

The

PROSECUTOR



RECENT CASES

United States Supreme Court

Counsel's Failure to Relay Plea Offer Will Support Ineffective-Assistance Claim

A defendant who pled guilty to a felony after his lawyer failed to communicate a more favorable plea offer before it lapsed can go forward with an ineffective assistance of counsel claim, the Supreme Court declared. *Missouri v. Frye*, U.S., No. 10-444, 3/21/12

Fair Trial Doesn't Preclude Remedy For Counsel's Bad Advice About Plea Offer

Defendants who received erroneous advice from their attorneys that led them to reject prosecutors' plea offers can still demonstrate the prejudice required to establish ineffective assistance even if they received a fair trial after forgoing the plea offer, the Supreme Court declared.

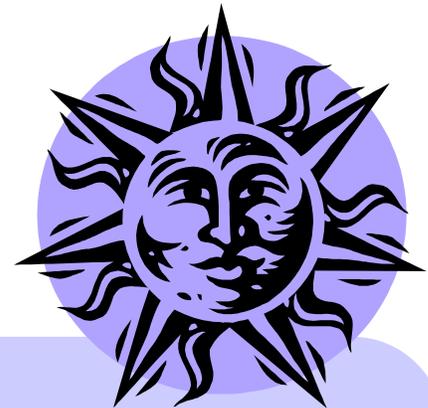
The court also elaborated on the appropriate remedies for such a violation, including a suggestion to require the prosecution to reoffer the plea deal. *Lafler v. Cooper*, U.S., No. 10-209, 3/21/12

Standard for Deciding if Death-Case Inmates Can Change Counsel

Interpreting the federal statute (18 U.S.C. §3599) that authorizes

the appointment of counsel for federal capital defendants and state habeas corpus petitioners in capital cases, the Supreme Court held that petitioners who seek replacement of their Section 3599 counsel must satisfy the same "interests of justice" standard that applies to substitution requests for counsel appointed under 18 U.S.C. §3006A (for federal noncapital cases). *Martel v. Clair*, U.S., No. 10-1265, 3/5/12

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State Procedural Default May Be Excused If Lawyer Was Ineffective Upon Initial Review

A state prisoner who says he was denied effective assistance of counsel during his initial opportunity to challenge the effectiveness of his trial counsel in collateral proceedings may be allowed to present that claim in a federal habeas corpus proceeding, even if there is no federal constitutional right to counsel on state collateral review, the Supreme Court held. *Martinez v. Ryan*, U.S., No. 10-1001, 3/20/12

Utah Supreme Court

“Community-Based Proctor Home” for Juveniles Does Not Fall Under “Incarceration Exception”

After a juvenile died from injuries sustained during his placement in a community-based proctor home, the juvenile’s parents sued the State for negligence. The State argued that under the “incarceration exception,” the state is immune.

In answer to a certified question by the Tenth Circuit, the Utah Supreme Court held that a juvenile delinquent placed in an unsecured community-based proctor home is not considered “incarcerated in a place of legal confinement” under the Governmental Immunity Act, and thus the incarceration exception did not apply to the current case. *State v. DJJS*, 2012 UT 12

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Public Service Commission Only Has Jurisdiction To Regulate Public Utilities

The Public Service Commission dismissed for lack of jurisdiction a complaint that requested a review of Summit Water Distribution Company's (SWDC) exemption from public regulation. The complaint was filed by one of SWDC's minority shareholders.

The Utah Supreme Court affirmed the 'lack of jurisdiction' holding, reasoning that the Commission only has jurisdiction to regulate public utilities, and because SWDC does not provide service directly to anyone other than its shareholders, it does not serve the general public. *Bear Hollow v. Public Service Commission*, 2012 UT 18

Resentencing Under the GAMI Statute Constituted Double Jeopardy

As part of his original sentence, Prion was committed to the mental hospital for evaluation. After a stay of several months, Prion reappeared for resentencing. Based on the recommendations of the hospital staff, and under authority of the GAMI statute, the district court nearly doubled his original sentence.

On appeal, the Utah Supreme Court reversed, holding that an increase in a mentally ill defendant's sentence on resentencing under the GAMI

statute constituted Double Jeopardy. The court reasoned that the state cannot evade this constitutional guarantee simply by making the possibility of increased punishment clear on the face of its original sentencing scheme. *State v. Prion*, 2012 UT 15

Utah Court of Appeals

Admission of Defendant's Confession after Detective Lied To Him Was Not Unfairly Prejudicial

On appeal, Rodriguez argued that his confession of child sexual abuse was unfairly prejudicial because the detective who interrogated him lied to Rodriguez about finding Rodriguez's DNA inside the victim. However, the appellate court held that Rodriguez did not demonstrate that his admission would have an undue tendency to suggest decision on an improper basis. *State v. Rodriguez*, 2012 UT App 81



"Retail Theft" Considered "Theft" For Enhancement Purposes

On appeal, Campbell argued that his prior retail theft conviction does not satisfy the enhancement provision because "retail theft" is not specifically enumerated in the provision and should not be included in the definition of regular "theft."

However, the appellate court disagreed, holding that every reference to "theft" under Section 76-6-412 may also apply to "retail theft," including the reference in the theft enhancement subsection. *State v. Campbell*, 2012 UT App 75

Protective Order Was Properly Issued

Hart argued that to prove a violation of a protective order, the state must also prove that the issuance of the protective order was done under one of the listed statutory provisions. The appellate court held, without even looking at whether the state must even prove it, that there was sufficient evidence to conclude that the protective order was properly issued because the protective order itself cited Utah Code section 30-6-4.2. *State v. Hart*, 2012 UT App 78

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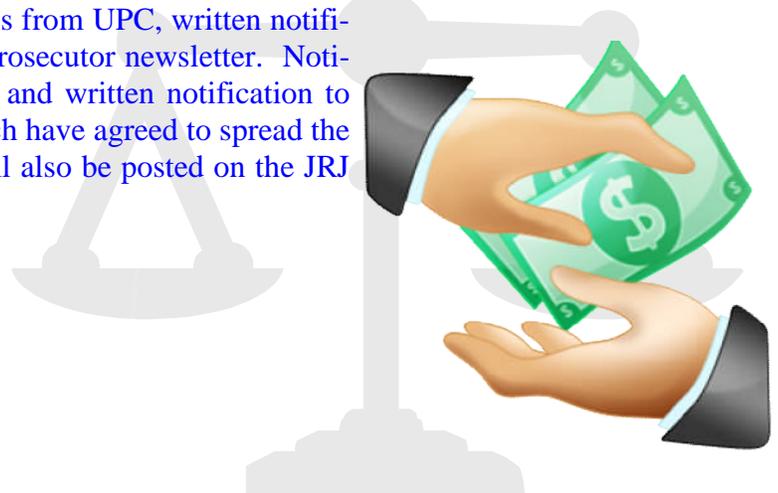
John R Justice Student Loan Repayment Assistance Program for Prosecutor and Public Defenders

The kick off of the Utah John R Justice (JRJ) Student Loan Repayment Program for Prosecutors and Public Defenders is rapidly approaching. The Utah information packet and the Utah JRJ assistance application form have been finalized. As soon as the JRJ website has been prepared and tested, the information packet and application form will be distributed to public defenders and prosecutors throughout Utah. Absent any technical problems in the development of the website, that distribution will likely take place by early May.

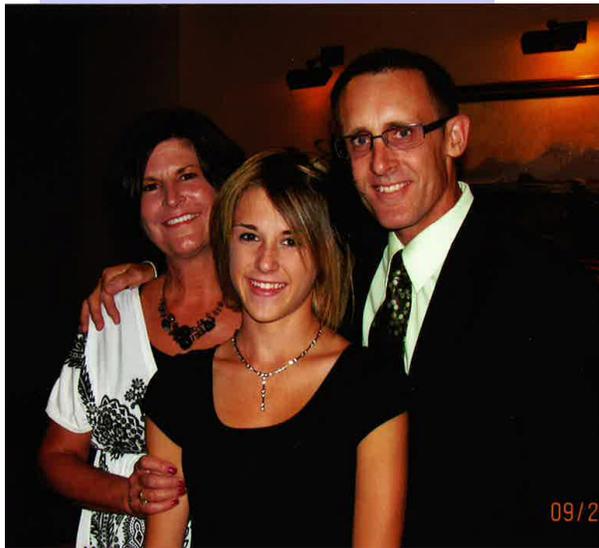
By way of reminder, here is some information about JRJ that was previously distributed:

- Only \$100,000 will be available for Utah during the current federal fiscal year. Up to 15% of that amount may be used to cover administrative expenses.
- The act mandates that JRJ funds be divided 50/50 between prosecutors and public defenders, regardless of the relative number of eligible persons in each category.
- To be eligible for JRJ assistance a person must be either:
 - a full time prosecutor who works for state government, for a local governmental entity, or for a tribal government;
 - a full time public defender who is employed by the state, by a local governmental entity, or by a non-profit agency which contracts to supply public defender services for the state or for a local governmental entity; or
 - a full time public defender who works for a federal defender's office.
- Priority must be given to applicants who are "least able to pay" their student loan obligation.
- The act requires that a procedure be used to assure relatively equal geographic distribution of JRJ assistance awards throughout the state.
- The Utah JRJ committee has determined that, at least during this federal fiscal year, no individual award of JRJ funds will exceed \$4,000. Individual award amounts will be based upon a formula that takes income and number of dependants into consideration. Longevity in JRJ eligible employment may also be considered.
- In order to receive a JRJ award, an applicant will be required to sign a written commitment to continue in eligible JRJ employment for at least three years from the date of the first award. Those who receive awards during the first year of the program will, if still eligible, receive priority for subsequent year awards. Any subsequent year awards are, of course, dependant upon continued congressional funding of the program.

Notification to prosecutors will be via e-mails from UPC, written notification to employers, and information in The Utah Prosecutor newsletter. Notification to public defenders will be through e-mail and written notification to Utah JRJ eligible public defender offices, all of which have agreed to spread the word internally to their employees. Information will also be posted on the JRJ website, once it is established.



PROSECUTOR PROFILE



Fred Burmester

Deputy Salt Lake County District Attorney

From representing Americans in uniform overseas, to representing Utahns locally in the courtroom, Fred Burmester has done his share of service.

As a child, Fred wanted to be a fisherman—until he got seasick. Then he thought about being a geologist—until he realized he hated math. So, naturally, his next step was to enroll at the ROTC, which was his father’s idea. It wasn’t until after airborne and ranger school that he found out his father was only joking about entering ROTC.

Since then, Fred has traveled quit a bit. While in the army, Fred was an infantry officer and paratrooper, and lived in Panama, California, and Alaska. He also traveled to Slovakia in 2001 where he taught ESL at an English Camp for a week with Missions to the World, and later visited Austria, Italy, Germany, and Czech Republic with his family in 2006.

Fred met his wife, Karen, while working at the Broadway Shopping Center where he stocked shelves and she worked the cash register. They have now been married for 26.5 years, and have a 16 year old daughter (who, to his worry, is now driving).



Some of the highlights of Fred’s career include the Mark Douglas Prideaux homicide trial, the Azharn Al-Fatlawi aggravated robbery trial, and the Deon Clopten murder trial and retrial.

Some of the more humorous moments he remembers include once when he was quoted by the Court of Appeals as saying to Judge Timothy Hansen, “A conviction in hand is worth two in the bush.” Another time came in the Clopten II trial when in an effort to explain why a witness might have more clarity of recollection of a particular moment surrounding a startling event, Fred said, “We all remember where we were on December 11...” (all the events in the Clopten trial occurred in December and of course Fred meant September 11).

Through his years of service, Fred has grown to believe that the most important qualities in a prosecutor, as well as a soldier, are honesty, humility, and mental toughness—all qualities Fred himself has relied on.

BORN - Fort Irwin, California

FIRST JOB - Washed cars

FAVORITE HOBBIES - Writing and drawing

FAVORITE SPORTS TEAMS- Detroit Red Wings and the Phoenix Coyotes

FAVORITE BOOKS - *War and Peace* and *All Quiet On the Western Front*

PETS - Two dogs and one cat, though he only claims one of the dogs

FAVORITE T.V. SERIES - Parks and Recreation

FAVORITE MOVIE: Breaker Morant

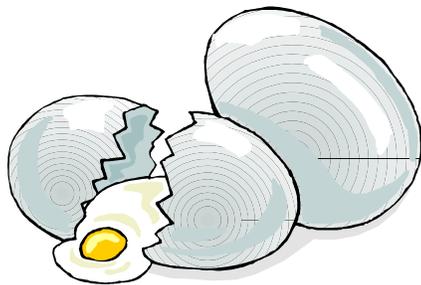
FAVORITE FOOD - Greek food



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No Ineffective Assistance for Counsel Who Failed To Call Expert on Eyewitness Testimony

On appeal of his murder conviction, Heimuli argued that he was entitled to a new trial because his counsel performed ineffectively by failing to introduce expert testimony regarding the reliability of eyewitness testimony. However, the appellate court affirmed, reasoning that because a de facto presumption against the admission of expert eyewitness testimony existed at the time of Heimuli's trial, his counsel did not perform deficiently. *State v. Heimuli*, 2012 UT App 69



"Eggshell Plaintiff Doctrine" Should Not Be Applied To Child Abuse Statute

The appellate court held that to prove second degree child abuse, the State had to prove that Defendant intended his conduct to cause the victim serious physical injury or of proving that Defendant knew that his conduct was reasonably certain to cause the victim serious physical injury. The court further held that the trial court erred by giving a jury instruction that misled the jury as to the mental

state required by improperly applying the tort concept known as the 'eggshell plaintiff doctrine' to the child abuse statute. *State v. O'Bannon*, 2012 UT App 71

Tenth Circuit Court of Appeals

Transaction Involves Proceeds of Bank Fraud Even If Fraudulent Loan Papers Went to Nonbank

A defendant who was acquitted on a charge of bank fraud involving a lender that did not qualify as a bank under federal law could still be convicted of money laundering on the basis of a transaction involving the proceeds of the loan, the Tenth Circuit held.

The court reasoned that the money laundering statute was satisfied by evidence that the proceeds of the loan used in the target transaction came from the lender's use of a line of credit from a parent corporation that did qualify as a bank. *United States v. Irvin*, 10th Cir., No.10-3106, 3/22/12

Other Circuits/States

Right to Cross-Examine Maker of Certification of License Status

According to the Washington Supreme Court, defendants' right to

confrontation was violated by the admission at their trials of certifications regarding the statuses of their driver's or professional licenses.

The court reasoned that because the defendants did not have the opportunity to cross-examine the individuals who prepared the certifications, the admission of the certifications was improper pursuant to *Melendez-Diaz*. *State v. Jasper*, Wash., No. 85227-8, 3/15/12

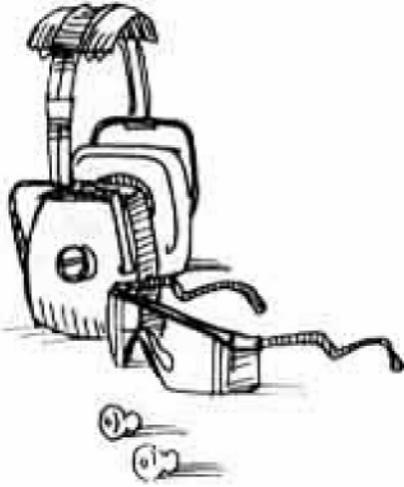


Police Officers Don't Need Warrant To Search Data on Arrestee's Cellphone

The Fourth Amendment's search-incident-to-arrest doctrine permits police officers to access the data on an arrestee's cell phone without a warrant, the Seventh Circuit held.

While the case involved a search that revealed only the telephone number of the arrestee's seized cell phone, the court's analysis suggests it would apply the same no-warrant rule to other information stored on an

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2012 LEOJ Course

--June 26, 27, 28, 2012

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

--Camp Williams, 17111 S Camp Williams Rd. Salt Lake County

This is the only course that will qualify a prosecutor, judge, or Board of Pardons member to apply for the LEOJ carry concealed weapons permit. *See* Utah Code Ann. § 53-5-711(2)(b).

Advance registration is required. Send e-mail registration request to lorinoe@utah.gov. There is **no fee** for the training. Tuition is paid by UPC and the Admin Office of the Courts. Participants must, however, supply their own eye and ear protection, 400 rounds of ammunition, and firearm. Space is limited to 20 participants. Registration accepted on *first come, first served*, basis.

Please do not attempt to register for the course until your court calendar is clear and you have received supervisory approval to attend.



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arrestee's cellphone. *United States v. Flores-Lopez*, 7th Cir., No. 10-3803, 2/29/12

Nevada High Court Loosens Up Rule On Admission of 'Other Crimes' Evidence

The Nevada Supreme Court held that its prior interpretation of the rule on "other crimes" evidence was incorrect and that such evidence may be admitted for purposes other than those set out in the relevant statute, as long as it is not used to prove character. *State v. Bigpond*, Nev., No. 57558, 3/1/12

Prosecutorial Immunity Is Extended By Counsel's Ongoing Brady Obligations

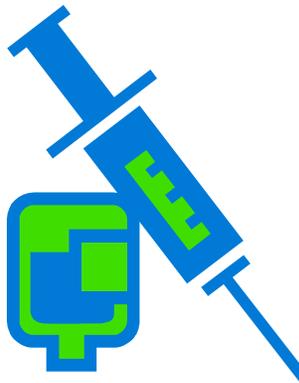
A prosecutor's ongoing duty to disclose exculpatory evidence up until a case is final is a prosecutorial function that allows him to claim absolute immunity for his alleged post-conviction improprieties, even though he no longer was the lead attorney in the matter, the Seventh Circuit held. *Fields v. Wharrie*, 7th Cir., No. 11-2035, 2/28/12

Forced Medication OK'd in Case Involving Shooter of Congresswoman Giffords

In cases in which doctors have determined that incompetent pretrial detainees are dangerous to themselves or others, the Due Process Clause allows the decision to forcibly medicate them to be

made by prison administrators rather than judges, the Ninth Circuit held.

The court addressed this and other involuntary-medication issues in a case involving the man charged with shooting Arizona Rep. Gabrielle Giffords and 18 other people. *United States v. Loughner*, 9th Cir., No. 11-10339, 3/5/12



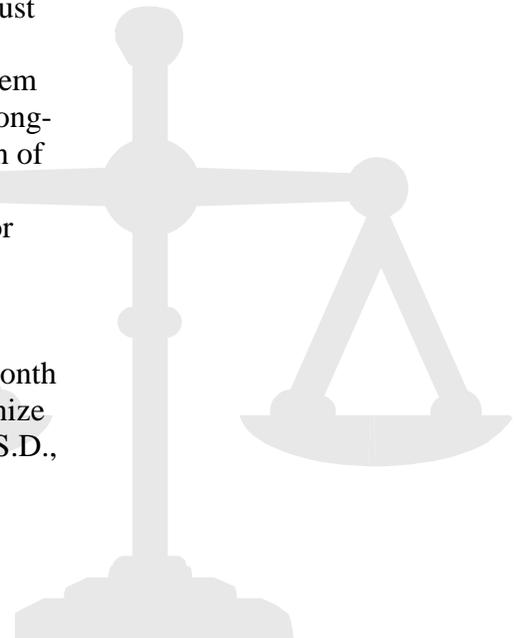
Fourth Amendment Requires Warrant For Extended GPS Monitoring of Vehicle

Law enforcement officers must obtain a search warrant before using a Global Positioning System device to conduct continuous, long-term surveillance of the location of a suspect's vehicle, the South Dakota Supreme Court held. For example, an individual's expectation that his or her whereabouts would not be continuously monitored for a month is one that society would recognize as "reasonable." *State v. Zahn*, S.D., No. 25584, 3/14/12

Untested Tipster's Uncorroborated Hearsay Did Not Provide Police Reasonable Suspicion

The Ninth Circuit held that uncorroborated "double hearsay" from tipsters of unknown reliability cannot give the police reasonable suspicion to believe that a defendant is engaged in criminal activity.

The court looked at: whether the tip was anonymous; whether the informer had a proven track record of reliability; whether the informer revealed his/her basis of knowledge; and whether the informer gave detailed, predictive information that was later corroborated by police observation. *United States v. King*, 9th Cir., No. 11-10182, 3/13/12



No “Duty To Retreat” In Utah

By Paul Boyden
Executive, Director
Statewide Association of Prosecutors

Recent events in Florida have caused considerable discussion about statutory provisions which provide that a person has no duty to retreat from a place where he or she has a right to be before defensively using deadly force. As a prosecutor, you may be asked to comment on the law and may not have an opportunity to retreat from the media. Although the duty to retreat issue may or may not be relevant even to the Florida case, it is getting attention anyway. Our Utah statute is not identical to the Florida statute but has some similarities. Our law deals with the retreat issue in a straight forward manner.

Section 76-2-402(3) UCA reads:

“A person does not have a duty to retreat from the force or threatened behavior described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).”

The **exceptions** in Subsection (2)(a) include circumstances where the person **initially provoked** the use of force as an excuse, attempted to commit a **felony**, was the **aggressor**, or was engaged in combat by **agreement**.

Not so obviously, this subsection was part of amendments made in the statute to deal favorably with self defense claims by battered women who had used lethal force against abusive cohabitants.

In the 1993 General Legislative Session, at the request of SWAP, Rep. Barth abandoned a bill which specifically would have recognized “battered woman syndrome” as a matter of “commonly accepted scientific knowledge” and made it an issue to be considered in determining whether the woman reasonably believed the use of force was necessary. It wasn’t that we were opposed to such evidence per se - just that we thought it should be subject to the same tests as other expert testimony. In the interim we worked out an agreement with the proponents of the legislation and dealt directly with the self defense issue.

The 1994 bill was HB13 and provided that:

1. remaining in an ongoing relationship did not constitute “combat by agreement;”
2. “imminent” danger did not just relate to time but to several listed factors; and
3. a person does not have a duty to retreat in a place where he or she entered lawfully and was not the aggressor, etc.

The third factor was a restatement of Utah case law - *State of Utah in the interest of M__S__584 P.2d 914 (1978)*, *State v. Turner 79 P.2d 46 (1938)* - so there was no concession there. In fact, the whole section still makes good sense.

As an interesting note, *The Salt Lake Tribune* ran an impassioned editorial citing self defense against intruders in the home and asking “If by society’s standards, it’s OK to kill strangers that way, shouldn’t it be acceptable for a woman to protect herself, with deadly force if she believes it necessary, from a dangerous family member?”

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No “Duty To Retreat” In Utah

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On another useful - if tangential - note, if you have taken the LEOJ course on deadly force, you know that if you can retreat from a threat of deadly force or at least create as much distance as possible between you and the threat, it is the first **tactical** option you should utilize - but that option is not always available.

And - speaking of tangents - there is a Utah Territorial case with a distinctly wild West flavor. In *State v. Hite* 8 Utah 461, 33 p. 254 (1893) the defendant who was packing a revolver approached the victim who was sitting on his porch holding a rifle. The following dialogue ensued:

“... I hear you are carrying a Winchester around town for me.”

“...I haven't said, ... I was carrying a Winchester for anybody.”

“...Put down your gun; I want to talk with you.”

“Any man who will carry a Winchester around town for another man is a damned cowardly son of a bitch.”

“I think any man who will carry a six-shooter around town is the same thing.”

“Take it back,”

The court continues “[Defendant] jumped out of his chair, drawing his six-shooter quickly, and shot twice in quick succession at ... [the soon to be deceased who was] standing with his gun resting on the doorsill [The victim] staggered back, reeling....”

The trial court, addressing the duty to retreat, noted that if the defendant “...went there for the purpose of a quarrel and by his own acts put himself in ... a dangerous position it was his duty to retreat ... if he could with safety ... he was not bound to run away, and take a shot in the back.” We note that this general notion is in our current statute as 76-2-402(2)(a).

We do not necessarily expect a huge groundswell in modifying the statute - but stranger things happen regularly. It is best to be conversant with the law if the topic comes up - unless you can make a tactical retreat.

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Visit the UPC online at

www.upc.utah.gov



UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 26-27	24 TH CONFERENCE ON VICTIMS OF CRIME Agenda Register	Salt Lake City, UT
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
June 21-22	UTAH PROSECUTORIAL ASSISTANTS CONFERENCE <i>Training for non-attorney staff in public attorney offices</i>	Courtyard by Marriott St George, UT
August 2-3	UTAH MUNICIPAL PROSECUTORS ASSOCIATION CONFERENCE <i>Annual training event for municipal and other misdemeanor prosecutors</i>	Zion Park Inn Springdale, UT
August 20-24	BASIC PROSECUTOR COURSE <i>Must attend course for attorneys new to prosecution</i>	University Inn Logan, UT
September 12-14	FALL PROSECUTORS TRAINING CONFERENCE <i>The annual training event for all Utah prosecutors</i>	Ruby's Inn Bryce Canyon, UT
October 17-19	GOVERNMENT CIVIL PRACTICE CONFERENCE <i>Training for civil side government attorneys</i>	Moab Valley Inn Moab, UT
November 12-14	JOINING FORCES MULTI-DISCIPLINARY CHILD ABUSE CONF. <i>Sponsored by Prevent Child Abuse Utah</i>	Davis Conf. Center Layton, UT
November 28-30	ADVANCED TRIAL SKILLS COURSE <i>Work in groups with your colleagues to sharpen your trial skills</i>	Hampton Inn West Jordan, UT

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES*
AND OTHER NATIONAL CLE CONFERENCES

May 6-10	OFFICE ADMINISTRATION Summary Agenda Registration	Marco Island, FL
May 22-23	DIGITAL EVIDENCE Summary Agenda Registration <i>Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation</i> <i>SHIFT training on May 24th at the same location</i>	Billings, MT
June 18-27	CAREER PROSECUTOR COURSE Summary <i>Every career prosecutor should attend this outstanding course. First time ever in the west.</i>	San Diego, CA
July 11-13	DIGITAL EVIDENCE Agenda <i>Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation</i> <i>SHIFT training on July 10th at the same location</i>	St Paul, MN

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JUSTICE IN OUR COMMUNITIES

[Brochure](#)

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Investigation and prosecution of child abuse. For more information, please contact Savannah Weil, Project Coordinator, at sweil@ndaa.org.

DATE	LOCATION	REGISTER
May 15-17	Rapid City, SD	Register
June 19-21	Willmar, MN	
July 10-12	Lafayette, IN	
July 17-19	El Dorado, KS	Brochure
July 31 - August 2	Muscatine, IA	
August 28-30	Lafayette, IN	Brochure
September 4-6	Houghton, MI	Brochure Register
September 11-13	Muscatine, IA	
October 9-11	Casper, WY	Brochure Register
October 23-25	Yankton, SD	Register
November 13-15	Defiance, OH	Register

July 25-28

ASSN. OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION [Fairmont Hotel](#)

This is AGACL's annual capital litigation seminar. For more information, visit WWW.agacl.com, call (602) 938-5793 or e-mail agacl@msn.com.

San Francisco, CA

September 18-19

DIGITAL EVIDENCE [Summary](#) [Agenda](#) [Registration](#) Jackson, MS

Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation SHIFT training on September 17th at the same location

October 10-11

DIGITAL EVIDENCE [Summary](#) [Agenda](#) Livonia, MI

Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation SHIFT training on October 9th at the same location

* 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.