

The PROSECUTOR



RECENT CASES

United States Supreme Court

Brady Violation for Not Disclosing Inconsistency in Witness Testimony

The Supreme Court ruled that prosecutors' failure to disclose evidence that the sole eyewitness to the murder of which the defendant was convicted had given the police statements that contradicted his trial testimony violated *Brady v. Maryland* and required reversal of the conviction. *Smith v. Cain*, 565 U.S.__(2012)



Prosecutors Don't Have To Exhaust Every Avenue of Inquiry To Prove Witness Unavailability

According to the Supreme Court, prosecution must make a good-faith effort to obtain the presence of a witness before obtaining an unavailability ruling. However, the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry no matter how unpromising. *Hardy v. Cross*, 565 U.S.__(2011)

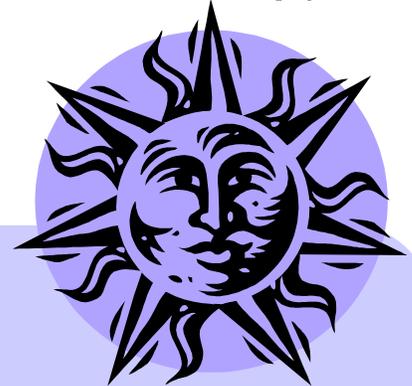
Bar for Requiring 'Prelim Judicial Inquiry' into Reliability of Eyewitness Identification

The Supreme Court held that the Due Process does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. *Perry v. New Hampshire*, 565 U.S. ____ (2012)

Statute of Limitations and Jurisdiction Clarifications for Federal Habeas Corpus Review

The Supreme Court looked at the Antiterrorism and Effective

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Barbara Lachmar, Deputy Cache
County Attorney

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Death Penalty Act and held that (1) for a state prisoner who does not seek review in the state's highest courts, the state judgment becomes final for purposes of the federal habeas corpus statute of limitations when the time for seeking such review expires; and (2) a federal judge's failure to indicate in a certificate of appealability the specific issue on which the habeas petitioner made "a substantial

showing of the denial of a constitutional right" does not deprive the court of appeals of subject-matter jurisdiction to adjudicate the appeal. *Gonzalez v. Thaler*, 565 U.S.__(2012)

Prisoners Can't File Civil Rights Action against Private Federal Prison

The Supreme Court held that a prisoner incarcerated in a federal corrections facility operated by a private corporation may not pursue a civil rights action against employees of the company under *Bivens v. Six Unknown Fed. Narcotics Agents* because state tort law already authorizes adequate alternative damages actions. *Minnecci v. Pollard*, 565 U.S.__(2012)

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Utah Supreme Court

Driver May Not Have Had Authority To Consent To Search of Passenger's Bag

On appeal, the Defendant, who was a passenger in a car stopped by an officer, argued that evidence of her drug possession should have been suppressed after an officer used consent from the driver to search Defendant's bags. The Utah Supreme Court held that the evidence supports the conclusion that the officer could not have reasonably believed that the driver had authority to consent to a search of Defendant's backpacks.

However, there were not any findings as to whether Defendant's conduct suggested the driver had apparent authority to consent, or as to the general nature of the backpacks. Hence, the case was remanded for further factual findings before deciding the issue. *State v. Harding*, 2011 UT 78.



Solicited Assault To Terminate Pregnancy Is Not An "Abortion"

The juvenile court held that the solicited assault of a woman to terminate her pregnancy was an "abortion." Because a woman cannot be held criminally liable for seeking an abortion, the court dismissed the State's delinquency petition.

However, the Utah Supreme Court reversed, holding that the solicited assault of a woman to terminate her pregnancy is not a "procedure," as required by the abortion statute, and therefore does not constitute an abortion. *State v. J.M.S.*, 2011 UT 75.

'Attempted Murder of An Unborn Child' and 'Abortion' Don't Share Same Elements

Harrison pleaded guilty to attempted murder of the unborn child of a mother after the mother paid him \$150 to try and kill the baby by punching her abdomen (see above case). At Harrison's sentencing, the district court found him ineligible for conviction of attempted murder under *State v. Shondel*, 453 P.2d 146, 148 (Utah 1969) ("[W]here there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser"), and sentenced him instead on the lesser charge of attempted "killing an unborn child" by abortion.

The state appealed, and the

Appellate Court held that there would not be double jeopardy because the state was appealing a decision that effected a "final judgment of dismissal" of the murder charge (Utah Code 77-18a-1(3)(a)). The Court then reversed, holding that there is no *Shondel* bar to Harrison's original conviction because the elements of attempted murder differ from the elements of attempted killing of an unborn child by abortion (which requires a *procedure*). *State v. Harrison*, 2011 Utah 74



'Solicitation' Can Include Soliciting A Potential Victim

The Utah Supreme Court held that statutes criminalizing attempt and solicitation do not run afoul of the *Shondel* doctrine, and that the solicitation statute encompasses not only the solicitation of another person to commit an offense, but also the solicitation of a potential victim.

The Court also held that when

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PROSECUTOR PROFILE



BORN: Glasgow, Montana

FAVORITE MUSIC: Folk

LAST BOOK READ - *The Purpose of Physical Reality* by John Hatcher

FAVORITE MOVIE - Soul Surfer

FAVORITE TREAT - Hot Tamales

HOBBIES - Doodling, guitar, and singing

FAVORITE QUOTE - “When the white water rapids of life occur... Stay in the boat!!”

CHILDREN - 3 daughters and 1 son

PETS - A yorkshire terrier, a cocker spaniel and two cats



Barbara Lachmar

Deputy Cache County Attorney

The best way to understand Barbara’s success as a prosecutor is to look at her background. It all begins with her family.

Though she has nieces and nephews working in law firms across the country, and an uncle who has argued cases before the U.S. Supreme Court, Barbara contributes who she is as a lawyer mostly to her immediate family.

From her father, Barbara inherited a sense of hard work and unconditional love. Her father worked as a civil engineer and raised the family in Fort Peck, Montana, a town of 450 people. From her mother, Barbara inherited a sense of justice and desire to support the underdog, as well as obedience and reverence before God.

From her siblings, Barbara developed an interest in mediation. Being the middle child of seven, Barbara learned the value of mediation and would like to see the criminal justice system use more offender perpetrator mediation in appropriate cases (i.e. she has a couple of cases now where the victims would undoubtedly benefit from a meeting with the defendant, especially with defendants who want to apologize for their choices affecting the victims).

Barbara’s faith also contributed to who she is as a prosecutor. Being a member of the Baha’i Faith has sometimes been a challenge due to it being a minority, but she credits her faith for shaping her conduct and choices in creating a set of invaluable core values.

Another aspect of Barbara’s background that contributes to her success was her 15 years as a public defender for Cache County before joining the Cache County Attorney’s office. Her time as a public defender helped her to be more understanding of the opposing position and to know what their job entails. She became a prosecutor once she was ready to make a change after visiting the jail and talking with some difficult folks for so long.

Being a prosecutor has been better than she ever expected. She had always assumed that she was a public defender type – but switching over has been a wonderful experience as she’s been able to use her authority to protect the community, do what is right, and advocate for justice.

One of the more rewarding experiences Barbara has had over the years is once when a six-year-old girl finished testifying in a child sex abuse case and had “hit it out of the ball park.” The defendant had been perpetrating on young girls for years...but no one had ever been willing to come forward and testify against him. The brave little girl did so, and it resulted in a conviction. Right after the girl testified, Barbara asked for a recess and scooped the girl into her arms and hugged her.

On a lighter note, once while one of her defendants was being chastised for wearing his red gang color to court for sentencing, Barbara noticed that she was wearing a bright red blazer while standing beside him.



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the Defendant approached a minor offering money for sex, that was simply an act of solicitation because it did not constitute a “substantial step,” as required by an “attempt to commit a crime.” *State v. Arave*, 2011 UT 84



Agents Did Not Create Exigency Before Seizing Computer Without a Warrant

Maxwell appealed his conviction for child pornography, arguing that his computer was improperly seized by ICAC agents. The Utah Supreme Court held that 1) an exigent circumstance arose out of Maxwell’s statement to the agents that he was thinking of destroying his computer; 2) the exigency was not improperly created by the police, as there was no threat to engage in conduct violating the Fourth Amendment; and 3) seizing Maxwell’s computer was a reasonable method of preventing the destruction of evidence. *State v. Maxwell*, 2011 UT 81

Utah Court of Appeals

Time To Appeal Begins Running on Date of Order

Perez appealed his termination with South Jordan City, but did so more than thirty days after the decision was issued. He argued that his appeal was timely filed because the time for appeal should not have begun until the decision was certified to the City Recorder and mailed to him.

However, the appellate court held that the thirty-day time period begins running as of the date of the order, and therefore Perez did not appeal in time and the Court lacked jurisdiction. *Perez v. South Jordan City*, 2011 UT App 430.

Rules of Evidence Apply to Certification Hearings

A.H.F. appealed from the juvenile court’s ruling certifying him to the district court for trial as an adult. He successfully argued that the juvenile court improperly concluded that the rules of evidence do not apply at certification hearings and hence had admitted a report filled with hearsay. The appellate court remanded to the juvenile court for the purpose of first identifying the admissible evidence, and then considering whether certification is appropriate based only on that evidence. *A.H.F. v. State*, 2011 UT App 437

Hanging Up on Officer Invokes Right to Remain Silent; No Notice Required Before Self-Testifying of Alibi

During trial for failure to respond to an officer’s signal to stop, the court admitted evidence of when the officer called Gallup to ask him about the incident and Gallup hung up on the officer. Also, the court denied Gallup’s ability to testify as to where he was during the phone call because he never gave notice as required when giving alibi testimony.

The appellate court remanded for a new trial. It held that admission of the evidence surrounding the hang-up violated his pre-arrest right to remain silent. It also held that failure to comply with section 77-14-2’s notice requirement grants the trial court discretion to exclude only alibi evidence extrinsic to the defendant’s own testimony regarding alibi. *State v. Gallup*, 2011 UT App 422



Evidence Was Sufficient

Bates asserted that there was insufficient evidence to convict him

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of assaulting his son. However, the appellate court held that 1) his claim was unpreserved, and 2) there was sufficient evidence to convict because his son testified directly that Bates was the person who injured him. *States v. Bates*, 2011 UT App 439

Post-Sentencing Rulings Did Not Extend Time Period To Appeal

The appellate court held that it lacked jurisdiction to consider Vaughn's appeal because it was filed more than thirty days after the imposition of valid sentences. Although Vaughn argued that the time period to appeal was extended when the trial court made additional post-sentencing rulings, the appellate court held that the trial court lacked jurisdiction to make any rulings after sentencing and therefore such rulings did not extend the 30-day timeline. *State v.*

Vaughn, 2011 UT App 411.

Defendant Not Entitled To A Reduction of His Sentence After Serving It

The Defendant obtained a reduction of the level of his offense after his completion of probation, and later filed a motion to clarify seeking a reduction of his original sentence. However, the Appellate Court held that under the plain meaning of subsection 76-3-402(2), the Defendant could obtain a reduction of the level of his offense, but he was not entitled to a reduction of the sentence that he had already served. *State v. Oseguera*, 2011 UT App 417



Evidence of BAC Subsequent to Driving Is Relevant, But Not During Driving

The trial court did not allow the Defendant's expert to testify regarding the possibility that his BAC may not have been at .08 at the time he was operating his motorcycle. The trial court also did not allow Defendant to cross examine the State's expert about blood-alcohol absorption rates to show that Defendant's BAC could have continued to increase after driving,

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thus showing that he might have had a BAC of less than .08 while he operated his motorcycle.

However, the appellate court affirmed, holding that such evidence was irrelevant because Defendant was being charged under subsection (1)(a) of the DUI statute, which focuses solely on a person's BAC at the time of a chemical test subsequent to driving and not on a person's BAC at the time of driving. *State v. Manwaring*, 2011 UT App 443

A Jury Instruction May Be Refused If Already Covered In Other Instructions

One of Crabb's arguments on appeal was that the trial court erred when it declined to give a requested jury instruction. The appellate court affirmed, reasoning that because the trial court gave a "reasonable doubt" instruction regarding the State's burden of proof, that point of law was covered in the instructions and it is not error to refuse a proposed instruction if the matter is properly covered in other instructions *State v. Crabb*, 2011 UT App 440

Tenth Circuit Court of Appeals

SORNA Requires Notification When Offender Moves to Foreign Country

A sex offender who abandons his residence and moves to a

foreign country without notifying authorities in the state he is leaving violates the federal Sex Offender Registration and Notification Act, the Tenth Circuit held. *United States v. Murphy*, 10th Cir., No. 10-4095, 12/23/11)

Other Circuits/ State Courts

Lies About Nature of Baby's Injuries Can Support Liability for Coerced Confession

Interrogator's lied to a defendant to get his confession, telling him that his gentle shaking of a baby was the only way the baby could have died. The Seventh Circuit held that a confession is coerced when it results from an interrogator's lies that make a suspect believe a victim's injuries could have had no cause other than the suspect's actions. *Aleman v. Village of Hanover Park*, 7th Cir., No. 10-3523, 11/21/11)



Prosecutors Immune for Material-Witness Matters

Though circuits are divided about the issue, the Second Circuit held that prosecutors are absolutely immune from civil lawsuits alleging they misrepresented facts to obtain the detention of material witnesses. *Flagler v. Trainor*, 2d Cir., No. 10-4081-cv, 11/21/11



'CSI Effect' Jury Instructions Clarified

Jury instructions on the "CSI effect" should not be given preemptively, the Maryland Court of Appeals declared. Such an instruction was given even before the defense made an argument about missing forensic evidence. The court reasoned that "to the extent that such an instruction is requested, its use ought to be confined to situations where it responds to correction of a pre-existing overreaching by the defense, i.e., a curative instruction." *Stabb v. State*, Md., No. 2, 11/21/11

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'Stay and Abey' Order Approved To Solve State Prisoner's Pinholster Problem

According to *Cullen v. Pinholster*, 89 CrL 5 (U.S. 2011), the AEDPA does not allow federal courts to hear newly discovered evidence when deciding whether the state courts acted reasonably. In response, the Ninth Circuit held that habeas corpus petitioners whose claims are affected by newly discovered evidence can still seek relief by having their federal proceedings stayed and held in abeyance while the petitioners go back to the state courts. *Gonzalez v. Wong*, 9th Cir., No. 08-99025, 12/7/11)



Ban on Misdemeanants' Gun Possession Survives Second Amendment

The statute that makes it a federal crime for someone who has previously been convicted of a misdemeanor crime of domestic violence to possess a firearm survives intermediate scrutiny under the Second Amendment, the Fourth Circuit held. *United States v. Staten*, 4th Cir., No. 10-5318, 12/5/11

Illegal Aliens Have No Gun Rights

Aliens present in the United States illegally have no Second Amendment right to possess firearms, the Eighth Circuit held. *United States v. Flores*, 8th Cir., No. 11-1550, 12/16/11)

Ban on Guns For Those Subject to Restraining Order

The federal law that forbids firearm possession by people subject to certain domestic-violence protective orders does not violate the Second Amendment on its face, the Eighth Circuit ruled. *United States v. Bena*, 8th Cir., No. 10-2834, 12/21/11

Juror Should Have Been Disqualified For Ignoring Admonition to Stop Tweeting

A juror's repeated failures to follow a trial court's instructions to refrain from posting thoughts about the trial on his Twitter account required his removal from the jury regardless of whether the tweets themselves were prejudicial, the Arkansas Supreme Court held. *Dimas-Martinez v. State*, Ark., No. CR 11-5, 12/8/11

Search Warrant Justified Stop Away From Premises

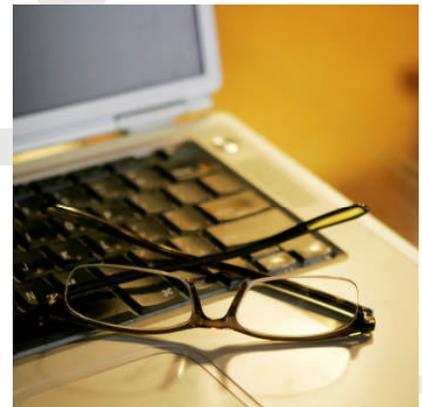
Investigators with a warrant to search a defendant's home did not violate the Fourth Amendment by detaining him after he had driven almost a mile away, the Fourth

Circuit held. To minimize trauma to the children living at the defendant's home, the officers stopped the defendant away from his residence.

The defendant unsuccessfully argued that his detention was contrary to *Michigan v. Summers*, 452 U.S. 692 (1981), which held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *United States v. Montieth*, 4th Cir., No. 10-4264, 12/5/11

No Ex Post Facto Problem With SORNA

The federal Sex Offender Registration and Notification Act is civil rather than punitive in nature for purposes of constitutional ex post facto analysis, the Eleventh Circuit held. *United States v. W.B.H.*, 11th Cir., No. 09-13435, 12/13/11



Insufficient Evidence to Support Porn Conviction

The Fifth Circuit overturned a defendant's child pornography

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conviction due to insufficient evidence. The court reasoned that the evidence gave equal support to a theory of guilt, as well as to a theory of innocence, because the defendant's diseased father also had regular access to the defendant's computer at the time the child porn was found. *United States v. Moreland*, 5th Cir., No. 09-60566, 12/14/11)

More Courts Grapple With Applying *Melendez-Diaz* Rule on Forensic Experts

The Massachusetts Supreme Judicial Court and the Fourth Circuit both recently approved more permissive approaches to the new restrictions on forensic evidence imposed under the Confrontation Clause. The courts held that under *Melendez-Diaz*, expert witnesses may testify about the results of forensic testing that was performed by nontestifying

analysts when the expert reasonably relied on that testing in reaching his opinion about the test results.

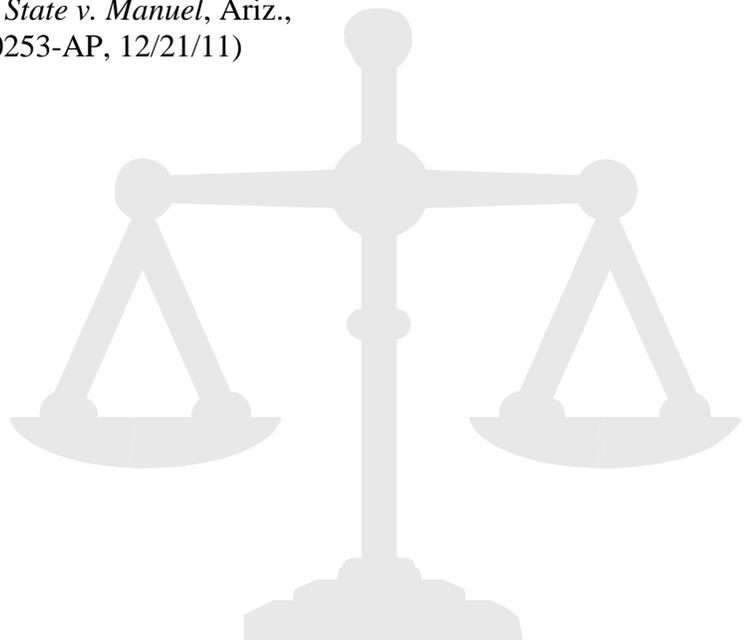
Commonwealth v. Munoz, Mass., No. SJC-11028, 12/15/11, and *United States v. Summers*, 4th Cir., No. 06-5009, 12/16/11

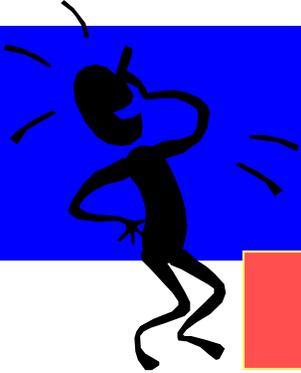
Gant Doesn't Limit Post-Arrest Protective Sweeps

A SWAT team executed an arrest warrant in the defendant's hotel room. The defendant was handcuffed and held at gunpoint when an officer lifted up a bed and found a firearm used to convict the defendant of capital murder. The Arizona Supreme court held that *Arizona v. Gant*, 556 U.S. 332, 85 CrL 95 (2009) does not preclude officers from conducting a "protective sweep" of areas adjacent to the place of an arrest even after the arrestee is handcuffed and secured. *State v. Manuel*, Ariz., No. CR-09-0253-AP, 12/21/11)



"For future reference, counselor, let me assure you that it's enough to simply cite the *Federalist Papers*."





On the Lighter Side

The old days vs. the new days...

	IN THE OLD DAYS	NOW
LISTENING TO MUSIC		
WATCHING FILMS		
CHATTING WITH FRIENDS		
READING THE NEWS		
PLAYING MUSIC		

BIRTHDAYS IN THE OLD DAYS



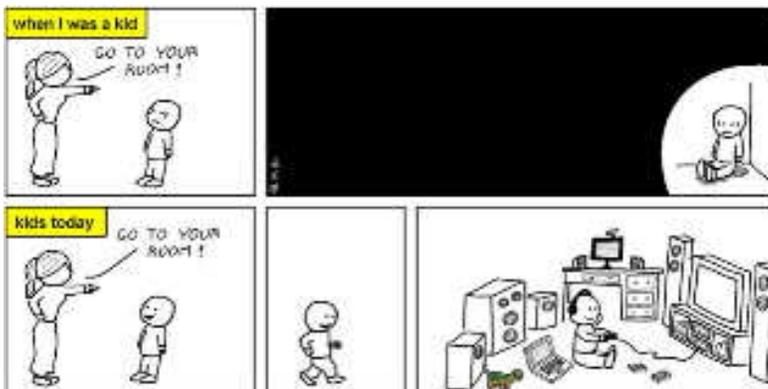
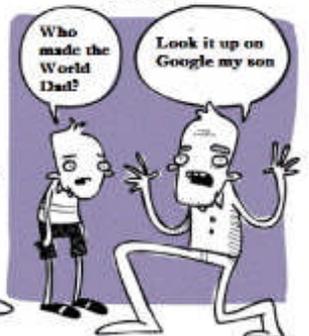
BIRTHDAYS NOWADAYS



BEFORE



NOW



UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 19-20	SPRING CONFERENCE <i>Case law update, legislative recap, ethics / civility, and more</i>	South Towne Center Sandy, 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	ADVANCED TRIAL SKILLS COURSE	Location pending

NATIONAL DISTRICT ATTORNEYS ASSOCIATION COURSES
AND OTHER NATIONAL CLE CONFERENCES

February 12-16	GOVERNMENT CIVIL PRACTICE CONFERENCE Summary Flyer Registration	San Antonio, TX
March 5-9	UNSAFE HAVENS II Summary <i>Prosecuting on-line crimes against children</i>	Registration Dulles, VA
March 11-15	FORENSIC EVIDENCE Summary Agenda	San Francisco, CA
April 23-27	PROSECUTING SEXUAL ASSAULTS Flyer Summary Agenda Registration	Savannah, GA
April 30 - May 2	National Cyber Crime Conference Summary Registration	Boston, MA