

The

PROSECUTOR



RECENT CASES



United States Supreme Court

Prison Inmate Did Not Have Right To Miranda Warnings Before Interrogation

The Sixth Circuit had adopted a rule that a prisoner is in custody when the prisoner is isolated from the general prison population and questioned about conduct outside the prison. However, the Supreme Court rejected such a bright-line rule and held that the determination of custody should focus on all of the features of the interrogation. *Howes v. Fields*, 565 U. S. ___(2012)

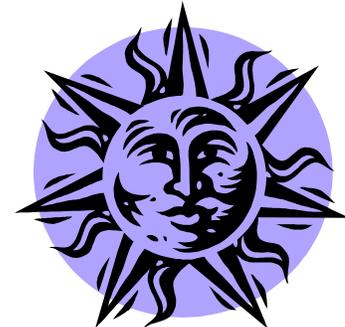
Brady Violation Was Not Properly Determined

The Third Circuit had granted Lambert, who was convicted of capital murder in 1984, habeas relief after holding that the failure to disclose a police activity sheet was a *Brady* violation. However, the Supreme Court remanded the case on the grounds that the Third Circuit had failed to address the state court's determination that the notations on the activity sheet were "not exculpatory or impeaching" but instead "entirely ambiguous." *Wetzel v. Lambert*, 565 U. S. ___ (2012)

Police Officers Given More Protection From Civil Lawsuits

The Supreme Court held that law enforcement officers could reasonably have believed, after consulting with their superiors and a prosecutor, that a search warrant they obtained and executed was not overbroad in violation of the Fourth Amendment. The decision makes it easier for officers to prevail with assertions of qualified immunity in civil rights lawsuits and for prosecutors to prevail on assertions of the good-faith exception to the exclusionary rule. *Messerschmidt v. Millender*, 565 U. S. ___ (2012)

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JOHN R. JUSTICE STUDENT LOAN RELIEF PROGRAM UPDATE

March, 2012

Governor Herbert has designated Utah Prosecution Council (UPC) to continue as the Utah administering agency for the John R. Justice Program here in Utah. Utah's application for the federal 2011-12 fiscal year was filed and has been approved by DOJ. The required acceptance documents have been signed and returned.

The draft of an application for 2011-12 JRJ funds has been prepared by UPC staff and is under review by the JRJ Review Committee. It is nearly the same as the 2010-11 application but a few tweaks were made based upon our first year's experience with the program. I anticipate that the 2011-12 JRJ application window will open sometime in April or early May, with the application deadline being sometime in late May or June.

Here is some information about the FY2011-12 JRJ program.

- \$121,220 will be available for Utah in FY11-12.
- The mandate that JRJ funds be divided 50/50 between prosecutors and public defenders, regardless of the relative number of eligible persons in each category, remains unchanged.
- As mandated in the JRJ legislation, those who received awards the first year of the program will, if still eligible, receive priority for subsequent year awards. The same priority will apply in future years to those who receive their first JRJ funding in 2012. Any funding beyond FY2011-12 is, of course, dependant upon continued congressional funding of the program.
- While neither UPC nor the Attorney General's Office claimed any JRJ funds for administrative expenses in FY2010-11, the act provides that up to 15% of the state's share may be used to cover administrative expenses.
- 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 office.
- The act mandates that funding priority be given to those 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 preliminarily determined that, as in FY 2010-11, no individual award of JRJ funds will exceed \$4,000. That ceiling may change as applications are evaluated. Individual award amounts will be based upon a formula that takes into consideration income and number of dependants. Longevity in JRJ eligible employment may also be considered.

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JOHN R. JUSTICE STUDENT LOAN RELIEF PROGRAM UPDATE (continued)

- In order to receive a JRJ award, an applicant must sign a written commitment to continue in eligible JRJ employment for at least three years from the date of the award.
- Despite the 21% increase from last year's funding level, there will not be nearly enough money to meet the needs of eligible prosecutors and public defenders in Utah.

Word will soon be spread that UPC is ready to accept applications from eligible public defenders and prosecutors for FY2011-12 JRJ assistance. Once UPC has opened the window to accept JRJ assistance applications for FY2011-12, notification to prosecutors will be through 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 eligible employers, all of whom have agreed to spread the word internally. Information will also be posted in a JRJ section of the UPC website:

As was done last year, all applications will be reviewed and award amounts will be determined by a five member committee consisting of two experienced public defenders, two experienced prosecutors and a representative from the Utah Higher Education Assistance Authority. The Director of UPC will chair the review committee but will have a vote only in case of a tie among other members of the committee.

IN MEMORY

WALTER R. (BUD) ELLETT

"THE QUINTESSENTIAL LAWYER"

SEPT 13, 1927 - FEB 15, 2012



Our long time colleague, Walter 'Bud' Ellett, passed away on February 15, 2012.

Bud graduated from the University of Utah Law School and had a long and successful career in the field of law. He was in private practice in Murray for thirty years before joining the Salt Lake District Attorney's office in 1985. Bud served with three District Attorneys as Chief of that office's Criminal Division. After retirement, he was appointed as Judge Protempore in the Third Judicial District and served in the

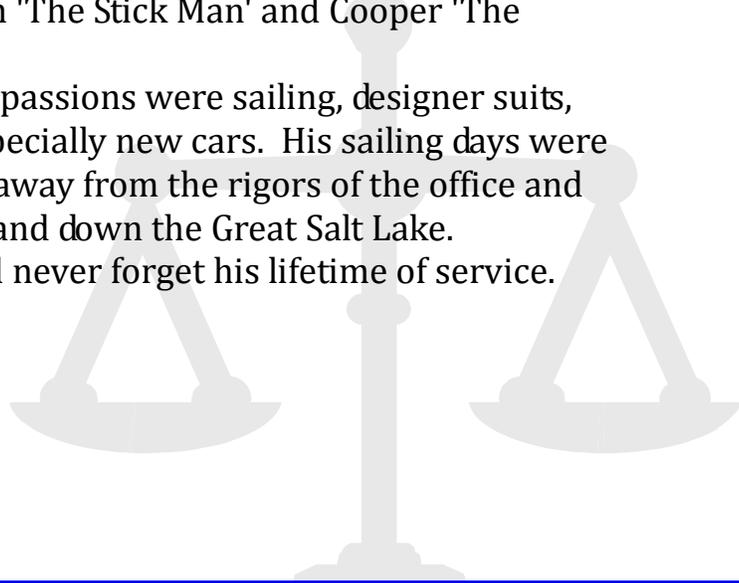
West Valley court.

Bud was the quintessential gentleman who brought a grace and kindness to the practice of law. Attorneys who followed his example were not only better attorneys but better people. Bud went out of his way to show kindness to new attorneys. He always gave of his time and never condescended as he provided or shared his knowledge.

Bud married Claudia White in August of 1956 and, for over 55 years, they had a wonderful life together. They had 3 children, but the joys of Bud's life were his two grandsons, Jackson 'The Stick Man' and Cooper 'The Bouncing Ball'

Outside of law, Bud's greatest passions were sailing, designer suits, playing cards, slots in Dover, and especially new cars. His sailing days were some of his happiest. He could get away from the rigors of the office and completely relax while he sailed up and down the Great Salt Lake.

We will miss Bud, and we will never forget his lifetime of service.





Utah Court of Appeals

Davis and Tooele Counties Properly Complied with GRAMA Requests

The appellate court held that Tooele County satisfied its obligation

under GRAMA for two reasons: first, Tooele County did not have to provide Maese with an electronic copy of the database or a twenty-year transaction report because doing so would require it to “create a record” and “compile” information in a “format” that it did “not currently maintain,” in contravention of GRAMA.

Second, GRAMA does not

necessarily require the governmental entity to provide a person with a copy of a public record merely because it was requested, but only that the record be accessible for the public to make a copy “during normal working hours,” an obligation that Tooele County satisfied. *Maese v. Tooele County*, 2012 UT App 49

In a similar case, the appellate court held that GRAMA did not

United States Supreme Court (p. 1)

Howes v. Fields - Prison Inmate Did Not Have Right To Miranda Warnings Before Interrogation

Wetzel v. Lambert - Brady Violation Was Not Properly Determined

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Maese v. Tooele County - Davis and Tooele Counties Properly Complied with GRAMA Requests

State v. Relyea - Important DUI Case Regarding 15-Min Observation Requirement in *Baker*

Wamsley v. State - Defendant Failed to Prove “New Evidence”

State v. Brooks - Court’s Failure To Make Express Finding Was Not Erroneous

State v. Kucharski - Judge May Rely on Knowledge Gained from Previous Proceedings With Defendant

Towner v. Ridgway - An Expired Stalking Injunction Is Moot and Cannot Be Retroactively Vacated

State v. Samples - No Plain Error in ‘Receipt of Stolen Property’ Case

State v. Sheehan - Confrontation Right Violated When Cross-Examination Was Limited

State v. Ruiz - Sufficient Evidence

State v. Milligan - Defendant Has Right To Appear at Any Subsequent Sentencing Hearing Where Discretion Is Involved

State v. Millett - Case Re-tried after Juror Lies during Voir Dire

State v. Maestas - No Custody During Interview with Defendant in Hospital

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United States v. West - Park With Sports Fields Qualifies as ‘Playground’

United States v. Sturm - Jurisdictional Element of Child Porn Laws

Thomas v. Parker - Dismissal of One Claim as Frivolous Makes Prior Lawsuit Qualify as PLRA ‘Strike’

World Publishing Co. v. DOJ - Arrestees’ Privacy Interest in Mug Shots Outweighs Public’s Desire to View Photos

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Commonwealth v. Allshouse - Child’s Statements to Abuse Investigator Were Not Testimonial

State v. Vigil - Child’s Statement to Investigator Was Admissible

United States v. Fofana - Identity Evidence Gleaned in Illegal Search Didn’t Contaminate Legally Acquired Evidence

United States v. Gray - Search Warrant for Suspect’s Rectum Didn’t Make Proctoscopic Exam Reasonable

In re Flatt-Moore, Ind - Prosecutor Rebuked for Letting Victim Call the Shots During Plea Negotiations

State v. Pohlman - Felon Status Precludes Challenge to State Gun Law

United States v. McGarity - Restitution in Porn Case Requires Causation

State v. Torres - Prior Opportunity to Cross-Examine Was Inadequate

Wheeler v. State - Backdoor Admission of ‘Indirect Hearsay’ Violated Defendant’s Confrontation Rights

Pettus v. United States - Forensic Handwriting Comparison Passes Frye Test

United States v. Doe - Fifth Amendment Privilege Precludes Forced Decryption of Computer Hard Drive

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require Davis County to compile a similar report for Maese. Rather, Davis County satisfied its obligations under GRAMA when it informed Maese that he could access and copy the requested records through its Redi-Web system and at the Recorder's Office, and explained to Maese how to do so. *Maese v. Davis County*, 2012 UT App 48



Important DUI Case Regarding 15-Min Observation Requirement in *Baker*

An officer performed a mouth check per *Baker* on an arrested DUI defendant prior to transporting him to the station for a breath test. En route and unbeknownst to the officer, defendant "regurgitated into his throat," and then "quickly swallowed down any residue prior to arriving at the police station."

At the station, the mouth check was not performed again nor was *Baker* re-started. From the time defendant arrived at the station until he blew into the instrument (BAC .237) an additional sixteen minutes elapsed.

The appellate court held that *Baker* was satisfied where the officer observed defendant for those

sixteen minutes. The court reasoned that although the Arresting Officer was preparing the Intoxilyzer for operation and did not keep a constant fixed gaze on Relyea, Relyea was sitting handcuffed in front of him and the Arresting Officer was able to look at Relyea, look at the screen, and look back at Relyea. The "undivided attention of the observing officer is not required," and officers may perform other tasks so long as they are still monitoring the suspect. The Arresting Officer was simultaneously able to focus on setting up the Intoxilyzer machine and to observe Relyea for sixteen continuous minutes, with no other distractions interrupting his observation."

Note: the *State* challenged *Baker* in this case, arguing that since the Intoxilyzer 8000 has a slope detector that will disallow a test if any mouth alcohol is detected, compliance with the *Baker* rule is unnecessary, since that rule was based on outmoded Breathalyzer technology, which did not have mouth-alcohol detection capability. Since the court held *Baker* was complied with, it did not reach that issue. *State v. Relyea*, 2012 UT App 55

Defendant Failed to Prove "New Evidence"

Wamsley argued that his post conviction relief petition was timely filed from the date he discovered new evidence. However, the appellate court held that he failed to

show that his alleged evidence was credible, and that he did not show when the evidence was discovered or why he could not have discovered it during his criminal case. *Wamsley v. State*, 2012 UT App 57

Court's Failure To Make Express Finding Was Not Erroneous

On appeal, the court held that the district court's failure to make an express finding of willfulness prior to revoking and restarting Brooks's probation presented either no error at all or invited error by Brooks's counsel.

The court also held that the district court provided Brooks with ample opportunity to speak and present evidence in mitigation and that Brooks failed to establish ineffective assistance. *State v. Brooks*, 2012 UT App 34



Judge May Rely on Knowledge Gained from Previous Proceedings With Defendant

The Defendant argued on appeal that his counsel performed deficiently by failing to file a motion to disqualify the judge.

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However, the appellate court affirmed, reasoning that it was not inappropriate for the trial judge to rely on what he had learned about the Defendant by dealing with him in the current and prior proceedings, or to make a judgment based on those dealings about the Defendant's ability to receive correction through probation. *State v. Kucharski*, 2012 UT App 50



An Expired Stalking Injunction Is Moot and Cannot Be Retroactively Vacated

The trial court refused to retroactively vacate a stalking injunction, reasoning that because the injunction was no longer in force, the dispute was moot. A dispute is not moot if collateral legal consequences may result from an adverse decision. The appellate court held that the issue was indeed moot because any consequences the Defendant identified, such as harm to his reputation, family relationships, and employment prospects, were not "imposed by law." *Towner v. Ridgway*, 2012 UT App 35

No Plain Error in 'Receipt of Stolen Property' Case

Samples appealed his conviction of theft by receiving stolen property, under the standard of plain error review. While the appellate court did acknowledge that there was little evidence of Samples's knowledge that the property was stolen, the court could not conclude that any evidentiary insufficiency was so obvious and fundamental that it would be plain error for the trial court not to discharge the defendant. *State v. Samples*, 2012 UT App 52

Confrontation Right Violated When Cross-Examination Was Limited

The appellate court reversed and held that the trial court violated the Defendant's constitutional right to confrontation by limiting the Defendant's cross-examination and attempts to impeach the State's experts without any valid justification.

The court also held that while it is true that an expert's testimony about fingerprint identification is considered sufficiently reliable to come in, such a determination does not automatically exclude any contradictory expert testimony, as long as the competing expert qualifies under rule 702. *State v. Sheehan*, 2012 UT App 62

Sufficient Evidence

Primarily because of inconsistencies and confusing statements in the victim's testimony, Defendant argued on appeal that there was insufficient evidence to support the verdict.

However, the appellate court deferred to the jury's credibility assessments, reasoning that the jury may well have concluded that the inconsistencies in the victim's testimony were not a product of fabrication but rather of her language limitations and cognitive impairment. *State v. Ruiz*, 2012 UT App 42



Defendant Has Right To Appear at Any Subsequent Sentencing Hearing Where Discretion Is Involved

The appellate court held that because Milligan had an opportunity to appear and defend at the original sentencing hearing, then he was not entitled to appear at the later amendment to his sentencing where it did not involve

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So you think a domestic violence conviction will make an offender a restricted person? It might not.

Edward A. Berkovich¹

There are a significant, undetermined number of convicted domestic violence offenders who should be disqualified/restricted persons but could nevertheless buy a gun at a retail store by close of business on the day you are reading this. The way many domestic violence convictions are being recorded at disposition, whether by guilty plea or by guilty verdict, is making it very difficult for the Bureau of Criminal Identification (“BCI”) to determine whether the offender is a disqualified/restricted person under federal firearms law.

By way of what is probably familiar background, when a conviction occurs, including a conviction for a domestic violence offense, the notation of that conviction is hand-written down by the court clerk on a paper minute document. After court is over, the court clerk enters all the hand-written notations of convictions into the Courts Information System (“CORIS”). CORIS pushes through that information to the Utah Criminal Justice Information System (UCJIS), and that conviction information is entered onto a person’s criminal history, what prosecutors often refer to colloquially as a person’s BCI record.

When any person (including a person previously convicted of a domestic violence offense) prepares to buy a firearm in Utah, he or she fills out two forms, an ATF Form 4473 and a Utah State White Form, and the information on those forms is transmitted to BCI by phone, fax or Internet. Then, while the applicant is waiting at the gun store, BCI personnel research the applicant’s BCI record to determine whether there are any convictions which may cause the applicant to be a disqualified/restricted person who is prohibited from possessing a firearm or ammunition.² Because of the way many domestic violence convictions are being recorded by the courts, BCI often cannot readily make that determination.³ If BCI cannot readily make that determination, the purchase application is placed on hold, and the applicant is told he or she will have to wait until BCI can make a determination. Once the application is put on hold, BCI personnel contact police agencies, courts and prosecutors to get police reports, dockets, judgments and convictions (“J&Cs”), and charging documents, to read those and try to make the disqualified/restricted person determination. Even after making these efforts, that research is futile all too often. If BCI cannot make the disqualified/restricted person determination after its research, BCI’s statutorily-mandated⁴ default position is to approve the firearm purchase application.

The difficulty arises because not every offense designated by state statute as a domestic violence offense⁵

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1. Staff Attorney, Utah Prosecution Council (Tel: 801.366.0241; E-mail: eberkovich@utah.gov). Lance Tyler, Brady Section Chief at the Utah Bureau of Criminal Identification has been the patient, tireless force behind working to find a solution to the issue discussed herein. He deserves recognition for his in-depth knowledge about this subject and for his willingness to travel to any meeting or training to find or begin implementing a solution to this issue. The following have also contributed time and effort toward finding a solution: Michaela Andruzzi, Judge John Baxter, Paul Boyden, Lauralee Blue, Rob Dobbins, Trina Higgins, John Huber, Kris Knowlton, Mark Nash, Laura Nygaard, Judge Jeanne Robison, Ryan Robinson, Judge Rick Romney, Rick Schwermer, Judge Marsha Thomas, Drew Yeates and others. By acknowledging their significant contributions I am not representing that they agree or disagree with the content or practice suggestions herein; I don’t know whether they do or not. Any errors herein are mine.

2. 18 U.S.C. § 922(g) (9) (2005) prohibits a person “who has been convicted in any court of a misdemeanor crime of domestic violence” from possessing a firearm or ammunition. See 18 U.S.C. §§ 921(a)(3), (17) (1968) for definitions of “firearm” and “ammunition.” If the applicant has a conviction for a domestic violence offense, his or her application is automatically placed on hold status so BCI can conduct the research necessary to make a determination. On average, 85% of determinations are made in less than three days, according to Lance Tyler. See n.1.

3. This statement does not attribute to the courts responsibility for the current way domestic violence convictions are being recorded. As will be discussed later, prosecutors are in the best position to ensure accurate recording sufficient to give BCI the information it needs to determine eligibility.

4. 18 U.S.C. §§ 922(t)(1)(B)(ii) (19__), 925A (1993).

5. Utah Code Ann. § 77-36-1(4) (2011) lists sixteen offenses, plus a catch-all, that can constitute a domestic violence offense if com-

So you think a domestic violence conviction will make an offender a restricted person? It might not.

(continued)

causes a person to be a disqualified/restricted person under federal firearms law. To be disqualifying, the “misdemeanor crime of domestic violence”⁶ must have, “as an element, the use or attempted use of physical force”⁷ by one cohabitant against another. In other words, to render the offender a disqualified/restricted person upon conviction, the domestic violence offense must involve the use or attempted use of *force against a person* who is the offender’s cohabitant.⁸

To illustrate, if X and Y are cohabitants, and if X strikes Y on the chest or head, and X is convicted of the assault charge, *and that conviction is recorded with specificity in the manner described below*, X becomes a restricted person because X has used physical force against Y. However, if X takes a golf club and smashes all the windows in Y’s car, and if X is convicted of the criminal mischief charge, X does not become a restricted person because X has not used physical force against a person; rather, X has used physical force against a car.⁹

As you will have concluded, a conviction for many of Utah’s sixteen potential domestic violence offenses, plus the catch-all, listed in Utah Code § 77-36-1(4), does not render an offender a disqualified/restricted person under federal law. And persons convicted of any of the “non-physical force” domestic violence offenses are lawfully entitled to purchase a firearm.

The immediately important application of all this is that the vast majority of domestic violence offenses are charged under Utah’s assault statute.¹⁰ However, only two of the three subsections of that statute, upon conviction, render the offender a disqualified/restricted person. This is because only two of the three subsections constitute “physical-force” offenses. Utah Code § 76-5-102 reads in relevant part:

Assault is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.¹¹

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mitted by one “cohabitant” against another, as that term is defined in Utah Code Ann. § 78B-7-102(2) (2008).

6. 18 U.S.C. § 922(g)(9) (2005).

7. 18 U.S.C. § 921(a)(33)(A)(ii) (1996). *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008). It is more correct to say the offender must be an “intimate partner” of the victim, as that term is defined in 18 U.S.C. § 921(a)(32) (1994): “The term “intimate partner” means, with respect to the person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.” *Id.* The relevance of the problem created by the mismatch between Utah’s definition of cohabitant and the federal definition of intimate partner will be discussed later in this article. *Johnson v. United States*, 130 S.Ct. 1265 (2010), is a related decision which discusses the definition of “physical force” in the disqualified/restricted person context.

8. Pleas held in abeyance do not render the offender a disqualified/restricted person, unless the offender does not comply with the terms and conditions thereof and the plea is entered as a conviction. Utah Code Ann. §§ 77-2a-1(1) (1993), -36-1.1(3) (2005); 18 U.S.C. § 921(a)(33)(B)(ii) (1996). Also, to be disqualifying, the defendant must have been represented by counsel or have knowingly and intelligently waived that right. 18 U.S.C. § 921(a)(33)(B)(i) (1996).

9. Prosecutors may well think, from a policy perspective, that X’s conduct should render him or her a disqualified/restricted person under the criminal mischief scenario above, given the implied force, implied threat of physical harm, or because X has demonstrated himself or herself to be a violent person, but that is not the law.

10. Utah Code Ann. § 76-5-102 (2003).

11. *Id.*

So you think a domestic violence conviction will make an offender a restricted person? It might not.

(continued)

A conviction as to subsection (a) or (c) renders the offender a disqualified/restricted person, while a conviction as to subsection (b) does not.¹² So if BCI gets a docket or J&C for a domestic violence conviction that was entered into CORIS and pushed through to UCJIS, and that docket simply shows a conviction as to section 76-5-102, that is not sufficient for BCI to timely determine whether the applicant is a disqualified/restricted person. Neither is a conviction as to section 76-5-102(1). Neither is the statement printed on the docket that says “THIS CASE INVOLVES DOMESTIC VIOLENCE.” Rather, the record of conviction, whether on a docket or on a J&C, must be specific as to the very subsection of the assault statute: to either section 76-5-102(1)(a) or section 76-5-102(1) (c), if that is what the facts support.

Prosecutors are in the best position to ensure convictions are recorded with sufficient specificity by saying at entry of plea something like, “May the record reflect defendant is pleading guilty to section 76-5-102(1)(a) and the victim was defendant’s cohabitant” or “...section 76-5-102(1)(c) and the victim was defendant’s cohabitant” where the facts support a conviction to either subsection (a) or subsection (c). The court should make those findings: “The court finds defendant guilty of violating section 76-5-102(1) (c) and finds the victim was defendant’s cohabitant.”¹³ The court clerk will then have the information to record both the conviction as to the specific subsection and the cohabitant status of the victim on the paper minute document and enter it that way into CORIS. CORIS will then communicate that information to UCJIS, which BCI can then read and timely determine whether a prospective firearm buyer is a disqualified/restricted person. This will save BCI personnel countless hours in unnecessary research, which currently often leads to no conclusion on the “use or attempted use of force” issue anyway, resulting in the subsequent default decision to grant an application. The granting of the application may very well be to an applicant who should have been denied because his or her conviction involved the use or attempted use of force against a cohabitant, but the docket and/or J&C did not reflect that.

CORIS is now set up so it can accept an information charging assault generally under section 76-5-102(1) at the time of filing, and then, at entry of plea or return of verdict, record the conviction as to the specific subsection. This data-entry/modification at disposition is accomplished by the court clerk clicking the “find violation” key on the CORIS screen, then entering “assault*” or “76-5-102*” after which “76-5-102(1)(a),” “76-5-102(1)(b)” and “76-5-102(1)(c)” appear as choices to click.

The importance of what gets entered into CORIS cannot be overstated. Consider a police report that reads something like, “I, Officer Jones, arrived at the scene and saw X punch his [or her] cohabitant Y three times in the head very forcefully and violently before I separated the parties.” The report itself is not sufficient for BCI, even though the facts, as stated, indicate the offense involved the use of force against a person, where the docket only shows a conviction to section 76-5-102 or section 76-5-102(1), not to the requisite section 76-5-102(1)(a) or section 76-5-102(1)(c).

Regarding trials: If you charged and then go to trial on the general section 76-5-102, in bench trials you will need to argue to the court that the evidence supports a guilty verdict to a specific subsection. In jury trials, a special verdict form should be used upon which the jury can indicate the exact subsection the jury convicted

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12. *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008). After *Hays* was decided, the Federal Bureau of Investigation (FBI) Legal Research and Analysis Team (“LRAT”) determined that a conviction to section 76-5-102(1)(b) does not render an offender a disqualified/restricted person. LRAT determinations for Utah statutes were finalized on July 14, 2009, and circulated thereafter.

13. These findings should be typed into CORIS as part of the docket entry for the date on which conviction proceedings are entered.

So you think a domestic violence conviction will make an offender a restricted person? It might not.

(continued)

the defendant of violating.

Solving the above-described specificity issue for assault cases alone would reduce BCI's unnecessary and often futile research workload by about 95%.¹⁴ For those of you concerned that at least some of your domestic violence assault convictions, which should have rendered the defendant a disqualified/restricted person, have not done so, you are probably correct. Utah is not the only state facing this challenge. *United States v. Hays*¹⁵ was not decided until 2008, and states have been grappling with how to comply with its holding.¹⁶ In Utah at least one prosecutor has suggested charging domestic violence assaults solely using the statutory language in section 76-5-102(1)(c) with no other statutory language from subsection (a) or (b) in the charging document.¹⁷

Following are other violations for which convictions must be recorded as to the specific subsection, where the facts support, to render the offender a disqualified/restricted person.¹⁸ CORIS is now set up to record these dispositions as to the specific subsection, including when they are charged generally, and then convicted as to the specific subsection:

- Disorderly conduct¹⁹ – must be recorded as a conviction as to:
 - subsection 76-9-102(1)(b)(i). Note, only the clause in subsection (1)(b)(i) that reads “engages in fighting” behavior is disqualifying, so if you are convicting pursuant to subsection (1)(b)(i), after you have asked that the record reflect that specific subsection, you must also ask for a notation on the docket indicating specific findings by the court: “The court finds defendant engaged in fighting behavior when committing this offense and finds the victim was defendant’s cohabitant.” For bench trials and jury trials, similar argument and verdict forms must be used as described in the discussion above regarding recording assault convictions. Prosecutors who use municipal ordinances to prosecute disorderly conduct/disturbing the peace are invited to email those statutes to me, so they can be evaluated for whether violations thereof render the offender a disqualified/restricted person when the victim is the defendant’s cohabitant.

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14. According to Lance Tyler. *See n.1.*

15. 526 F.3d 674.

16. Connecticut, a state where a prosecutor is present at every disposition in a domestic violence case, developed a special minute entry for domestic violence cases. If anybody would like a copy of that for local practice, to assist your judge and court clerk(s), or for further education, please contact me and I will send it.

17. Note, however, that CORIS cannot enter a charging document that charges subsections (a) and (c) but not (b). In other words, a charging document containing only the subsections which, if convicted to, render the offender a disqualified/restricted person, cannot be entered into CORIS. This is a data entry issue. The following assault charges can be both entered and “dispositioned” in CORIS: 76-5-102, 76-5-102(1)(a), 76-5-102(1)(b), 76-5-102(1)(c), 76-5-102(3), 76-5-102(3)(b).

18. These are LRAT determinations. *See n.12.*

19. Utah Code Ann. § 76-9-102 (1999). Under the preemption doctrine the language in Utah Code § 77-36-1(4)(o) stating that a conviction to disorderly conduct which was amended down from another domestic violence offense “does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. § 921, and is exempt from the federal Firearms Act, 18 U.S.C. Section 921 et seq.” should be viewed with skepticism.

So you think a domestic violence conviction will make an offender a restricted person? It might not.

(continued)

- Child abuse²⁰ – must be recorded as a conviction as to:
 - subsection 76-5-109(2)(a), or
 - subsection 76-5-109(2)(b), or
 - subsection 76-5-109(2)(c), or
 - subsection 76-5-109(3)(a), or
 - subsection 76-5-109(3)(b), or
 - subsection 76-5-109(3)(c). Note, in child abuse cases, a conviction pursuant to any of the six subsections above is only disqualifying if the offender is the parent of the victim, and that parent inflicted the serious bodily injury on the victim. Therefore, after asking the court to record the conviction as to the specific subsection, you must also ask for findings of the parental relationship of the defendant to the victim and that the defendant inflicted the serious physical injury on the victim: “The court finds that defendant is the parent of the victim and finds that defendant inflicted serious physical injury on the victim.” For bench trials and jury trials, similar argument and verdict forms must be used as described in the discussion above regarding recording assault convictions.

- Damage to or interruption of a communication device²¹ – must be recorded as a conviction as to:
 - subsection 76-6-108(2)(a). Note, only the clause in subsection (2)(a) that reads “uses force” is disqualifying. So if you are convicting pursuant to subsection (2)(a), after you have asked the record to reflect that is the specific subsection to which the defendant is pleading, you must also ask for findings to be recorded on the docket: “The court finds defendant used force against the victim when committing this offense and finds that the victim was defendant’s cohabitant.” For bench trials and jury trials, similar argument and verdict forms must be used as described in the discussion above regarding recording assault convictions.

- Threatening with or using a dangerous weapon in fight or quarrel²² – must be recorded as a conviction as to:
 - subsection 76-10-506(2). Note, only the clause in subsection (2) that reads “or unlawfully uses a dangerous weapon in a fight or quarrel” is disqualifying. Therefore, if the conviction is pursuant to subsection (2), after you have asked the record to reflect that is the specific subsection to which the defendant is pleading, you must also ask for findings to be recorded on the docket: “The court finds defendant is pleading guilty to unlawfully using a dangerous weapon in a fight or quarrel and finds that the victim was defendant’s cohabitant.” For bench trials and jury trials, similar argument and verdict forms must be used as described in the discussion above regarding recording assault convictions.

- Unlawful detention²³ – must be recorded as a conviction as to:
 - subsection 76-5-304(1). Note, the clause in subsection (1) that reads “detains or restrains the victim” is the disqualifying language, so after you have asked the record to reflect the conviction is pursuant to subsection (1), you must also ask for specific findings on the docket: “The court

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20. Utah Code Ann. § 76-5-109 (2011).

21. Utah Code Ann. § 76-6-108 (2000).

22. Utah Code Ann. § 76-10-506 (2010).

23. Utah Code Ann. § 76-5-304 (2001).

So you think a domestic violence conviction will make an offender a restricted person? It might not.

(continued)

finds that in committing the offense defendant detained or restrained the victim and finds that the victim was defendant's cohabitant." For bench trials and jury trials, similar argument and verdict forms must be used as described in the discussion above regarding recording assault convictions.

Judges, court clerks, prosecutors and defense counsel have been informed of this issue, or soon will be, but because of the scheduling of those groups' continuing education meetings, some of them will have been informed about this, and some will not have been. So you may need to educate them about it. Some jurisdictions have begun implementing these practices.

The solution above is not comprehensive. The mismatch of the state definition of "cohabitant" and the federal definition of "intimate partner" presents a challenge. But BCI informs me that challenge will be wholly manageable when convictions are recorded as to the specific subsection.²⁴ Also, some courts take pleas in domestic violence cases without a prosecutor being present. In those courts, the judge cannot get a reliable factual basis to make the "use of force" determination to record the conviction as to the specific subsection. That issue will need to be resolved. In addition, rule 11(g), Utah Rules of Criminal Procedure, which requires the court to advise a defendant convicted of a domestic violence offense that he or she is prohibited from "possess [ing]...any firearm or ammunition,"²⁵ is over broad, since only "physical force" domestic violence convictions render an offender a disqualified/restricted person under *United States v. Hays*.²⁶ That rule may need to be amended.

As a point of information, when making plea offers in cases where the charges are both a violation of a protective order and assault, prosecutors should be aware that if the assault is dismissed in exchange for a plea to the violation of protective order, there is no disqualification, because violation of a protective order is not an offense which renders the offender a disqualified/restricted person.²⁷

The human element underlying this discussion is about striving to protect domestic violence victims. And the discussion of legal decisions, statutes, research, clicks and key strokes is to assist you in your continuing efforts to protect them. With this in mind, we encourage you to implement the practices above. Please contact me if you have any comments, criticisms, ideas or questions regarding this issue.

24. BCI will make the determination whether the parties meet the definition of "intimate partner" under 18 U.S.C. § 921(a)(32) (1994) by reading the police incident report.

25. Utah R. Crim. P. 11(g).

26. 526 F.3d 674.

27. This is not to be confused 18 U.S.C. § 922(g)(8) (1994), under which it is unlawful for a person subject to a qualifying protective order to possess a firearm or ammunition.

AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

The Supreme Court has approved amendments to the Utah Rules of Criminal Procedure. The amendments are effective April 1, 2012, unless otherwise noted.

Summary of amendments

Rule 4. Prosecution of public offenses: Amended. Allows prosecutors to add or change charges before trial as long as the substantial rights of the defendant are not prejudiced.

Rule 7. Proceedings before magistrate: Amended. Implements the Supreme Court's decision in *State v. Hernandez*, 2011 UT 70, requiring preliminary hearings in class A misdemeanors.

Rule 36. Withdrawal of counsel: Amended. Requires counsel to include in a motion to withdraw a certification that withdrawal is consistent with the rules of professional conduct.

To see the text and effective date of the amendments, click on this link: <http://www.utcourts.gov/resources/rules/approved/> and then click on the rule number. All amendments are effective on the dates indicated. Updated versions of the rules will be posted to the main rules web page (<http://www.utcourts.gov/resources/rules/>) on or about the effective date of the amendments.

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any judicial reasoning or decision making.

However, where the trial court's imposition of consecutive sentences at the amended sentencing did involve an exercise of discretion, Milligan should have been permitted to argue against such consecutive sentencing. Thus, the court reversed and remanded for the narrow purpose of giving Milligan an opportunity to defend against that aspect of the amended sentencing. *State v. Milligan*, 2012 UT App 47



Case Re-tried after Juror Lies During Voir Dire

The *McDonough* test, adopted by the Utah Supreme Court in *State v. Thomas*, 830 P.2d 243 (Utah 1992), "mandates a new trial if the moving party demonstrates that (1) 'a juror failed to answer honestly a material question on voir dire,' and (2) 'a correct response would have provided a valid basis for a challenge for cause.'"

The appellate court ordered a new trial after reasoning that one of the jurors likely recognized Defendant's name from the sex offender registry but did not disclose this information during

voir dire, thereby not answering honestly to a material question on voir dire that would have provided a basis to challenge the juror for cause. *State v. Millett*, 2012 UT App 31

No Custody During Interview with Defendant in Hospital

The appellate court held that Officer Horner did not engage in objectively coercive tactics or knew of and exploited Defendant's alleged mental limitations when he questioned the Defendant in the hospital after his DUI accident.

The court further held that Defendant was not entitled to *Miranda* warnings prior to the questioning because he was not in custody. Moreover, Defendant's counsel did not perform deficiently in failing to call Defendant's codefendant to the stand because the codefendant has a constitutional right not to be called as a witness in his own criminal trial. *State v. Maestas*, 2012 UT App 53

Tenth Circuit Court of Appeals

Park With Sports Fields Qualifies As 'Playground'

A sports complex containing a swingset, a jungle gym, and athletic fields qualifies as a "playground" within the meaning of the federal statutes that criminalize sales of

illegal drugs within 1,000 feet of a public playground, the Tenth Circuit held. *United States v. West*, 10th Cir., No. 11-3070, 2/14/12



Jurisdictional Element of Child Porn Laws

The jurisdictional element of the federal child pornography statutes does not require the government to prove that a digital file the defendant distributed or received traveled in interstate or foreign commerce, so long as there is proof that other files depicting the same image have done so, the Tenth Circuit held. *United States v. Sturm*, 10th Cir. (en banc), No. 09-1386, 2/24/12

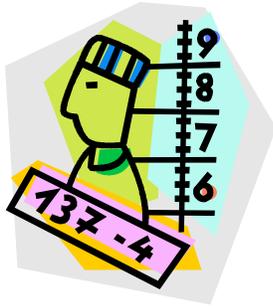
Dismissal of One Claim as Frivolous Makes Prior Lawsuit Qualify as PLRA 'Strike'

While circuits are split on the issue, the Tenth Circuit held that when an indigent prisoner's prior civil rights lawsuit was dismissed and only some of multiple claims were deemed frivolous, the action nonetheless counts as one of the three strikes allotted under the Prison Litigation Reform Act. *Thomas v. Parker*, 10th Cir., No. 11-6087, 2/22/12

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Arrestees' Privacy Interest in Mug Shots Outweighs Public's Desire to View Photos

A Freedom of Information Act request seeking mug shots from the U.S. Marshals Service was properly rejected as an “unwarranted invasion” of the subject's personal privacy, the Tenth Circuit held. *World Publishing Co. v. DOJ*, 10th Cir., No. 11-5063, 2/22/12

Other Circuits/ State Courts

Child's Statements to Abuse Investigator Were Not Testimonial

A defendant's Sixth Amendment rights were not violated when a trial judge allowed prosecutors to present hearsay accusations that a 4-year-old made to a child abuse investigator, the Pennsylvania Supreme Court held. The child's statements were not testimonial and, thus, not covered by the Confrontation Clause. *Commonwealth v. Allshouse*, Pa., No. 55 WAP 2008, 1/20/12

Child's Statement to Investigator Was Admissible

Even if statements like those discussed in the prior case are not considered testimonial, they must still fall under a hearsay exception. Statements a child victim made to a forensic interviewer in a medical setting may be admissible under the medical-treatment exception to the hearsay rule even though the interview is partly aimed at assisting law enforcement's investigation of the crimes, the Nebraska Supreme Court held. *State v. Vigil*, Neb., No. S-11-434, 1/27/12

Identity Evidence Gleaned in Illegal Search Didn't Contaminate Legally Acquired Evidence

Evidence that a defendant committed bank fraud need not be suppressed even though investigators were able to identify the defendant only after reviewing fake identification documents seized in an unrelated, and presumably illegal, airport search, the Sixth Circuit ruled.

The court reasoned that although the hard evidence of identification seized at the airport must itself be suppressed, that illegal search did not automatically taint the evidence already in the government's possession merely because it was useful in nailing down the defendant's identity. *United States v. Fofana*, 6th Cir., No. 09-4397, 1/24/12

Search Warrant for Suspect's Rectum Didn't Make Proctoscopic Exam Reasonable

The intrusiveness of having medical personnel conduct a proctoscopic examination of a suspect's rectum was so great that the suspect's uncooperativeness and the fact that the search was authorized by a warrant were not enough to make the search “reasonable,” the Fifth Circuit held. *United States v. Gray*, 5th Cir., No. 10-11150, 2/1/12



Prosecutor Rebuked for Letting Victim Call the Shots During Plea Negotiations

A prosecutor in a check fraud case engaged in conduct prejudicial to the administration of justice by giving the crime victim total veto power during plea bargaining with the defendant, the Indiana Supreme Court held. Moreover, the prosecutor did not prove her subordinate-lawyer defense that her actions were done following policies imposed by supervisors. *In re Flatt-Moore*, Ind., No. 30S00-0911-DI-535, 1/12/12

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PROSECUTOR PROFILE



Steve Major

Deputy Davis County Attorney

At first glance, you might think that Steve Major is a little sheltered. After all, he did grow up in Kaysville, Utah, which was then a small town, where everybody knew him. As a kid, he wanted to be an astronaut. His first job was being a janitor at Clover Club Foods. He's even part of four generations to have attended Davis High School.

But in reality, Steve is anything but sheltered. Having been a prosecutor for 27 years, he has seen both the best and worst this world has to offer. The worst involves having to deal with death and violence perpetrated on victim's, especially young children. Years ago, Steve was involved in the investigation of a young child's death that still haunts him to this day.

But Steve has also seen plenty of good. He's seen victims find peace. He's gone home at night knowing that he has served the public by ensuring justice. He's built relationships, especially with other prosecutors across the state (one of his favorite things to do is to swap war stories with other prosecutors at conferences).

Though Steve was originally a defense attorney and planned on only being a prosecutor for a short time before moving on, he ended up falling in love with the job. He liked how each day there was something new and strange going on; he liked having a steady paycheck and being able to wear a white hat and sleep well at night.

One change Steve would like to see in the criminal justice system is better pay for the police officers who risk their lives daily. He also believes that prosecutors may fret and agonize over a case all they want but once they've finished the case, there will be another one just like it. So don't sweat the small stuff, make the best decision you can and move on. Don't take it personal and don't let your ego get the best of you.

The best way to sum up Steve's career is to recognize that he's heeded Neitche's famous advice: "He who fights monsters must take great care that he doesn't become a monster himself."

FAVORITE TEAMS: Jazz and Chicago Cubs

LAST BOOK READ - *Game of Thrones*

FAVORITE MOVIE - anything with Clint Eastwood

FAVORITE FOOD - Spaghetti and Meatballs

FAVORITE TREAT - Mr. Goodbar

HOBBIES - Guitar, astronomy, and woodworking

FAVORITE BOOK - *To Kill a Mocking Bird*

FAMILY - Married, with 4 children

FOREIN LANGUAGE - German





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Felon Status Precludes Challenge to State Gun Law

Unpardoned felons have no Second Amendment rights and, therefore, they cannot challenge a state law banning their possession of firearms, the Nevada Supreme Court held. *State v. Pohlman*, Nev., No. 55403, 1/26/12

Restitution in Porn Case Requires Causation

The Eleventh Circuit refined its approach to a circuit-splitting issue regarding restitution for the victims depicted in images of child pornography. It explained that proof of proximate causation requires evidence of a causal connection between “the actions of the end-user” of the pornography and the “slow acid drip” of trauma that exacerbates a victim's emotional problems. *United States v. McGarity*, 11th Cir., No. 09-12070, 2/6/12

Prior Opportunity to Cross-Examine Was Inadequate

A defendant's opportunity to cross-examine a witness at a preliminary hearing was not sufficient to justify the admission at trial of the preliminary-hearing testimony under *Crawford*, the Illinois Supreme Court held.

The court noted that when defense counsel cross-examined a key witness at the preliminary hearing, the attorney did not yet know of inconsistent statements the

witness had made to police, and the judge rushed the defendant's attorney through that proceeding. *State v. Torres*, Ill., No. 111392, 2/1/12



Backdoor Admission of 'Indirect Hearsay' Violated Defendant's Confrontation Rights

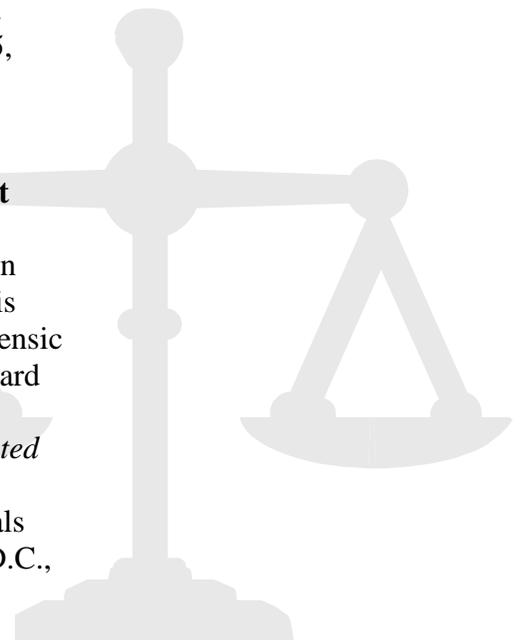
The state violated a defendant's confrontation rights by having a detective imply in his testimony that unavailable eyewitnesses had fingered the defendant, the Delaware Supreme Court held. *Wheeler v. State*, Del., No. 365, 2011, 2/7/12

Forensic Handwriting Comparison Passes Frye Test

The handwriting comparison methodology used by the FBI is sufficiently accepted in the forensic community to satisfy the standard for the admission of scientific evidence set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the D.C. Court of Appeals held. *Pettus v. United States*, D.C., No. 08-CF-1361, 2/9/12

Fifth Amendment Privilege Precludes Forced Decryption of Computer Hard Drive

The government cannot compel a suspect to decrypt his computer hard drives without granting him full immunity from prosecution where the act of unlocking the drives would itself be testimonial, the Eleventh Circuit held. *United States v. Doe*, 11th Cir., No. 11-12268, 2/23/12



UTAH PROSECUTION COUNCIL AND OTHER LOCAL CLE TRAININGS

April 12-13	SPRING CONFERENCE <i>Case law update, legislative recap, ethics / civility, and more</i>	South Towne Center Sandy, UT
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 CLE CONFERENCES

April 23-27	PROSECUTING SEXUAL ASSAULTS Flyer Summary Agenda Registration	Savannah, GA
April 30 - May 2	National Cyber Crime Conference Summary Agenda Registration	Boston, MA
May 22-23	DIGITAL EVIDENCE Summary Agenda Registration <i>Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation</i>	Billings, MT
July 11-13	DIGITAL EVIDENCE Agenda <i>Investigation and Prosecution of Technology-Facilitated Child Sexual Exploitation</i>	St Paul, MN
July 25-28	ASSN. OF GOVERNMENT ATTORNEYS IN CAPITAL LITIGATION <i>AGACL's annual capital litigation seminar: WWW.agacl.com,</i>	Fairmont Hotel San Francisco, CA