *Doughtery v. City of Covina*, 9th Cir., No. 09-56395, 8/16/11



Temporary Resident's Objection to Search Prevails Over Long-Time Resident's Consent

The Fourth Amendment rule from *Georgia v. Randolph*, 547 U.S. 103, 78 CrL 726 (2006), that one resident's objection to a police search of a home will override another resident's consent, applies even when the objecting resident has a "lesser possessory interest" in the residence, the Sixth Circuit

held. *U.S. v. Johnson*, 6th Cir., No. 09-6461, 8/29/11)

Prosecutors Have Absolute Immunity For Lying to Secure Witness's Detention

A prosecutor is entitled to absolute immunity in a civil rights action claiming that she caused a material witness to be unlawfully detained by misrepresenting the witness's willingness to testify in criminal proceedings, the Sixth Circuit held. *Adams v. Hanson*, 6th Cir., No. 09-2045, 8/30/11

Prosecutor's Animus Won't Support Hyde Fee Where Indictment Is Objectively Reasonable

Even if the government's decision to launch a questionable witness-tampering investigation and secure a superseding indictment was motivated by a prosecutor's apparent ill will against the defendant and his lawyers, that did not justify the lower court's decision to impose monetary sanctions of more than \$600,000 under the Hyde Amendment where the decision to prosecute was objectively reasonable on its face, the Eleventh Circuit decided. *U.S. v. Shaygan*, 11th Cir., No. 09-12129, 8/29/11

Venue For Crimes Partly Committed Abroad

The general criminal venue statute, which allows a federal

crime to be prosecuted in the district in which the defendant was arrested, applies to crimes that are committed partly within the United States and partly outside the country, the Third Circuit held. The court also upheld Congress's power to make it a crime for a U.S. citizen or permanent resident to engage in illegal sex with a child abroad. *U.S. v. Pendleton*, 3d Cir., 10-1818, 9/7/11



Porn Website Payments Didn't Justify Search Warrant

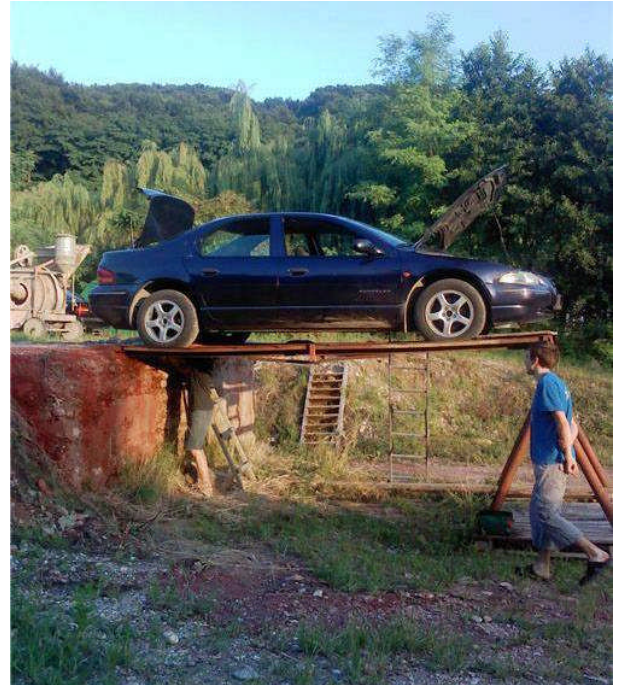
The fact that a couple's credit card was used to pay the hosting fee for two websites that featured images of child pornography was not enough by itself to establish probable cause to issue a warrant for searches of their home, office, and computers, the Ninth Circuit held. *Chism v. Washington*, 9th Cir., No. 10-35085, 8/25/11.

On the Lighter Side

It's a wonder why life expectancy is actually going up...



On the Lighter Side



2011-12 Training Calendar

UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

October 19-21	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training and interaction for civil side public attorneys</i>	Zion Park Inn Springdale, UT
November 7-9	JOINING FORCES: CHILD ABUSE & FAMILY VIOLENCE CONF. <i><u>Prevent Child Abuse Utah</u> has graciously welcomed UPC as a co-sponsor of its 24th annual conference. UPC has planned a track specifically for prosecutors and investigators who handle child abuse cases.</i> <i>Prosecutors wishing to attend should register through UPC to have most of the conference fee waived.</i>	Davis Conf Center Layton, UT
November 17-18	COUNTY/DISTRICT ATTORNEYS EXECUTIVE SEMINAR <i>County / District attorneys meet in conjunction with UAC</i>	Dixie Center St. George, UT
Nov. 30 - Dec. 2	ADVANCED TRIAL SKILLS TRAINING <i>Substantive and trial advocacy training for experienced prosecutors</i>	Hampton Inn West Jordan, UT
April 19-20	Spring Conference <i>Case law update, legislative recap, ethics / civility, and more</i>	Exact facility Pending Salt Lake Valley
May 15-17	Annual CJC / DV Conference <i>The best trainers teach about dealing with child abuse and domestic violence</i>	Zermatt Resort Midway, UT

2011-12 Training Calendar

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES* AND OTHER NATIONAL CLE CONFERENCES

October 23-27 PROSECUTING HOMICIDE CASES [Summary](#) [Registration](#) [Agenda](#) Tucson, AZ
Check back (click on the course title) for course summary and registration

See Table JUSTICE IN OUR COMMUNITIES [Summary](#) *Investigation and prosecution of child abuse*

November 1-3	Carlinville, IL	Check back to register
November 8-10	Bismarck, ND	Check back to register
November 8-10	Portland, ME	Check back to register
November 15-17	Chillicothe, OH	Check back to register
December 5-7	Durango, CO	Check back to register
December 13-15	Bloomington, IN	Check back to register

Oct. 31 - Nov. 4 Demystifying SMART DEVICES [Summary](#) [Registration](#) [Agenda](#) Chicago, IL

November 16-17 Digital Evidence [Summary](#) [Registration](#) [Agenda](#) Los Angeles, CA
Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation

December 8-9 DEFENDING THE FORENSIC INTERVIEW Durango, CO
Check back (click on the course title) for course summary and registration

March 5-9 UNSAFE HAVENS II [Summary](#) Dulles, VA
Prosecuting on-line crimes against children

* 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.